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VOICE OF ESSENTIAL LIBERTY

## ALEXANDER'S ESSAY

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### KOMRADE KAGAN

“[T]he opinion which gives to the judges the right to decide what laws are constitutional and what not ... would make the judiciary a despotic branch. ... [T]he germ of dissolution of our federal government is ... the federal Judiciary ... working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped. ... They are construing our constitution from a co-ordination of a general and special government to a general and supreme one alone.” --Thomas Jefferson

Barack Obama has nominated his Solicitor General, Elena Kagan, to replace retiring Supreme Court Justice John Paul Stevens.

Since this is a lifetime appointment, we should consider the implications for our Constitution and for liberty.

Will this Ivy League academic be an advocate for Essential Liberty and Rule of Law, or does she subscribe to the errant notion of a “living constitution”?

According to Obama, Kagan “is widely regarded as one of the nation’s foremost legal minds,” and he’s right -- if by “widely” he means among elitist Leftists.

In fact, Obama’s assessment of Kagan mirrored that of her über-Leftist Princeton prof Sean Wilentz, under whose tutelage Kagan wrote her glowing thesis on socialism in the early 20th century. “Kagan,” said Wilentz, “is one of the foremost legal minds in the country.”

In her thesis, Kagan lamented the fact that free enterprise overcame socialism and concluded, “A coherent socialist movement is nowhere to be found in the United States to speak of a golden past than of a golden future, of capitalism’s glories than of socialism’s greatness.”

“Why, in a society by no means perfect, has a radical party never attained the status of a major political force?” wondered Kagan. “Why, in particular, did the socialist movement never become an alternative to the nation’s established parties? Through its own internal feuding, then, the SP [Socialist Party] exhausted itself...”

In her thesis, Kagan lamented the fact that free enterprise overcame socialism and concluded, “In our own times, a coherent socialist movement is nowhere to be found in the United States. Americans are more likely to speak of a golden past than of a golden future, of capitalism’s glories than of socialism’s greatness. ... In unity lies their only hope.”

Ah, yes, the “hope and change” necessary for Obama to make good on his promise to “fundamentally transform the United States of America.”

Just as Obama was mentored by Marxists, Kagan has been steeped in socialist doctrine, and is no doubt rejoicing in the resurgence of socialism in the U.S. under the leadership of Obama and his water boys in the legislative and judicial branches.

As for her qualifications for a seat on the Supreme Court, Obama insists that Kagan “is an acclaimed legal scholar with a rich understanding of constitutional law.”

In fact, she has exactly *no* judicial experience and very limited litigation experience. Legal authority Ken Klukowski writes that Kagan is an ideal nominee for Obama: “She’s a liberal without a paper trail.”

Sounds like the Obama model.

Most of Kagan’s experience is academic (read: “deficient”), at the University of Chicago Law School and as dean of Harvard Law School, where she attempted to boot military recruiters off campus at the height of the war in Iraq. Her reason for this frontal assault on our nation’s ability to defend itself was the “Don’t Ask, Don’t Tell” policy, which Kagan called “a profound wrong -- a moral injustice of the first order.”

Even The Washington Post concludes that her qualifications “can only be called thin,” noting further, “even her professional background is thin.”

While media profiles of Kagan paint her, predictably, as a moderate “consensus-builder,” Kagan is, in fact, a genuine, hardcore Leftist, a former legal counsel to the Clintonista regime who began her political career in earnest

as a staffer for liberal Massachusetts Governor Michael Dukakis's presidential run back in 1988.

Her liberal roots were firmly entrenched by the time she graduated from Princeton in 1981, the year Ronald Reagan took office. A New York Times profile of Kagan notes, "On Election Night, she drowned her sorrow in vodka and tonic as Ronald Reagan took the White House."

More recently, the thin legal trail she *has* established as Obama's Solicitor to the Supreme Court raises serious questions about Kagan's commitment to the plain language of the First Amendment.

In a 1996 law review article, Kagan wrote that the "re-distribution of speech" is not "itself an illegitimate end," which is another way of saying that the court has a responsibility to level the playing field for various ideas, including the Internet, talk radio, etc.

She recently offered a similar argument before the High Court in regard to the government's authority to regulate print materials under campaign finance laws, a notion that Chief Justice John Roberts concluded, "As a free-floating test for First Amendment coverage, that [proposition] is startling and dangerous."

Says Kagan, "Constitutional rights are a product of constitutional text as interpreted by the courts and understood by the nation's citizenry and its elected representatives."

She undoubtedly came to that errant conclusion while clerking for Justice Thurgood Marshall, of whom she later wrote admiringly, "In Justice Marshall's view, constitutional interpretation demanded, above all else, one thing from the courts: it demanded that the courts show a special solicitude for the despised or disadvantaged. It was the role of the courts, in interpreting the Constitution, to protect the people who went unprotected by every other organ of government -- to safeguard the interests of people who had no other champion. The Court existed primarily to fulfill this mission. ... The Constitution, as originally drafted and conceived, was 'defective.' The Constitution today ... 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.' Our modern Constitution is [Marshall's]."

Setting aside her utter disdain for our Constitution and its authors, Kagan is flat-out wrong about the role of the High Court. It exists to safeguard the unbiased application

of our Constitution's original intent.

In 1987, the year before Kagan clerked for Marshall, he delivered a lecture entitled, "The Constitution: A Living Document," in which he argued that the Constitution must be interpreted in a way that succumbs to the contemporary political, moral and cultural climate.

That is the very definition of the "living constitution" upon which judicial activists have relied in order to amend our Constitution by judicial fiat rather than its prescribed method in Article V.

No doubt, Kagan will advance that heretical and treasonous interpretation.

Obama claims that Kagan understands the law "not as an intellectual exercise or words on a page -- but as it affects the lives of ordinary people."

Not as "words on a page"?

It is precisely that rejection of the plain language of our Constitution that led President Thomas Jefferson in 1804 to call the court "the despotic branch."

Indeed, since the very founding of our constitutional government, the judiciary has worked "like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped."

Back in 1987, during confirmation hearings for Judge Robert Bork (one of the most qualified jurists ever nominated to the High Court), one Leftist senator commented, "The Framers intended the Senate to take the broadest view of its constitutional responsibility," especially in regard to the nominee's "political, legal and constitutional views." That senator was Joe Biden, who rejected Judge Bork because he was a "constitutional constructionist," precisely the attribute our Founders wanted in jurists.

Perhaps those in the Senate today will rightly consider Kagan's "political, legal and constitutional views," and reject her nomination in order to preserve Essential Liberty and Rule of Law.

Semper Vigilo, Fortis, Paratus et Fidelis!

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