



Commentary

Don't Dismiss Elena Kagan

Ilya Somin 05.11.10, 11:53 AM ET

From a libertarian or conservative standpoint, Elena Kagan is far from an ideal Supreme Court nominee. But she may well be the best we can hope for at this time. Her openness to non-liberal views of the law and occasional deviations from liberal orthodoxy make her a more attractive candidate than the likely alternatives.

Elena Kagan clearly has the necessary professional qualifications for the job. She was a successful dean of Harvard Law School and a respected legal scholar. She also has a record of service in important government positions, including her recent post as solicitor general, the official responsible for arguing the federal government's position before the Supreme Court.

Still it is perfectly legitimate to oppose a professionally qualified judicial nominee because of flaws in her judicial philosophy. But such opposition must be based on a realistic view of the available options.

Kagan is a judicial liberal. But her record as dean of Harvard Law School shows that she has respect for alternative perspectives on the law. While at Harvard she hired several prominent conservative legal scholars, such as Jack Goldsmith (in international law" and John Manning (in constitutional law and statutory interpretation). Both had taken controversial positions on major legal issues that attracted opposition to their appointments from some left-wing students and faculty. She also created a welcoming atmosphere for conservative and libertarian student groups, such as the Federalist Society.

Given the very liberal nature of the Obama administration and the large Democratic majority in the Senate, it was more or less inevitable that we would get a liberal nominee. In such a situation it is better to have a liberal justice who takes alternative perspectives seriously than one who is generally dismissive.

Kagan has prominent critics on the left who believe she is almost a closet conservative who would tilt the law significantly to the right. I highly doubt that is the case. Kagan has a long record of liberal views and involvement with liberal causes. There aren't any noteworthy conservative or libertarian legal scholars or activists who believe that Kagan is somehow one of them, or even believe that she is a centrist. As conservative Harvard Law professor Charles Fried puts it, Kagan's heart "beats on the left."

Still, there is at least a small chance that Kagan's left-wing critics have divined her true views correctly. Her First Amendment scholarship, for example, suggests skepticism about some liberal views. In one of her articles, she rejects the standard left-wing argument for banning "hate speech": the claim that it can be suppressed because of the harm that it might cause to women or racial minorities.

In another piece, she expresses skepticism about claims that the Constitution gives government wide-ranging power to restrict campaign-related speech by corporations and some other interest groups, in order to redress supposed imbalances of political influence, a position that has become orthodox on the legal left. Both articles are sufficiently equivocal that it is not easy to divine Kagan's ultimate views. However, the interpretation given here is consistent with that of several other scholars who have considered Kagan's work, including libertarian First Amendment expert Eugene Volokh of UCLA, and liberal law professor Marvin Ammori.

Kagan is no conservative or libertarian. But she might be less liberal than administration supporters hope. With Kagan, that possibility at least exists. Not so with most of the other plausible Obama nominees, such as Judge Diane Wood or Judge Sidney Thomas. None of them has a comparably extensive record of openness to non-liberal ideas or deviation from liberal orthodoxies.

Barring some unforeseen revelation, Kagan is likely to be better from a non-liberal point of view than anyone else President Obama is likely to pick. Therefore there is little to be gained from aggressively opposing her nomination. Indeed Obama

opponents might actually hurt their cause by attacking her too much. If they dig in and signal they will wage all-out war against any potential liberal nominee, it could increase the administration's incentive to appoint hard-line left-wingers. If Democrats believe they can't avoid a tough nomination battle no matter what they do, they will have little reason to go with relative moderates.

Even if they choose not to oppose Kagan, conservatives and libertarians can still use the nomination and resulting hearings as an opportunity to raise important issues and point out weaknesses in the administration's judicial philosophy. Kagan has herself defended the legitimacy of inquiries into a nominee's views in a 1995 article. We were fairly successful at doing that during the debate over the nomination of Sonia Sotomayor, which gave new prominence to property rights issues, and forced the nominee to repudiate liberal views on judicial "empathy" and international law. With any luck, the Kagan hearings will be another opportunity to advance public debate over important legal questions.

Ilya Somin is an associate professor of law at George Mason University, where he teaches constitutional law and property.

Read more Forbes opinions [here](#).