Elena Kagan Should Be Rejected

by Phyllis Schlafly July 2, 2010

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Barack Obama revealed his goal for the Supreme Court when he complained on Chicago Radio Station WBEZ-FM in 2001 that the Earl Warren Court wasn't "radical" enough because "it didn't break free from the essential constraints placed by the Founding Fathers in the Constitution" in order to allow "redistribution of wealth." Now that Obama is President, he has the power to nominate Supreme Court justices who will "break free" from the Constitution and join him in "fundamentally transforming" America.

That's the essence of his choice of Elena Kagan as his second Supreme Court nominee. She never was a judge, and her paper trail is short but it's long enough to prove that she is a clear and present danger to the Constitution.

When Kagan was dean of the Harvard Law School, she presented a guest speaker who is known as the most activist judge in the world: Judge Aharon Barak, formerly president of the Israeli supreme court. The polar opposite of the U.S. Constitution which states that "all legislative powers" are vested in the elected legislative body, Barak has written that a judge should "make" and "create" law, assume "a role in the legislative process," and give statutes "new meaning that suits new social needs."

Barak wrote that a judge "is subject to no authority" except himself, and he "must sometimes depart the confines of his legal system and channel into it fundamental values not yet found in it." Channel? Does he mean he channels in a trance as Hillary Clinton supposedly channeled discourse with the long deceased Eleanor Roosevelt?

Despite Barak's weirdo writings, or maybe because of them, Elena Kagan called him "my judicial hero." Judge Robert Bork, a man careful with his words, says that Kagan's praise of Judge Barak is "disqualifying in and of itself."

Bork said that Barak "establishes a world record for judicial hubris." Bork wrote that Barak embraces a judicial philosophy that "there is no area of Israeli life that the court may not govern."

During Kagan's confirmation hearing for Solicitor General, Senator Arlen Specter asked her views on using foreign or international law or decisions to interpret our Constitution and laws. She wrote in reply that she approves using "reasonable foreign law arguments."

Au contraire. The U.S. Constitution states that our judges "shall be bound" by "the Constitution, and the laws of the United States which shall be made in pursuance thereof."

Federal law requires all educational institutions receiving federal funds to present an educational program on the U.S. Constitution on every Constitution Day, September 17. Kagan thumbed her nose at Constitution Day 2007 by hiring a transnationalist on the Harvard faculty, Noah Feldman, and featuring him for two days of speeches.

Transnationalists are lawyers who advocate integrating foreign and international law into the interpretation of the U.S. Constitution and laws. In his Harvard Constitution Day address, Feldman urged "use of international legal materials in constitutional decision-making ... to help actually decide cases," and opined that "international tribunals' rulings must be treated as law."

Kagan's hero, Judge Barak, is also a transnationalist. In his book, The Judge in a Democracy, he sharply criticizes the U.S. Supreme Court for failing to cite foreign

law, and he praises Canada, Australia and Germany for their "enlightened democratic legal systems."

Kagan is particularly inappropriate because this anti-military woman would replace the only veteran on the Court, John Paul Stevens. As Harvard Law School dean, Kagan signed a brief asking the Supreme Court to overturn or rewrite the Solomon Amendment, which she called "profoundly wrong."

That popular federal law denies federal funds to colleges that bar military recruiters from the campus. The Supreme Court unanimously rejected Kagan's argument, which proves what an extremist she is.

Kagan demonstrated her feminist extremism when she served as the lead White House strategist advising President Bill Clinton to veto the Partial-Birth Abortion Ban Act. Ten years later, substantially the same Act was repassed by Congress, signed by President George W. Bush, and upheld by the Supreme Court.

Harvard Law School Professor Noah Feldman, a Dean Kagan hire, has just published a long New York Times Magazine article in which he worries about how the Supreme Court will rule on lawsuits about Obamacare, Obama's takeover of big corporations, and the cronyism in Stimulus spending. Feldman hopes the Kagan appointment means "the moment has arrived for progressive constitutional thought" to take over the courts.

The Left is counting on Kagan to play a major role to get the Supreme Court to uphold Obama's transformation of our exceptional private enterprise system to a socialist economy. The New Republic magazine is salivating at the prospect that Kagan will reassert the discredited doctrine of the "living Constitution."

The Rasmussen poll reports that 42 percent of American oppose Kagan's confirmation, and only 35 percent favor her. Are Senators listening?