COUNTYFAIR

Conservative bloggers really grasping at straws to attack Kagan on immigration case

June 01, 2010 5:25 pm ET by Adam Shah

Ed Whelan and Volokh Conspiracy blogger **Stewart Baker** are attacking Elena Kagan for a brief the Solicitor General's office filed asking the Supreme Court to overturn one aspect of an Arizona law dealing with illegal immigration. (No, not the controversial **SB 1070** that was passed earlier this year, but **another law**, which was passed in 2006 and punishes businesses for hiring undocumented immigrants.) Their attack is bizarre.

First, as Whelan and Baker acknowledge, the brief -- which was submitted by the Solicitor General's office on May 28 -- does not bear Kagan's name, because Kagan had recused herself before the brief was filed. Second, another blogger at the conserviative-leaning Volokh Conspiracy, Jonathan Adler has taken issue with the attacks on the Solicitor General's brief. And third, the overwrought is internally contradictory.

Baker, a **former Bush administration official** attacked the Solicitor General's office for filing a brief in *Chamber of Commerce v. Candelaria* that argues that the Supreme Court should strike down a portion of an Arizona law that imposes punishment on businesses that hire illegal immigrants. Baker states: "The brief takes positions that from a political and policy point of view are hard to square with, well, sanity. In leaving little room for states to address a problem the feds haven't solved, the brief gets to the left of the Ninth Circuit, which upheld this law." Later in the blog post, Baker states: "What does all this say about Elena Kagan, woman of mystery and Solicitor General until two weeks ago? Nothing good, I fear."

Whelan highlighted Baker's comments about Kagan, stating: "I'll highlight here Baker's harsh criticism of Elena Kagan's presumed role in the matter:

In fact, though, as Baker acknowledges in a portion of his post quoted by Whelan, Kagan "stopped acting as Solicitor General on May 17, and this brief was presumably filed on May 28, when it was released." Indeed, Kagan's name is not on the **brief** that Baker and Whelan attack. Baker's and Whelan's attack is based *solely* on pure speculation about how much work Kagan did on the brief before **recusing herself** from working as Solicitor General because of her Supreme Court nomination. Furthermore, even if they did have such evidence, it wouldn't be evidence of Kagan's personal views on the issue. As Kagan **said** in written questions regarding her Solicitor General nomination:

> I understand that role [of the Solicitor General] as representing the interests of the United States, not my personal views. I indeed think that I would enjoy, as well as be deeply honored by, the Solicitor General's position if I am fortunate enough to be confirmed. The advocate's role is frequently to put aside any interests or positions other than those of her clients.

Baker's arguments that the brief was a travesty are contradicted by his fellow blogger at Volokh Conspiracy, Jonathan Adler, who wrote that the Solicitor General's office's brief "probably came out at the right place." Adler is **no liberal**. He is a contributing editor at National Review Online, is a member of and has been honored by the Federalist Society, has worked for the Competitive Enterprise Institute, and is a member of the Cato Institute's Supreme Court Review Academic Advisory Board. From Adler's **blog post**:

> On the substance of the *Candelaria* brief, I don't think there is anything unusual about the SG's office supporting cert in a preemption case of this sort. There is certainly a keen federal interest in the proper application of federal law that is independent of whether a circuit split has yet developed. Moreover, the likelihood of a circuit split developing is dependent upon the adoption of potentially conflicting state laws, and not all states (or regions) are as likely to enact the sorts of laws that raise preemption questions. So, for instance, southern border states may be more likely to enact aggressive immigration laws than other states. If

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border states may be more likely to enact aggressive immigration laws than other states. If so, the likelihood of a circuit split ever developing is greatly reduced. As a consequence, I believe it's somewhat common for the SG's office to support a cert grant in preemption cases (at least in preemption-friendly administrations).

I am also more sympathetic than Stewart to the argument that Congress may have sought to balance more stringent enforcement of immigration rules with other interests, and that preemption is one way for Congress to ensure that this balance is maintained. Congress may not want employers to hire illegal aliens, but Congress might also not want employers to be hit with extreme sanctions, such as the loss of a business license, for violating the law. This policy may well be foolish, as Stewart argues, but I don't see why this should factor into the preemption analysis.

The relevant question for the courts is Congressional intent -- whether Congress sought to impose a uniform policy across the nation that precludes both more stringent and less stringent state policies -- not whether Congressional intent was wise. As a legal matter, I think *Candelaria* is a close call -- it has both an express preemption clause and a savings clause -- but I think the preemption arguments are reasonably strong. The case also implicates broader federalism questions, such as the extent to which the federal power over immigration is exclusive and the extent to which state police powers may be exercised in the immigration context, as suggested by the Supreme Court's decision in *De Canas v. Bica*. The brief itself may not be the SG office's finest work -- I suspect Stewart is correct it was the subject of political wrangling within the Administration -- but I think they probably came out at the right place.

Finally, Baker accuses the Solicitor General's office of ignoring the normal rules that would counsel against the Supreme Court taking the case, because this case is "*important.* This is about immigrants, and racism, and Arizona, for Pete's sake! There's no time for niceties like a factual record or a conflict among the circuits."

It's strange. In the same post, Stewart argues that Kagan bears responsibility for the brief because the brief likely has been in the works for months. Then he suggests that the brief was written partially in response to Arizona's controversial immigration law, which was passed little more than a month before the brief was filed -- and only a couple of weeks before Kagan recused herself. I guess consistency doesn't matter much to Baker if it stands in the way of his attacks.

Furthermore, according to Adler the Solicitor General's office was not stretching the rules regarding when the Supreme Court should hear appeals. Adler writes: "I believe it's somewhat common for the SG's office to support a cert grant in preemption cases (at least in preemption-friendly administrations)."

Tags: **Supreme Court Nominations**, **National Review Online**, **Ed Whelan**, **Elena Kagan**

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by progressivevoicedaily (**1 minute ago**)

Conservatives are hypocrites. They all need to go the way of those great lawyer jokes we all heard as a kid.

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