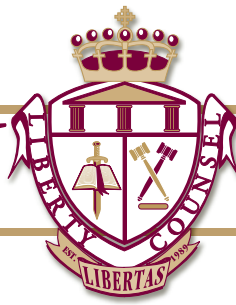


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BARACK OBAMA'S PLAN TO "KAGANIZE" THE UNITED STATES SUPREME COURT

INTRODUCTION

On July 20, 2010, the Senate Judiciary Committee reported the nomination of Elena Kagan for Justice of the Supreme Court of the United States. Thus, the full Senate is currently considering her nomination and will soon vote on Kagan's confirmation.

President Barack Obama nominated Elena Kagan because she shares his belief that the Constitution is a living document that she is willing to manipulate in order to reshape America. Elena Kagan not only shares Obama's radical judicial philosophy but also shares his political ideology. It is precisely for the purpose of ensuring Presidents do not nominate their inexperienced friends and supporters that the Founding Fathers placed a Confirmation check on the President's nomination and appointment powers.¹

During her confirmation hearing, Kagan spent the majority of the time evading questions and providing little substance in her responses. However, despite her evasiveness, Elena Kagan, did reveal herself to be a radical political operative, rather than an experienced attorney that merits a position on the highest court in the country.



Elena Kagan not only shares Obama's radical judicial philosophy but also shares his political ideology.

This White Paper on Elena Kagan's nomination to become a Supreme Court Justice is published for the benefit of Liberty Counsel's friends and supporters. Additional copies of this report may be obtained by writing to the address listed. Feel free to reproduce its contents for inclusion in a civic flyer or a church bulletin. Thank you for your interest in Liberty Counsel's vital work and for your continuing prayer and financial support.

Even Obama's supporters, who share Kagan's radical views, agree that Kagan is an ideologue fashioned from the same "mold" as Obama.² During her hearing, in response to Senator Graham, Kagan admitted, "My political views are – are generally progressive..."³ Kagan went on to reassure the Committee of her political position when she said, "I worked in two Democratic administrations. ... you can tell something about me and my political views from that. ... I've been a Democrat all my life. I've worked for two Democratic presidents. And those are, you know, that's — that's what my political views are."⁴

Kagan is a radical activist. She lauds socialism; elevates transnational law over American law; is willing to restrict free speech; is hostile toward the military and religion; and stated the Constitution is "defective," contains "outdated notions," and attributes "our modern Constitution" to liberal Justice Thurgood Marshall, de-emphasizing the role of the Founding Fathers, who drafted the document.

She also shamelessly promoted the activist agenda of transsexuals and homosexuals at Harvard, in part, by refusing to give military recruiters access to the law school's Office of Career Services because of the Clinton-passed "Don't Ask, Don't Tell" policy.⁵ However, Kagan revealed her prejudice toward the military when she refused to protest the acceptance of a \$20 million gift from supporters of Islam and by allowing Shariah-Compliant Finance recruiters access to the Office of Career Services, when Shariah Law calls for the murder of those who engage in homosexual conduct.

Kagan's radical ideology extends beyond her open admiration of the homosexual activist agenda and her discriminatory treatment of America's military recruiters and extends to her position on a number of issues, including her support of abortion, assisted suicide, and cloning.⁶

These radical views can likely be attributed to another of Kagan's radical positions: a refusal to acknowledge the existence of "natural rights;" rights given by God.⁷ Though Kagan refused to acknowledge them, the Declaration of Independence clearly states that among these natural, or "inalienable" rights, are the rights to "life, liberty, and the pursuit of happiness." This concept of natural rights is fundamental in understanding the Constitution and America's judicial system. The fact that Kagan is unable to understand the perspective of the Founding Fathers on this issue should cause Senators to question whether she would be able to accurately construe the intent of the Founding Fathers in other areas of constitutional concern, such as the First and Second Amendments.

At her confirmation hearing, Kagan said, "... I think you can look to my whole life for indications of what kind of a judge or justice I would be... I think you can look to my tenure at Harvard Law School and think about the various things I did there and the — and — and the approach that I took."⁸

1 Alexander Hamilton, Federalist No. 76: The Appointing Power of the Executive, April 1, 1788.

2 Judiciary Committee, U.S. Senate, Confirmation Hearing, 6/29/10.

3 Judiciary Committee, U.S. Senate, Confirmation Hearing, 6/29/10.

4 Judiciary Committee, U.S. Senate, Confirmation Hearing, 6/29/10.

5 William Rubenstein, Address at Harvard Law School, pg. 14 (Sept. 20, 2003).

6 Memorandum from Elena Kagan, to Jack Quinn, Clinton Library, Box 069-001, at pg. 10, (Date unknown) <http://www.clintonlibrary.gov/KAGAN%20DPC%201/DPC%20-%20Box%20069%20-%20Folder%200001.pdf>; Memorandum on Assisted Suicide, Clinton Library, Kagan Box 002-011 pg. 31; Memorandum on Cloning, Clinton Library Box 006-0018 at page 55. <http://www.clintonlibrary.gov/KAGAN%20DPC/Corrections/DPC%20-%20Box%20002%20-%20Folder%200011.pdf>

7 Judiciary Committee, U.S. Senate, Confirmation Hearing, 6/29/10.

8 Judiciary Committee, U.S. Senate, Confirmation Hearing, 6/29/10.

However, it is her life's work, and the radical philosophies and ideologies that compelled it, which concerns many Americans. She even exhibited her willingness to compromise her integrity to further her agenda when she changed the language in a medical memorandum, while serving in the Clinton Administration.⁹ She also showed her disregard for her duty as Solicitor General when she refused to defend the laws of the United States because she disagreed with them.

Kagan is a radical political operative and has been since her youth. Radical nominees like Elena Kagan deserve a no vote or a filibuster, not confirmation. The role of Senators and the views and philosophies of Kagan and Obama are further developed below.

ANALYSIS

SENATE'S OBLIGATION IN VETTING NOMINEES:

In writing about the confirmation process, Hamilton stated: "To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view of popularity. ... He would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure."¹⁰ The Founding Fathers did not want presidents appointing people because they were his friends or because they shared his ideology. They wanted the president to appoint individuals who were qualified. With Kagan, Obama has nominated an individual he thinks will carry his agenda to the judiciary.

Kagan, herself, has recognized the importance of the advice and consent process, having stated that "a nominee can say a great, great deal before making a statement that, under this standard, nears the improper. A nominee, as I have indicated before, usually can comment on judicial methodology, on prior caselaw, on hypothetical cases, on general issues like affirmative action or abortion. To make this more concrete, a nominee can do ... well, what Robert Bork did."¹¹

OBAMA'S REQUIREMENTS FOR JUDICIAL NOMINEES:

Obama has provided some understanding of what he was looking for, and Americans should recognize that President Obama's nomination of Elena Kagan indicates that she meets the following criteria:

- "a keen understanding of how the law affects the daily lives of the American people," an elaboration of the "empathy" standard he sought in Justice Sotomayor;
- "somebody who is going to be interpreting our Constitution in a way that takes into account

⁹ Memorandum from Elena Kagan, Clinton Library, Box 69-001 at page 10.

¹⁰ Alexander Hamilton, Federalist No. 76: The Appointing Power of the Executive.

¹¹ Elena Kagan, *Confirmation Messes, Old and New*, 62 U. Chi. L. Rev. 919, 940 (1995).

individual rights, and that includes women’s rights,” in other words, someone who is pro-abortion; and

- “part of what our core Constitution – constitutional values promote is the notion that individuals are protected in their privacy and their bodily integrity, and women are not exempt from that,” in other words, someone who will expand the umbrella of the “penumbras” of the Constitution, reading into the Constitution what the Founding Fathers did not intend it to say, when most Americans want it to be applied how it is written.

Kagan shares Obama’s judicial philosophy and ideologies, which should concern Americans, considering on January 18, 2001, he said, “The Supreme Court [has] never ventured into the issues of redistribution of wealth and served more basic issues of political and economic justice in this society. ... It didn’t break free from the essential constraints that were placed by the Founding Fathers in the Constitution. ... I think one of the tragedies of the civil rights movement was because the civil rights movement became so court-focused ... there was a tendency to lose track of ... the actual coalitions of power through which you bring about redistributive change. ... [W]e still suffer from that.”¹²



Kagan’s writings evidence the fact that she lacks the ability to interpret the law without invoking her personal experiences and prejudices.

KAGAN’S EXPERIENCE (OR LACK THEREOF):

The resumé of this Upper West Side Ivy Leaguer contains little experience related to legal practice. She has only two years of private practice experience, and only in her role as Solicitor General has she gained any experience in court, only arguing six appeals.¹³ She has spent most of her career in government, under the Clinton and Obama Administrations, and as Dean of Harvard Law School, where she reshaped the curriculum to de-emphasize American law and instead required classes on international law, while encouraging professors and students to approach American law from a transnational perspective.

Not only does Elena Kagan lack the experience (she has less than Harriet Miers did when she was nominated and Republicans demanded a more experienced nominee from President Bush), but Kagan’s writings evidence the fact that she lacks the ability to interpret the law without invoking her personal experiences and prejudices. In fact, she was not able to do so when she was acting as Solicitor General. Though her duty as Solicitor General was to defend the laws of the United States, and though in her confirmation hearings for the position, she swore she would do so, when the time came to act, she refused. She refused to intervene in cases regarding “Don’t Ask, Don’t Tell,” the Defense of Marriage Act, gun bans, and life sentences for juveniles. These are Kagan’s words, from a thesis she wrote in pursuit of her master’s degree, “... judges will have opinions, prejudices, values. Perhaps most important, judges will have goals. And because this is so, judges will often try to mold and steer the law in order to promote certain ethical values and achieve certain social ends. Such activity is not necessarily wrong or invalid. The law, after all, is a human

¹² Ken Blackwell and Ken Klukowski, *The Blueprint: Obama’s Plan to Subvert the Constitution and Build an Imperial Presidency*, 47 (2010).

¹³ Josh Gerstein, *Elena Kagan’s Scant Writings Spark Concern*, Politico, May 10, 2010, <http://www.politico.com/news/stories/0510/37041.html>

instrument – an instrument designed to meet men’s needs.”¹⁴ Her inaction as Solicitor General speaks to her “opinions,” “prejudices,” and “values” regarding particular issues and how she may adjudicate in accordance with her ideology.

KAGAN’S POSITION ON JUDICIAL ACTIVISM:

Kagan’s self-proclaimed “judicial hero” is Aharon Barak, who said that judges should “adapt the law to life’s changing needs”, and who said a judge “may give a statute a new meaning, a dynamic meaning, that seeks to bridge the gap between law and life’s changing reality without changing the statute itself. The statute remains as it was, but its meaning changes, because the court has given it a new meaning that suits new social needs.”¹⁵

In writing a law review praising liberal Justice Thurgood Marshall, for whom she clerked, Kagan said this: “He declared that the Constitution, as originally drafted and conceived, *was ‘defective’*; only over the course of 200 years had the nation ‘attain[ed] the system of constitutional government, and its respect for...individual freedoms and human rights, we hold as fundamental today.’ The Constitution today, the Justice continued, contains a great deal to be proud of. ‘But the credit does not belong to the Framers. It belongs to those who refused to acquiesce in *outdated notions* of liberty, justice, and equality, and who strived to better them.’ The credit, in other words, belongs to people like Justice Marshall. As the many thousands who waited on the Supreme Court steps well knew, our *modern Constitution is his*.”¹⁶

Kagan argued the Supreme Court case, *Citizens United v. Federal Election Commission*, in an attempt to keep a corporation from funding *Hillary: The Movie*, a movie that expressed opinions regarding whether Hillary Clinton would make a good President.¹⁷ During her oral argument, this short interchange between Chief Justice Roberts, Kagan, and Justice Kennedy took place: Roberts said, “... you are asking us to uphold *Austin* on the basis of two arguments, two principles, two compelling interests we have never accepted in the expenditure context.” To which Kagan responded, “... fair enough.” And Justice Kennedy followed with, “And to undercut *Buckley* in so doing?”¹⁸ This exchange shows that Kagan is willing to confound and confuse precedent in order to reach the conclusion she desires, no matter the consequence. This can only lead Americans to believe that as a Supreme Court Justice, she would also confound and confuse the law in order to further her positions and ideologies from the bench.

In *Citizens United*, Kagan not only asked the Court to create law based on unrelated precedent, but she also stated that the government had the right to ban books and papers, the very speech that the First Amendment was adopted to protect.¹⁹

14 Elena Kagan, *The Development and Erosion of the American Exclusionary Rule: A Study in Judicial Method*, p. 120 (April 20, 1983) (unpublished M.P.P. thesis, Oxford University) (http://www.fed-soc.org/docLib/20100518_OxfordThesis.pdf).

15 *Solicitor General Elena Kagan’s Judicial Hero*, Americans United for Life, May 12, 2010, <http://catholicexchange.com/2010/05/12/130230/>

16 Elena Kagan, *For Justice Marshall*, 71 Tex. L. Rev. 1125, 1125 (1993) (emphasis added).

17 *Citizens United v. Federal Election Commission*, 558 U.S. ___ (2010).

18 See http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205%5BReargued%5D.pdf, page 64.

19 See http://mcconnell.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=b4e894b0-b6cc-4f96-8cde-db6156c8c9ae&ContentType_id=c19bc7a5-2bb9-4a73-b2ab-3c1b5191a72b&Group_id=0fd6ddca-6a05-4b26-8710-a0b7b59a8f1f.

When Kagan worked for the Clinton administration, she effectively recommended that President Clinton take action that she believed to be unconstitutional in order to provide him with political cover.²⁰ This raises serious questions about her ethics.

KAGAN'S POSITION ON FOREIGN LAW:

Four years after assuming the position of Dean of Harvard Law School, Kagan completely changed the law school's curriculum, putting a greater emphasis on international and comparative law, the purpose of which was to embrace what Harvard called the "transnational nature" of law.²¹ While making an international law course a requirement for first-year students, she deemed constitutional law an elective course, de-emphasizing the United States Constitution and encouraging students to view American law through an international lens.

Kagan has said, "...at least some members of the Court find foreign law relevant in at least some contexts. ... A number of the Justices have considered foreign law in the Eighth Amendment context, where the Court's inquiry often focuses on 'evolving standards of decency' and then on the level of consensus favoring or disfavoring certain practices."²² Though this does not provide specific insight into when and how Kagan would incorporate foreign law, she has accepted that in certain circumstances, on certain issues, it may be permissible, and based on the curriculum change at Harvard, it is logical to conclude that Kagan would often incorporate foreign law into her decisions.

While Kagan banned military recruiters from Harvard Law's campus, she welcomed Saudi recruiters who sought lawyers for work on Shariah-Complaint Finance.²³

Kagan indicated an affinity for the socialist governments of other countries when she wrote, "Americans are more likely to speak of a golden past than of a golden future, of capitalism's glories than of socialism's greatness. Conformity overrides dissent; the desire to conserve has overwhelmed the urge to alter."²⁴

KAGAN'S POSITION ON RELIGIOUS LIBERTIES:

In a law review article, Kagan advocated for regulation of "hate speech" by first regulating conduct.²⁵

Showing her hostility toward religion, or at least faith-based initiatives, Kagan stated, "...the government is of course right that religious organizations are different and that these differences are sometimes relevant for the purposes of government funding. The government, for example, may give educational subsidies to religious universities, but not to parochial schools. But when the government funding is to be used for projects so close to the central concerns of religion, all religious organizations should be off limits." However, when it became convenient for her to do so, Kagan rescinded that position stating, "I think it incorrect (or, as I

20 See http://news.yahoo.com/s/ynews/20100512/ts_ynews/ynews_ts2028_3

21 See http://www.law.harvard.edu/news/bulletin/2008/winter/feature_3.php

22 See <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf>, page 4.

23 Frank J. Gaffney, Jr., *Kagan: Shill for Shariah?*, Big Government, May 19, 2010.

24 Mike Allen and Josh Gerstein, *White House to Release Kagan Theses*, Politico, May 17, 2010, <http://www.politico.com/news/stories/0510/37343.html#ixzz0oUA32ctP>

25 Elena Kagan, *Regulation of Hate Speech and Pornography After R.A. V.*, 60 U. Chi. L. Rev. 873, 902 (1993).

more colorfully said at the hearing, ‘the dumbest thing I ever heard’) essentially to presume that a religious organization will use a grant of this kind in an impermissible manner.”²⁶ Is it not odd that Obama has nominated someone who actually said the dumbest thing she had ever heard? The Supreme Court of the United States requires intelligent minds, not those who say “dumb thing[s].”

KAGAN’S POSITION ON HOMOSEXUALITY AND THE FAMILY:

As Dean of Harvard Law School, Kagan initiated a ban of military recruiters from the campus because of the law that Congress enacted, which bans those who engage in homosexual acts from serving in the military. The law that Kagan objected to was unanimously ruled constitutional in an 8-0 Supreme Court decision. In fact, she called the law a terrible and profound wrong.²⁷ It is certainly evident, based on her ban of military recruiters, that she is not what most Americans would call a patriot, and because of her lack of judicial experience, it is difficult to ascertain how her hostility toward groups like the military, that do not practice in accordance with her ideology, will translate into judicial opinions.

Kagan was a participant in the “HGLC 25th Anniversary Weekend,” at which she moderated a panel regarding LGBT legal developments and trends, a panel on which lesbian activist, Chai Feldblum, served.²⁸

Kagan has revealed herself as a major proponent of the homosexual agenda. While Dean of Harvard Law School, Kagan recruited a prominent pioneer of GLBT legal scholarship, William Rubenstein, to be the professor for classes pertaining to GLBT (Queer) legal theory,²⁹ and Catherine Mackinnon, an outspoken critic in society about the lack of equality for homosexuals and lesbians.³⁰ Kagan enlisted Janet Halley, an activist homosexual advocate and attorney with the Lambda Law Organization and female who claimed to be a “gay man,” to teach a Transgender Law course, which Kagan incorporated into HLS’s curriculum.³¹

Kagan takes no issue with the arbitrary use of bathrooms for transgender students. Between the years of 2004 and 2006, during her term as Dean, Kagan, based on a nondiscrimination on the basis of “gender identity” policy, allowed for the arbitrary choice of bathrooms for transgender students.³²



It is certainly evident, based on her ban of military recruiters, that she is not what most Americans would call a patriot.

26 See <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf>, pages 26-27.

27 See <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf>, page 9.

28 See <http://hgcl.org/anniversary/schedule.html>.

29 William Rubenstein, Address at Harvard Law School, pg. 14 (Sept. 20, 2003). <http://www.clintonlibrary.gov/KAGAN%20DPC/Corrections/DPC%20-%20Box%20002%20-%20Folder%20011.pdf>

30 <http://www.law.harvard.edu/academics/courses/2007-08/?id=3978> .

31 <http://www.clintonlibrary.gov/KAGAN%20DPC/Corrections/DPC%20-%20Box%20002%20-%20Folder%20011.pdf> .

32 Jeffrey C. Aguero, *Amendments to Bathroom Bill Fail*, The Harvard Crimson, May 17, 2004, <http://www.thecrimson.harvard.edu/article/2004/5/17/amendments-to-bathroom-bill-fail-in/>

KAGAN'S POSITION ON THE SANCTITY OF LIFE:

In an article she wrote, Kagan lamented the victories of pro-life congressmen stating, “[e]ven after the returns came in, I found it hard to conceive of the victories of these anonymous but Moral Majority-backed opponents of Senators Church, McGovern, Bayh and Culver, these avengers of innocent life and the B-1 Bomber...,”³³ which indicates her disdain for supporters of innocent life.

Kagan supports the proliferation of doctor assisted suicide. In a memo regarding the issue, Kagan clearly states in a handwritten note that constructing legislation to make doctor-assisted suicide a federal crime is a “fairly terrible idea.”³⁴

Kagan supports the use of stem cell research using human embryos. In a memo sent from the Clinton staffers requesting language clearance, Kagan made no corrections to language that supported the use of human somatic cell nuclear transfer. Kagan also advocated that violators of the “sunset” provision, which prohibited the use of human embryos, should not face any criminal prosecution.³⁵ Kagan did not advocate for cloning that resulted in live birth; however, this simply means that she advocated for the abortions of cloned embryos.

Kagan contributed financially to the pro-abortion group, National Partnership for Women and Families, which has strong ties to Emily's List and NARAL.³⁶

She criticized a 1991 U.S. Supreme Court decision that prohibited the use of Title X funds to pay for abortion referrals.³⁷ In other words, she believes that abortions should be taxpayer funded.

Kagan worked for some of the nations most notorious pro-abortion characters, including:³⁸

- Judge Abner Mikva, who, during an interview, stated: “I think judges tend to be too separate from the political process and the body politic. I support the result of *Roe v. Wade*.”
- Supreme Court Justice Thurgood Marshall, who said, “The right of every woman to choose whether to bear a child is, as *Roe v. Wade* held, of fundamental importance. An unwanted child may be disruptive and destructive of the life of any woman...”
- Michael Dukakis, who, prior to *Roe v. Wade*, introduced a bill in the Massachusetts House to repeal that state's pro-life legislation.

33 Elena Kagan, *Nov. 10, 1980: Fear and Loathing in Brooklyn*, *The Princetonian*, Nov. 10, 1980, <http://www.dailyprincetonian.com/2010/05/03/26082/>

34 Memorandum on Assisted Suicide, Clinton Library, Kagan Box 002-011 pg. 31 <http://www.clintonlibrary.gov/KAGAN%20DPC/Corrections/DPC%20-%20Box%20002%20-%20Folder%20011.pdf>

35 Memorandum on Cloning, Clinton Library, Kagan Box 006-018 pg. 55. http://www.clintonlibrary.gov/KAGAN%20DPC/DPC%205-17/DOMESTIC%20POLICY%20COUNCIL%20BOXES%205-30_Part34.pdf

36 *Elena Kagan Donated to Pro-Abortion Women's Groups with Ties to Emily's List*, *Americans United for Life*, May 13, 2010, <http://www.lifenews.com/nat6332.html>

37 Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 S. Ct. Rev. 29.

38 See <http://www.aul.org/2010/05/auls-kagan-file-the-pro-abortion-politicians-memo/>

- Vice President Joe Biden, who believes the Constitution offers an “inherent right to privacy” and “strongly supports *Roe v. Wade*.”
- President Bill Clinton, who vetoed the Partial Birth Abortion Ban passed by Congress not once, but twice; reversed the *Mexico City Policy*, allowing federal funding to go to groups that perform or promote abortion; and supported the Freedom of Choice Act (codifying *Roe* and *Doe* into federal statutory law).
- President Obama, who on the 35th Anniversary of *Roe v. Wade* during his presidential campaign, said: “With one more vacancy on the Supreme Court, we could be looking at a majority hostile to a women’s fundamental right to choose for the first time since *Roe v. Wade*. The next president may be asked to nominate that Supreme Court justice. That is what is at stake in this election.”

KAGAN’S POSITION ON ISLAMIC SHARIAH-COMPLIANT FINANCE:

Though Kagan kicked America’s military recruiters out of Harvard Law School’s Office of Career Services, Kagan posed no objection to allowing Shariah-Compliant Finance recruiters or to the acceptance of a \$20 million donation that was given for the creation of a Center for Islamic Studies and Shariah Law at Harvard.³⁹ Kagan has been outspoken on issues pertaining to the promotion and significance of homosexuals’ rights.⁴⁰ However, according to Shariah Law a person who participates in homosexual activity is punished by death or flogging.⁴¹ Apparently, though President Clinton’s “Don’t Ask Don’t Tell” Policy is considered by Kagan to be a “moral injustice of the first order,” the fact that Shariah law promotes the murder of homosexuals does not offend her conscience.

KAGAN’S POSITION ON 2ND AMENDMENT RIGHTS:

Kagan, in a memorandum to Justice Thurgood Marshall, stated she was “not sympathetic” to an appellant’s desire to challenge a gun ban.⁴² And, Kagan was involved in Clinton’s scheme to ban more than fifty types of commonly-owned semiautomatic firearms – an effort described by one of Kagan’s admirers as “taking the law and bending it as far as we can to capture a whole new class of guns.”⁴³

KAGAN’S POSITION ON IMMIGRATION AND E-VERIFY:

Kagan opposes state legislation that requires individuals to prove legal status prior to being employed by businesses licensed by state agencies. According to Representatives Smith and Tiahrt, Kagan was the originator and driving force behind the Obama Administration’s decision to ask the Court to overturn the Arizona immigration law requiring employment verification.⁴⁴

39 Judiciary Committee, U.S. Senate, Confirmation Hearing, 6/29/10.

40 S. Judiciary Questionnaire, Kagan, at 52 (2010).

41 Koran, Al-Baqarah: 178.

42 Memorandum on 2nd Amend. to J. Marshall, Aug. 27, 1987.

43 Elizabeth Shogren, *Clinton Moves to Limit Import of Assault Guns*, L.A. Times, Oct. 22, 1997 at A-1.

44 Congressional Reps. Smith and Tiahrt, *Kagan Has Some Explaining to Do*, The Hill’s Congress Blog (June 28, 2010, 2:25 PM), <http://thehill.com/blogs/congress-blog/judicial/105929-kagan-has-some-explaining-to-do-today-reps-lamar-smith-and-todd-tiaht>



...Taking the position that incorporating the Second Amendment and applying it to the states was of no interest to the Obama Administration or the federal government.

KAGAN'S POLITICIZATION OF AN OBJECTIVE MEDICAL OPINION:

Serving as an advocate for the Clinton administration's Department of Domestic Policy, Kagan manufactured the language of what was supposed to be an objective memorandum about partial-birth abortions. Kagan, displeased with the language the American College of Obstetrics and Gynecologists, which said that the group "could not surmise a circumstance where partial birth would be the only option to save the life or preserve the health of a mother," called the draft language a "disaster."⁴⁵ Thus, Kagan contacted ACOG and proposed changing the document to state, "An intact D&X, however, may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman, and a doctor should be allowed to make this determination."⁴⁶ Kagan's change was adopted without consulting the experts on the issue.⁴⁷

Additionally, after the release of the ACOG statement, Kagan falsely stated, "A [partial birth abortion], however, may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman, and only the doctor, in consultation with the patient, based upon the woman's particular circumstances can make this decision."⁴⁸

KAGAN'S DERELICTION OF HER DUTY:

In a floor speech, Senator Jeff Sessions said, it is the "*duty of every Solicitor General to defend the laws of the United States whether they like them or not, whether they think it's a good idea or not...*"⁴⁹ However, while serving as Solicitor General, Kagan chose to oppose, rather than defend some of the laws of the United States. On more than one occasion, Kagan submitted legal briefs that undermined the Defense of Marriage Act and Clinton's "Don't Ask Don't Tell" Policy of the military.

In *Witt v. Dept. of the Air Force*, Kagan failed to appeal Federal Circuit Court ruling that determined "Don't Ask Don't Tell" was unconstitutional.⁵⁰ Her lack of action is most likely attributable to her personal opinions regarding the policy. While Dean of Harvard, Kagan said, "I abhor the military's discriminatory recruitment policy. This [policy] is a profound wrong – a moral injustice of the first order. And it is a wrong

45 Memorandum from Elena Kagan, to Jack Quinn, Clinton Library, Dec. 14, 1996. <http://www.aul.org/featured-images/Kagan-Ethics-Report.pdf>

46 Memorandum from Elena Kagan, to Jack Quinn, Clinton Library, Box 069-001, at pg. 10, (Date unknown). <http://www.clintonlibrary.gov/KAGAN%20DPC%201/DPC%20-%20Box%20069%20-%20Folder%20001.pdf>

47 *National Abortion Federation v. Ashcroft*, 287 F. Supp.2d 525 (2003).

48 Memorandum from Elena Kagan, Clinton Library, Box 069-001, at pg. 6, Jan. 12, 1997.

<http://www.clintonlibrary.gov/KAGAN%20DPC%201/DPC%20-%20Box%20069%20-%20Folder%20001.pdf>

49 Senator Jeff Sessions, Address to the U.S. Senate, (July 19, 2010).

50 *Witt v. Department of Air Force*, 548 F. 3d 1264 (9th Cir. 2008).

that tears at the fabric of our own community, because some of our members cannot, while others can, devote their professional careers to their country.”⁵¹

Additionally, Kagan refused to uphold her duty as Solicitor General in cases concerning the Defense of Marriage Act. In *Smelt v. U.S.*, the Department of Justice, in conjunction with the Solicitor General’s office, said, “With respect to the merits, this Administration does not support DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal. Consistent with the rule of law, however, the Department of Justice has long followed the practice of defending federal statutes as long as reasonable arguments can be made in support of their constitutionality, even if the Department disagrees with a particular statute as a policy matter, as it does here.”⁵²

Finally, last year, Solicitor General Kagan refused to file a brief in the landmark *McDonald* case, thereby taking the position that incorporating the Second Amendment and applying it to the states was of no interest to the Obama Administration or the federal government.

CONCLUSION

Elena Kagan is a dangerous radical activist who, if confirmed, could potentially spend decades on the bench of the highest court in the land, legislating rather than adjudicating and ultimately changing America for the worst. Kagan’s positions on issues such as life, homosexuality, the Second Amendment, and E-Verify, her lack of appreciation for natural rights, and her disregard for her duty as Solicitor General should cause every senator to vote against confirming Elena Kagan for the position of Justice of the Supreme Court of the United States of America.

Original research for this White Paper provided by Mandi D. Campbell, Legal Director, Liberty Center for Law and Policy, with assistance from Jeremy Penland.

⁵¹ Email from Elena Kagan, Dean Harvard Law School, to Harvard Law Students (Oct. 06, 2003).

⁵² Reply Brief of Respondent, *Smelt v. United States*, No. SACV09-00286 DOC (MLGx) (9th Cir. Aug. 24, 2009).
<http://lawdork.net/wp-content/uploads/2009/08/Smeltdomareplybrief.pdf>



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