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Court picks can prove unpredictable

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The U.S. bishops announced last month their withdrawal from the Leadership Conference on Civil and Human Rights because the latter organization endorsed the nomination of Elena Kagan to the U.S. Supreme Court. The endorsement ?clearly contradicts [U.S. Conference of Catholic Bishops] policy and compromises the principled positions of the bishops,? said Bishop William Murphy of Rockville Centre, N.Y.

It was not always so. In a recent article in The Washington Post, Stewart Spencer, political strategist to President Gerald Ford, recalled the bishops? involvement in the selection of Justice John Paul Stevens in 1975. Spencer said that he met with a delegation of bishops and they gave him a list of three candidates. He continues: ?I [later saw the president] and said: ?I met with the bishops of the Catholic church today. They have an interest in your appointment to the Supreme Court.? [Ford] smiled. ?I bet they do.? I pulled out this list and said: ?They gave me this list. These are people who are acceptable to them. I?m not going to lobby, I?m just going to give you the list.? He looks at the list, puts it in his drawer. ... Ten days later he appoints John Paul Stevens to the bench. He was on the list.?

Stevens went on to become the court?s most stalwart liberal vote, including defense of *Roe* v. *Wade*, so perhaps the bishops? reluctance to get involved these days is evidence of the maxim, once burned, twice shy.

The episode illustrates the difficulty in predicting how a court appointment will turn out.

Does Kagan?s previous service within government provide clues to her judicial philosophy? Pragmatism is indicated.

In 1997, while serving in the Clinton White House, Kagan wrote a memo urging President Clinton to support legislation that would ban late-term abortions. The plan she supported was seen as a compromise at the time, but it was fiercely opposed by pro-choice groups. In any event, Clinton did not take Kagan?s advice, the Republican Congress passed a more extreme version of the partial-birth abortion ban, and Clinton vetoed the measure.

To be sure, the Supreme Court will continue to grapple with social issues of the ?guns, gays and God? variety. But an increasing percentage of the docket will be filled with business-related issues, as new technologies raise fresh questions that have not been previously addressed by the court. Hopefully, Kagan?s experience of politics will have alerted her to the real-world consequences of the court?s decisions in these areas.

Certainly, the ecological catastrophe in the Gulf of Mexico has shown, yet again, that private businesses cannot be trusted to exercise sufficient care for the consequences of their risks. The Constitution?s foundational objective to ?promote the general welfare? requires a robust government capable of regulating companies and their practices and punishing those that fail to act responsibly. No company has a ?right? to destroy the coast of Louisiana.

Of course, if history is any guide, the senators can ask what they want but it is no use guessing how a justice will actually perform on the bench. Dwight Eisenhower did not expect Earl Warren to become the liberal lion he

became. George H.W. Bush did not foresee that David Souter would become a reliably liberal vote. Bill Clinton could not have guessed that Stephen Breyer would join, in part, the majority in Bush v. Gore. And neither the man who appointed him nor the bishops who suggested him foresaw that Stevens would become the leader of the liberal wing of the court for 30 years. His replacement, Elena Kagan, may prove just as unpredictable, no matter what we do and do not learn in the forthcoming confirmation hearings.

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