

Elena Kagan and the Right Wing Dog That Didn't Bark

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The relative ease with which Elena Kagan is almost certain to be confirmed for the Supreme Court is a political victory for the White House and tells us a few important things about the current political environment. Kagan's imminent confirmation, particularly when paired with Justice Sonia Sotomayor's confirmation last year, demonstrates that when the White House is faced with contained and discrete political choices, they are able to make good decisions. The Obama administration has nominated two relatively uncontroversial, qualified candidates. Sotomayor raised some partisan ire, more for her "wise Latina" comment than for her record, while the Republican attacks on Kagan have focused on the activist judge fear mongering which is really little more than poorly concealed partisan politics, but these criticisms got little traction outside of the Republican base.

In this regard, the Obama administration is not all that unusual. George W. Bush also was successful in his Supreme Court appointments. In recent years, most nominees to the court are confirmed, largely because of the more thorough vetting processes since Reagan nominees Douglas Ginsburg and Robert Bork were kept off the court in 1987, the former due to marijuana use and the latter due to his political extremism. Interestingly, it is likely that neither of these would be enough to keep a nominee from being confirmed today.

The relative ease with which Kagan appears to be moving through the confirmation process also indicates that something is changing within the Republican Party as well. A year ago Republican senators, the right wing media and blogosphere was much more visible in their opposition to Sotomayor's candidacy. Sotomayor is not more liberal than Kagan, so this different approach was not based on ideological differences between the candidates. Rather it is a reflection on the changed political environment.

The Republican Party wisely chose not to fight too hard to stop Kagan's confirmation for political reasons, but not because she was so uncontroversial. Her decision regarding the military while serving as dean of Harvard Law School and her lack of any real experience on the bench, while both far from the kind of thing that should disqualify her for the Supreme Court, are certainly the kinds of issues about which the Republicans could have made a lot more noise.

Supreme Court confirmation battles, while generally not very suspenseful because most nominees are easily confirmed, are opportunities for the party opposing the nomination to grandstand a bit, get some time on television and throw some rhetorical red meat to their party's base, particularly, as was the case with Kagan, when the hearings are only a few months before a major election. However, the Republicans chose not to do that during the Kagan confirmation process despite the right wing activists who are still visible and mobilized and would have been up for the fight.

It is not hard to imagine a scenario where Republican politicians around the country would have spoken at Tea Party and other right wing events portraying Kagan as a dangerous anti-military radical, beholden to far left social issues and an admirer of subversives like Thurgood Marshall. All of these issues, of course, were brought up during the hearings, but they were raised and dismissed relatively quickly with little active pressure from outside the senate.

Therefore, it is possible that the Republican leadership made a strategic decision not to go down that road. If this is true it suggests a significant break from their recent past, and a rare burst of sound strategic thinking by the post-Bush Republican Party. Another few weeks of media dominated by right wing activists making absurd claims about a calm, qualified and media savvy Obama nominee would have weakened the Republican Party going into an election season which promises to be very competitive.

The far right of the Republican Party has already done a great deal to damage their party's chances this year by nominating senate candidates like Sharron Angle or Rand Paul who represent far right views but are less electable than more moderate Republicans would be, offering few serious solutions to the country's problems and presenting themselves as sufficiently angry and irrational that it is relatively easy for the Democrats and the Obama administration to position themselves as the political center.

The continued dominance of the Republican Party by its right wing fringe is the best hope the Democrats have for minimizing damage in the midterm elections, but the Republicans may finally be moving away from this domination. The Kagan hearing was to some extent a no win situation for the Republican Party. From the moment she was nominated, her confirmation was almost guaranteed, thus all but ensuring a political victory for the White House. Making the confirmation into a big fight might have slightly raised the chances of derailing the nomination but would have again revealed the angry, ideological and extremist face of the party, while not taking up the fight meant defeat. The Republicans seemed to have played this one right by recognizing the inevitable and focusing on positioning themselves for 2010.