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Elena Kagan: High Priestess of the Regulatory State

President Barack Obama chose U.S. Solicitor General Elena Kagan, who was on the top of everyone's predictive "short list," as a candidate for nomination to the U.S. Supreme Court. As an attorney, professor, White House counsel, Harvard Law School dean, and U.S. Solicitor General, Elena Kagan has led a charmed life in the law to this point.



Commentators wrinkle their brows about her alleged lack of a public record that would reveal her legal philosophy and her positions on issues. However, she has produced more than enough in print to allow us to infer her likely approach as a U.S. Supreme Court justice. That record reveals something that mainstream pundits will not admit, lest the real game be given away. Attorney Kagan adheres to a philosophy called "legal positivism" and applies its worldview to her interpretation of the U.S. Constitution. Through the lens of the legal positivist, law has no fixed truth, but must be re-invented and bent to fit the changing needs of society. She has also associated throughout her life with lawyers, judges, and politicians who favor that position.

Arbitrary and Capricious ?Outcome of Cases

Attorney Kagan's commitment to legal positivism portends a completely arbitrary outcome if she is placed on the High Court. If interpretation of the law is not based on the actual words in the statute or on the intent of the lawgiver, then the law comes to mean whatever the legal positivist wants it to be, and it can be changed at a whim. Expediency and the existence of a government edict are the only rules. Though this explanation reduces a complicated philosophy to a caricature, it illustrates the basic problem: In the view of modern jurists, law is not based on objective truth or even on the fact that words have meaning.

Application of this doctrine to Supreme Court cases means that a litigant cannot have the security of a predictable outcome, even when appealing to the plain meaning of the text of the Constitution. Since the actual words of the Constitution are no longer the basis for legal rulings, litigants experience arbitrary and capricious results, which shift with the political winds. Once in a while they get lucky, and the justices will incidentally agree that a phrase in the Constitution actually means what it says, such as the recent *Heller* decision, affirming an individual right to keep and bear arms. But the court may



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equally discard its plain meaning, such as when it upheld most of the McCain-Feingold campaign finance law, in direct violation of the clear First Amendment language which says, "Congress shall make no law ... abridging the freedom of speech."

An Exalted View of the Law

Another unstated premise of Elena Kagan's legal positivism is her exalted view of the nature of law, lawyers, and judges, which lies at the heart of why her nomination should not be approved. Her belief is that the law should address all human interactions in a modern regulatory state, and that lawyers and judges are the proper guides for this elitist vision of American life.

Attorney Kagan's extensive writing shows that she is in the grip of a big-government ideology that has done much to ruin the legal system and the entire political landscape. A 100-page piece that she wrote, which appeared in the *University of Chicago Law Review*, expounds her view. It is entitled "Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine."

In that critically praised article, Professor (at that time) Kagan seems more concerned with justifications for hair-splitting minutia about government control of speech than with focusing on how to protect the freedom of speech from government intrusion, which is the purpose of the First Amendment. She rationalizes interference with free speech on many highly technical grounds that only a law professor could love.

One of many examples should suffice. In her article, she expounds at length about the so-called "secondary effects doctrine," a hair-splitting that would likely provoke Madison to rush the Supreme Court bench with a poker if he were alive. Attorney Kagan describes that doctrine as follows: "Facially content-based regulations of speech that are justified without reference to the content of the regulated speech should be treated as if they made no facial distinctions on the basis of content." To Professor Kagan, the motive for why the government is suppressing free speech is all important, and this allows hairs to be split to the microscopic level, and hordes of lawyers to be employed to do the splitting and inspecting.

Her belief in the efficacy of government is the nub of the matter. Whereas the Founders feared its power, Attorney Kagan explains, justifies, and embraces it. When a measure is passed into law, or a regulation is propounded by an agency, it becomes transcendent truth for Attorney Kagan. It should not be questioned, but followed and venerated as part of the holy writ that is law.

In a 141-page behemoth of an article in *Harvard Law Review* with 527 footnotes that she wrote in 2001, entitled "Presidential Administration," Professor Kagan reveals her propensity to default to the regulatory state in almost all situations. In the article, she lauds the effectiveness of an all-powerful executive branch, which contains and controls the myriad regulatory agencies which currently terrorize most law-abiding citizens. She refers to "a certain kind of dynamism or energy in administration, which entails both the capacity and willingness to adopt, modify or revoke regulations, with a fair degree of expedition, to solve perceived national problems." She lauds the President's "central position within the regulatory state to promote a variety of technocratic values." This talk of "energy," "dynamism," and "technocratic values" in government is dialog you would hear in a *Star Trek* movie lauding a universal controlling federation, rather than in a constitutional republic.

Perverting Legal Education

While Elena Kagan was Dean of Harvard Law School, she wrote a brief piece in 2008 called *Harvard Law School Revisited*, which similarly reveals her view of the role of law in society, as it manifests in



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legal education. As head of the most influential law school in the world, she wants to prepare students who will then go about “establishing regulatory approaches and governance structures to meet problems.” She wants them to be “able to operate effectively in a context where statutes and regulation (not just cases) play an increasingly important role.”

In other words, Dean Kagan does not aspire to inculcate a spirit of liberty and personal responsibility in her students, so that they may go into the world and help freedom to flourish. Her task is to teach them how to go forth and construct ever more glorious government regulatory agencies. Accordingly, her school spews out lawyers with this vision of themselves as anointed priests of the elite caste, and who increasingly occupy high positions in government, law, academia, and media.

Wrong on the Issues

Elena Kagan’s positions on issues of constitutional dimension, which a Supreme Court justice would be called to rule upon, are a little harder to find, but she has expressed her positions on political issues both in word and deed over her career. From her carefully parsed written answers to the U.S. Senate in her 2009 confirmation hearings for the position of United States Solicitor General, and various other quoted statements, we can assemble a scorecard on where she stands on issues of interest to those who favor limited constitutional government.

Her tendency to believe in government has made her more likely to side with whoever is winning the fight to interpret a particular constitutional provision at the time. She swings with the political wind, and the shifting sand of judicial interpretation does not make her lose her balance. For example, she is now content to say that the Second Amendment to the U.S. Constitution protects an individual right to keep and bear arms, owing to the recent *Heller* decision at the U.S. Supreme Court.

In the matter of abortion, she affirms the current state of the law that allows killing of children in the womb since some judges said it was right several decades ago, and they haven’t changed their minds yet. When in the Clinton White House in 1997, she supported a pragmatic compromise that would have banned a few late-term abortions. She does not oppose the death penalty because “international law” does not prevent it, a harbinger of her universalism, rather than adherence to the U.S. Constitution.

Solicitor General Kagan argued to the Supreme Court that, where the First Amendment value of speech is “clearly outweighed” by its societal costs, the speech may be prohibited on its content. The justices rejected that brutalization of the First Amendment by an 8-1 vote, calling her opinion “startling and dangerous.” Also as Solicitor General, she argued for government secrecy in four out of five cases involving the Freedom of Information Act.

It is evident that Elena Kagan does not really believe in the Constitution, but goes along with it as a matter of expediency. To the U.S. Senate, she said, “I think a judge should try to the greatest extent possible to separate constitutional interpretation from his or her own values and beliefs.” That statement carries two disturbing implications: that the Constitution conflicts with her personal convictions, and that she is willing to compromise her convictions to keep her job.

Guilty by Association

Elena Kagan’s associations reveal a great deal about her. She worked as a law clerk for the liberal Supreme Court Justice Thurgood Marshall, and was Bill Clinton’s White House assistant counsel.

Some of her close connections reveal extreme socialist leanings. She has praised Israeli leftist Judge Aharon Barak as “my judicial hero.” Barak is a judicial relativist who stated, “A judge may give a statute



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new meaning, a dynamic meaning, that seeks to bridge the gap between the law and life's changing reality." In his view, judges should "go beyond deciding the dispute." This comports with Elena Kagan's own consistently expressed legal relativism. Former federal judge Robert Bork called Judge Barak "the worst judge on the planet."

Attorney Kagan has had a long association with socialist and former Congressman and judge Abner Mikva. She clerked for U.S. Appeals Court Judge Mikva in 1986-87, and was on the faculty with him and President Barack Obama at the University of Chicago Law School from 1991 to 1995. Mikva was a law partner of Arthur Goldberg, the sponsor of a number of Communist Party fronts in Chicago, and was president of the National Lawyers Guild, a communist bulwark. He was an associate of Saul Alinsky, the leftist community organizer, and a scholar at the Institute for Policy Studies, the most left-wing think tank in Washington, D.C.

Will She Be Confirmed?

Elena Kagan has careened from one privileged post to another during her post-law school career, as law clerk, professor, law school dean, and U.S. Solicitor General. However, she has never served as a judge, even in traffic court. This lack of judicial experience has worried professionals and non-lawyers alike. However, the Standing Committee on the Federal Judiciary of the American Bar Association, a powerful insider lawyer lobbying and educational group, has rated her "well qualified" by unanimous vote. No surprise there.

A July Rasmussen poll found that 42 percent of the American people oppose Kagan's nomination, while only 36 percent favor it. Senators would normally look at such numbers and vote accordingly. In an age of political arrogance, the will of the people may have no relevance, as confirmed by Rasmussen's figure of 87 percent who say that Elena Kagan will likely be confirmed as the next Supreme Court justice.

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