

RESEARCH

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Allen's "critics" of Kagan rely on distortions and stereotypes

 May 09, 2010 5:36 pm ET — [3 Comments](#)

In his May 9 "Playbook," Politico's Mike Allen claimed President Obama was "poised to name" Solicitor General Elena Kagan to the Supreme Court and purported to characterize "what critics will say" about the nomination. However, the "critics'" arguments that Allen presented rest on baseless accusations, stereotypes and distortions of Kagan's record.

Allen's "critics": Kagan not "fair-minded, impartial" and doesn't have "proper temperament to be a judge"

Allen **wrote** that "critics will say" that "there is nothing in [Kagan's] record to suggest she has the proper temperament to be a judge. ... Her record is one of an advocate and an activist, not of a fair-minded, impartial judge."

In fact, numerous conservatives and legal experts have praised Kagan's "fair-minded" temperament

Hayes: "Kagan treats conservative arguments with respect." On the May 7 *Special Report with Bret Baier*, the *Weekly Standard's* Steve Hayes praised Kagan's fair-mindedness and intellect, saying, "She is by all accounts from people who have dealt with her personally and intellectually someone who can make convincing and compelling arguments and martial her arguments in a way that is persuasive to people who might not otherwise be predisposed to agree with her. And I think you're seeing that to a certain extent in the, sort of half embrace she is getting from some conservatives, particularly conservative academics. You know, it goes beyond just the fact she hired three conservatives at Harvard, and certainly that is to her credit, but it's also the fact that she treats conservative arguments with respect, that she seems to genuinely be interested in understanding where conservative jurists are coming from." [Fox News' *Special Report*, [5/7/2010](#)]

Former Bush lawyer Berenson lauded Kagan's "fair-minded consideration of competing views." From a [letter](#) sent by former Bush administration assistant White House counsel Bradford Berenson supporting Kagan's solicitor general nomination:

Her legal acumen is more than equal to the task she faces, as reflected in her scholarship. The spirit of toleration and fair-minded consideration of competing views she brought to the Deanship reflect the sort of temperament and judgment that will inspire confidence in the Justices of the Supreme Court as well as the private parties with whom she will need to interact as SG. The same institutional loyalty that has enabled her to put Harvard Law School's interests ahead of her own will undoubtedly cause her to do likewise in service of the United States.

Reagan Solicitor General Charles Fried praised Kagan's temperament and "ability to put aside disagreements with a candidate's political or intellectual disposition." In a [letter](#) supporting her nomination for solicitor general, Fried -- solicitor general during the Reagan administration -- said Kagan "is a superb lawyer and awesomely intelligent person." He added: "Her judgment was unerring. But more strikingly, she showed an ability to put aside disagreements with a candidate's political or intellectual disposition and to see only the quality of the candidate's intellectual ability and potential contribution. The result has been the most vibrant and intellectually diverse faculty I have know [sic] since coming to the Harvard Law School in 1961." Fried offered the following anecdote that he argued "sums up her temperament and her affect on others":

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 1 HOUR AND 37 MINUTES AGO

Geraghty was right: Beck and

Some years ago, it came Harvard Law School's turn to host the national convention of the student chapter of the Federalist Society. There was a dinner of some 1,000 guests from all over the country and it was her duty as dean to offer the welcome to our many guests. When she rose she was greeted by prolonged and thunderous applause. Enduring it for awhile, she finally raised her hands-a big grin on her face-and said "You are not my people...." There was loud and friendly laughter in the hall, almost drowning out her next words: "But I love the Federalist Society." This was met by applause more lively and prolonged than before. I would guess she loves the American Constitution Society too, but I do not go to those meetings."

Bush judicial nominee Estrada said Kagan's time at Harvard proves she is "someone who can create consensus"; praised her for "work[ing] tirelessly to bring intellectual diversity" to the school.

In a [letter](#) supporting her nominations for Solicitor General, Miguel Estrada -- who Bush nominated to be a D.C. Circuit judge - stated that Kagan's "tenure as Dean [of Harvard Law School] demonstrates that she is a uniquely gifted administrator-someone who can create consensus even in an institution that had become notorious for its fractiousness. For good measure, she has worked tirelessly to bring intellectual diversity to an institution that for too long had too little of it."

Bush official and judicial nominee Keisler praised Kagan's "way of dealing respectfully with everybody." Former Bush Justice Department official and D.C. Circuit nominee Peter Keisler [wrote](#) in support of Kagan's nomination to be Solicitor General: "I am confident that it is precisely this combination of strong intellectual capabilities, thoughtful judgment, and her way of dealing respectfully with everybody that enabled her to become such a unifying and universally respected figure at Harvard."

Bush administration assistant AG Goldsmith spoke of Kagan's ability to judge problems "without ideological suppositions." In a letter supporting Kagan's nomination for solicitor general, Jack Goldsmith -- former assistant attorney general for the Office of Legal Counsel during the Bush administration [stated](#): "Good judgment is a hard quality to describe, but Kagan has it. She understands problems in all their dimensions, she thinks about them clearly and without ideological suppositions, and she has a knack for understanding well the consequences and ramifications of various courses of action." He added: "Her success at Harvard also resulted from her shrewd ability to bridge disagreement. Kagan does this by listening to all sides of an argument, by engaging interlocutors honestly and empathetically, and by exercising her judgment openly and with good reasons."

Laurence Tribe: Kagan "respectful of the views of others." Harvard Law School professor Laurence Tribe [wrote](#): "No-one I have met at this or any other university has been better at orchestrating the abilities and energies of faculty, staff, and students without ruffling anyone's feathers or leaving hard feelings among those who cannot, by the nature of things, always get their way. That Elena Kagan was able to achieve that kind of harmony and cooperation while creating genuine intellectual excitement as she spearheaded the expansion of the Harvard Law School faculty in size, ideological range, and substantive depth is nothing short of remarkable." He added:

Simultaneously respectful of the views of others and capable of diplomatically identifying and correcting gaps in their understanding, Elena Kagan is the ideal advocate for an administration that seeks common ground among partisan opponents and that must grapple with the most difficult domestic and foreign challenges any incoming President has had to face in many generations.

Former assistant solicitors general: "Kagan is a person of great legal and personal skills, intellect, integrity, independence, and judgment." Six former assistant solicitors general -- four of whom also served as deputy solicitors general -- [wrote](#): "In sum, Dean Kagan is a person of great legal and personal skills, intellect, integrity, independence and judgment. We therefore believe, based on extensive personal experience, that she has all the attributes that are essential to an outstanding Solicitor General."

Allen's "critics" baseless accusation: Kagan "can become" too "emotionally involved on issues she deeply cares about"

Allen also [claimed](#) Kagan's "critics will say" that "her record shows that she can become emotionally involved on issues she deeply cares about," a completely baseless accusation.

"Emotional" is a tired gendered stereotype often used to attack women

The Handbook of Social Psychology lists as one "gender stereotype" that "women are (too) emotional." *The Handbook of Social Psychology* -- edited by Daniel T. Gilbert, Susan T. Fiske, and



crew suggest Kagan "was endorsing" socialism with college thesis

1 HOUR AND 40 MINUTES AGO



Toobin: Kagan "has been a leader, and she has been someone who has brought factions together"

2 HOURS AND 42 MINUTES AGO

Gardner Lindzey and [described](#) by its publisher as "the standard professional reference for the field of social psychology for many years" -- [cites](#) being too "emotional" as a gender stereotype applied to women: "In addition the content of gender stereotypes is heavily prescriptive-that is, telling how men and women should behave. Men should be competent; women should be nice. Other gender stereotype content is more descriptive: Men are (too) aggressive; women are (too) emotional." [p378]

Sotomayor's intellect and temperament was attacked with use of gender and racial stereotypes. As *Media Matters for America* [noted](#), Supreme Court Justice Sonia Sotomayor's critics frequently employed gender and racial stereotypes in attacking her temperament and intellect. Conservative media figures and others would attack Sotomayor as being an "angry" justice who is a "bully" and "not that intelligent," which many argued reflected negative stereotypes about women and Latino.

Pelosi's judgment was attacked as being "based on emotions and not good sense." Following Democratic victories in 2006 which paved the way for Nancy Pelosi to become the first female Speaker of the House, many media figures trotted out tired gender based stereotypes in discussing Pelosi's judgment and leadership. For instance, as *Media Matters* [noted](#), CNN political analyst Bay Buchanan asserted that Pelosi's "judgment is based on emotions and not good sense."

During Presidential campaign, media diagnosed Clinton with "mood swings," depression and "multiple personality disorder." As *Media Matters* has [documented](#), during her Presidential campaign, Hillary Clinton-often the [subject of sexist attacks](#) and [commentary](#)-- members of the media asserted that Hillary Clinton-often the subject of sexist attacks and commentary-- displayed "mood swings," "could be depressed," "[r]esembl[ed] someone with multiple personality disorder," and "has turned into Sybil," an apparent reference to a [book](#) and [movie](#) about a woman who developed multiple personality disorder after being severely abused as a child.

Allen's "critics": Harvard's "ban" on military recruiters proves Kagan "an advocate" and "activist"

Allen wrote that Kagan's "critics will say," that "[w]hen Kagan was dean of Harvard Law School, she was a tireless advocate for the university's decision to ban military recruiters from the school's campus because of 'Don't Ask, Don't Tell.' Her record is one of an advocate and an activist, not of a fair-minded, impartial judge."

In fact, Kagan followed the law and students had access to military recruiters

Kagan consistently followed the law, and Harvard students had access to military recruiters during her entire tenure as dean. Throughout Kagan's tenure as dean, Harvard law students had access to military recruiters -- either through Harvard's Office of Career Services or through the Harvard Law School Veterans Association. Moreover, Kagan consistently followed existing law regarding access to military recruiters. Kagan briefly restricted (but did not eliminate) access to recruiters only after the 3rd Circuit Court of Appeals ruled that law schools could do so. As *The New York Times* explained in a May 6 [article](#) [emphasis added]:

[Kagan's] management of the recruiting dispute shows her to have been, above all, a pragmatist, asserting her principles but **all the while following the law**, so that Harvard never lost its financing.

[...]

[E]ven when she ... briefly barred the military from using the law school's main recruitment office, **she continued a policy of allowing the military recruiters access to students.**

Kagan allowed military recruiters access to Harvard Law School's Office of Career Services. In the 1990s, based on its anti-discrimination policy, Harvard Law School refused to allow military recruiters to use the school's Office of Career Services (OCS) because of the military's discriminatory Don't Ask, Don't Tell policy. In 2002, after the Bush administration threatened federal funding at Harvard, Kagan's predecessor as dean created an exception to Harvard's anti-discrimination policy and allowed military recruiters access to OCS. When Kagan [became dean](#) in 2003, she continued to allow military recruiters access to OCS.

After appellate court -- including Reagan appointee -- ruled Solomon Amendment unconstitutional, Kagan prohibited Harvard's career office from working with recruiters for one semester. In 2004, a three-judge panel of the U.S. Court of Appeals for the 3rd Circuit [held](#) 2-1 in *FAIR v. Rumsfeld* that the Solomon Amendment violated First Amendment free-speech rights: "The Solomon Amendment requires law schools to express a message that is incompatible with their educational

objectives, and no compelling governmental interest has been shown to deny this freedom." Judge Walter Stapleton, a **Reagan appointee**, joined the majority opinion in the case. Following the 3rd Circuit's ruling, Kagan **reinstated** the ban against military recruitment through OCS for one semester in 2005. After the Bush administration threatened to revoke Harvard's federal funding, Kagan once again granted military recruiters access to OCS. In 2006, the Supreme Court **reversed** the 3rd Circuit decision.

During that one semester, students still had access to military recruiters via the Harvard Law School Veterans Association. *The New York Times* **noted** on May 6 that "even when [Kagan] ... briefly barred the military from using the law school's main recruitment office, she continued a policy of allowing the military recruiters access to students." As Kagan explained in a September 20, 2005, **letter** to her colleagues:

The Law School's anti-discrimination policy, adopted in 1979, provides that any employer that uses the services of OCS to recruit at the school must sign a statement indicating that it does not discriminate on various bases, including sexual orientation. As a result of this policy, the military was barred for many years from using the services of OCS. The military retained full access to our students (and vice versa) through the good offices of the Harvard Law School Veterans Association, which essentially took the place of OCS in enabling interviews to occur.

[...]

I reinstated the application of our anti-discrimination policy to the military (after appropriate consultation with University officials) in the wake of the Third Circuit's decision; as a result, the military did not receive OCS assistance during our spring 2005 recruiting season.

Kagan's actions regarding DADT and military recruiters were within the legal mainstream

Dozens of other law professors, other law schools, and the Cato Institute argued against government's interpretation of Solomon Amendment. As *Media Matters for America* has **documented**, Kagan joined a brief filed on behalf of 40 Harvard law professors arguing against the government's interpretation of the Solomon Amendment. Briefs filed on behalf of 100 other law professors also argued against the Solomon Amendment or the government's interpretation of that amendment, as did other organizations including the Cato Institute.

Numerous law schools restricted military recruiters' access because of the discriminatory "Don't Ask, Don't Tell" policy. The Joint Appendix filed in connection with the appeal of *FAIR v. Rumsfeld* to the Supreme Court contains statements from numerous law professors **detailing** their law schools' attempts to restrict military recruiters' access to career services offices. Following the 3rd Circuit's decision, in addition to Harvard, Yale and New York Law School also reportedly **reinstated** their restrictions against military recruiters.

— J.M.

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by mmfa.fan (May 09, 2010 5:59 pm ET)

2

I think the GOP has a template for criticizing Democratic nominees to the court, and they just fill in the name when it's announced.

REPLY REPORT ABUSE



by princeofwheels (May 09, 2010 8:48 pm ET)

2

So many Cons, not enough big paying hate jobs.
If the Con press and commentators would devote as much energy and as many words to real issues, this country would be in better shape. But nooooo, these Doomers can only move up the Murdoch ladder with hate. For example, notice how Annie Coulter has lost her station in life. She must come up with a new routine so they allow her to write a book and get on the TV rounds.

But to call this woman a prostitute should have the "good" Christians on the Right up in arms about fairness and the Christian way. Where are they such phony people?

P.S. Why should anyone care what these Merchants of Menace think?

REPLY REPORT ABUSE



by MickD (May 09, 2010 10:43 pm ET)

1

Politico represents this stuff, and then they want everyone to think they're impartial. They've stepped over the line too many times.

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