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SUPREME MATTERS: TEA PARTIES AND THE ACTIVISM OF RESTRAINT

Heather Kurzbauer*

According to recently released statistics, one-fifth of all US citizens are Tea Party Supporters: predominantly white conservatives convinced of the 'evils' of the Obama administration.¹ Taking their cue from the defining protest in American history, The Boston Tea Party of 1773 in which the slogan 'no taxation without representation' inspired the colonists to revolt against the British, today's tea party proponents apply their heady brew of T.E.A. (Taxed Enough Already) protests to focus on the White House's penchant for social spending, the perils of government controlled health care, not to speak of the menace of immigration. No tea-drinking pussycats, the growing legions of these supporters call for immediate political action to overturn federal legislation including the 2009-2010 Health Care reform bill and the 2008 Emergency Economic Stabilization Act. Tea parties have gathered enormous momentum since 2009 with millions of frenzied supporters expected at cross-country rallies this summer. 'Our idea is essentially to act as ferocious as we are about our government being fiscally responsible as we will about our political process.'²

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From politics to law is but a small step. Recently, Tea Party supporters have turned their attention to the hallowed halls of the Supreme Court. Summer season in Tea Party blog-land has opened with a volley of verbal vitriol aimed at Obama's second Supreme Court nominee, Elena Kagan and Obama's purported attempt to pack the highest court with like-minded progressives.

European intellectuals, who once dismissed Tea Party proponents as silly US right-wingers with a laughable programme, have subdued their criticism as they deal with the results of recent elections in the Netherlands and Belgium. Agendas that once lurked beneath a murky surface are now the talk of the town in Amsterdam and Brussels. Breaking news on the infamous Huffington Post includes a call for advice on the part of a European Labour politician just in case the Tea Party movement gains momentum with Europe's disgruntled right-wingers.³ With the rise of the right in Europe and Tea Party challenges in the US, the choice for consistent and fair-minded Supreme Court justices has become even more imperative.

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On May 10, 2010, President Obama's announced Solicitor General Elena Kagan as his Supreme Court nominee to replace John Paul Stevens. Immediately the quest for 'who is Ms. Kagan' in terms of legal and political stance roared into top gear. Every phrase that the former Harvard Law School Dean had published, pronounced or whispered was analyzed by the punditocracy.

Is she an activist or restrained interpreter is the burning question. Will Ms. Kagan embrace the activism of liberals whose 'living' Constitution leads to an open interpretation of the sacred document or will Ms. Kagan take a restrained, literal approach to Constitutional interpretation? The *New York Times* provided a blow-by-blow description of Ms. Kagan's 1983 Oxford graduate thesis in which Ms. Kagan's statement, 'it is not necessarily wrong or invalid' for a judge 'to try to mold and steer the law' to support socially valid ends put her directly in the judicial activist camp. Other interpretations of the same thesis in the traditionally conservative *Wall Street Journal*

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1 CBS News Poll, April 14, 2010.

2 www.politico.com/news/stories/0210/32607.html#ixzz0r0pEmyVO, quote given by Mark Skoda, National Tea Party Convention 2010 organizer (lastly viewed on July 21, 2010).

3 See *The Huffington Post*, June 16, 2010. Post by Raymond Johansen, Party Secretary of the Norwegian Labour Party.

came to diametrically opposed conclusions centering on Ms. Kagan's criticism of the notoriously liberal Earl Warren's Supreme Court. 'Why should nine appointed lawyers play so large a role in a democratic nation? Only because these nine lawyers arrive at their decisions in a unique and inherently valuable way, only because these lawyers resolve all issues by reference to law and legal principle [...] only the methods of principal and reason can justify supreme judicial authority in a political democracy [...] only those methods can ensure that such opinions will have a lasting effect.'⁴ Tea Party activists chipped away at Ms Kagan's statement that 'foreign law is relevant in at least some contexts.'⁵ Kagan's support for mandatory courses on international and comparative law at Harvard Law School was taken as proof of her liberal activist leanings and 'raise serious questions about how she would follow the US Constitution if confirmed.'⁶

Is Elena Kagan an activist or restrained interpreter is the burning question

To enter into the fray of judicial activism with its built-in fear of a judge imposing personal politics into a judicial decision is far beyond the scope of a reflective memo.⁷ The colourful Supreme Court orator Antonin Scalia, a proponent of a close, literal reading of the Constitution opted for four words to summarize his disdain for the opposing, activist view: 'You know, it [the Constitution *HK*] morphs.'⁸

President Obama's administration is facing legal disputes on the Supreme Court level that will ultimately test the limits of his executive power. Hopefully neither the Constitution nor executive power will enter into a 'morph' phase. The president has articulated his support for a high court with representatives of

many viewpoints and interpretational flavours. An individual who 'understands that justice isn't about some abstract legal theory or footnote in a case book. It is also about how our laws affect the daily realities of people's lives.'⁹

As a footnote to the confirmation of Ms. Kagan as the 114th Supreme Court Justice and fourth woman to serve on the bench, it might be worth reading a few tea leaves to predict her views on the expansion of executive powers, one of the hottest topics in a summer replete with heat waves. Tea leaves might provide a better answer than analysis as Ms. Kagan's record is mixed indeed: a much-quoted article defended the president's authority to achieve progressive goals through an expansion of powers¹⁰ while many of her actions as solicitor general pointed to her firm disapproval of the Bush administration's widespread expansion of executive authority.

Tea leaves might provide a better answer than analysis as Ms. Kagan's record is mixed indeed

History might have the last word as we await Ms. Kagan's confirmation and the Tea Party summer convention season slows down in September. Justice Felix Frankfurter (Supreme Court 1939-1962) frequently complained of his activist colleague Earl Warren's shoddy research and penchant for pushing change too quickly. Yet, to allay the fears of those who occupy their time by labeling judicial interpreters as members of a particular camp, Frankfurter called for active restraint. Never fear, Frankfurter noted, 'as a member of this court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard.'¹¹

- 4 Quoted in the Wall Street Journal, 'Kagan Criticized the Warren Court in Thesis', May 18, 2010.
- 5 Statement made during Senate confirmation hearings prior to Ms. Kagan's appointment as US Solicitor General, March 19, 2009.
- 6 Terrence McKeegan JD, www.lifenote.com May 17, 2010.
- 7 Recommended reading: Thomas Sowell's *Judicial Activism Reconsidered*, www.tsowell.com/judicial.htm (lastly viewed on July 21, 2010).
- 8 Associate Justice Antonin Scalia delivered the following remarks at the Woodrow Wilson International Center for Scholars in Washington, D.C. on March 14, 2005.
- 9 White House official reaction to Justice David Souter's retirement announcement, May 1, 2009.
- 10 E. Kagan, 'Presidential Administration', 114 *Harvard Law Review* 2245 (2001).
- 11 Associate Justice Frankfurter went down in US legal history as the chief proponent of the concept known as judicial restraint with its hands-off approach in terms of the Constitution's ability to limit the executive branch.