

A CONCURRENCE IN THE CASE AGAINST ELENA KAGAN

✘ Last week Glenn Greenwald penned a solid case delineating why current Solicitor General Elena Kagan, who is at the top of the purported Obama “short list”, would make a poor nominee to replace the retiring Justice John Paul Stevens on the Supreme Court. Despite the hard truth in Greenwald’s facts and arguments, he has been blistered by both the Obama Administration and their apologists and fanboys. The Administration has, as reported by Sam Stein, even enlisted a hit team of loyalist flaks and supporters to discredit Greenwald and his article.

The reason the White House finds itself in the position of fighting off its own base in the first place is because Greenwald is dead on the money with his analysis, criticism and conclusion that Kagan is a poor nominee; and especially considering it is Stevens’ critical seat she would be filling. Glenn’s facts and argument speak for themselves, but there is an additional area neither he, nor anyone else, has substantively touched on which militates against Kagan. Elena Kagan is so terminally inexperienced with the American court system as to be unqualified to serve on the Supreme Court.

I appeared in three different courthouses last Friday. Which is two more than Elena Kagan has appeared in as either an attorney or judge during her entire legal career. Her first appearance in the Supreme Court as Solicitor General, little more than six months ago, was the first time she had substantively appeared in any court. Ever. You can still count her total number of live court experiences (all appellate arguments) on one hand. The complete absence of experience and seasoning showed in several key areas in Kagan’s uneven oral argument presentations, and the claim Kagan is some kind

of wonderful talent who necessarily would bring diverse Supreme Court justices together exposed as unsupported fawning fantasy.

The American trial court system is literally the backbone of our rule of law; they are where the public substantively interacts with the law and their law is meted out, as well as being where the foundation and record for appellate cases and controversies are made and perfected. How is it appropriate to be considering a woman for a position that will impact evidentiary, procedural and substantive trial processes – for every trial court in the country; federal, state and local – when she has never been in one? There are forty Justices in the long and glorious history of the Supreme Court who had no prior judicial experience; there are none I am aware of who had the nearly complete absence of any practical legal court experience as an attorney, much less as a judge, such as is the case with Elena Kagan.

These are complex situations and issues arising in uniquely dynamic confrontational adversary settings; they are not fully cognizable nor understandable from the cold isolation of a printed record. If you have never been in the halls, bowels and docks of trial courts, you just do not know. An understanding of the dynamics, biases, unwritten rules, grit and feel of trial level courts simply cannot be gained without at least some exposure to them. Elena Kagan has absolutely none, yet Barack Obama and the Kagan fan club blithely think she should be given a lifetime appointment to review and affect the daily literal life and death matters occurring there. She is not fit for the job, and it is reckless and deplorable the Obama White House does not realize it.

It is already such that the Supreme Court has only one member, Sonia Sotomayor, with any experience as a trial judge, but at least the other Justices have varying substantial histories and experience as attorneys and judges in a variety of trial and inferior appellate

courts. Elena Kagan has squat. The cloistered imperious disconnect between the hallowed halls of the Supreme Court and the actual public judicial system would go from the already bad to far worse were Kagan confirmed to replace Stevens. An extremely troubling move being contemplated by a President who ran on the supposed mantle of being an experienced lawyer, Constitutional scholar and wise leader.

One of the heavyweights rolling out to buck up Kagan against Greenwald was Supreme Court appellate specialist Tom Goldstein of Akin Gump and SCOTUSBlog fame and fortune. Goldstein savaged Glenn by painting him, and other unnamed progressive Kagan critics, as “wingnuttery extremists” operating on the “ideological fringes”. Goldstein’s attack posturing is unfounded and scurrilous, all the while as he conveniently omits any disclosure of his own personal connection to Kagan, her former Harvard largesse and dependence on the acts and kindness of Supreme Court Justices.

Yes Mr. Goldstein, Greenwald and a lot of us others believe the executive branch is not above the law, that the Fourth Amendment and FISA laws actually have meaning and that the US government should not sanction and institutionalize torture. I guess these tenets are what sensible “centrists” like the oh so superior Goldstein consider indicative of the radical fringe left. Funny, at one time they were considered the kind of concepts the United States was founded and built upon.

Irrespective of Goldstein’s malevolent and false posturing, the theoretical policy distinctions he strains to argue are one thing; Kagan’s complete lack of foundational experience is quite another. If Goldstein is going to slough off this disqualifying fact, it will require greater fictional liberties than even his new self promoting television show.