NATIONAL CATHOLIC REPORTER
Published on *National Catholic Reporter* (http://ncronline.org)

Q & A: Rick Garnett

Michael Sean Winters | Jul. 13, 2010 Distinctly Catholic

This week in Q & A, we will address the upcoming confirmation vote for Elena Kagan. Yesterday, we heard from Benjamin Wittes, Senior Fellow and Research Director in Public Law at The Brookings Institution. Today, we pose the question to Professor Rick Garnett of Notre Dame Law School and editor of the excellent blog " Mirror of Justice [1]."

The question: What is the best reason to vote to confirm, or to vote not to confirm, Elena Kagan?

Rick Garnett:
We?ve all heard the old saying, ?where you stand is where you sit?, and its truth is confirmed, I think, by commentators? efforts (including mine) to answer the question, ?what is the best reason to confirm, or not to confirm, Solicitor General Elena Kagan?? It is not now possible for anyone to give an answer (though some will claim that they are giving an answer) that is entirely untethered to partisan divisions, loyalties, agendas, and grudges.

It is possible to imagine a happy world in which pretty much everyone endorsed the idea that any duly elected President is entitled to have his or her (qualified) nominees to the Court confirmed. Elections matter, after all. And, our world has sometimes resembled such a world, as when the Senate overwhelmingly confirmed in bipartisan fashion Justices Scalia (nominated by President Reagan) and Ginsburg (nominated by President Clinton). If this were our world, then the ?best? reasons to vote to confirm Kagan would be the obvious ones: She is qualified, and she is the President?s ? and so, in theory, the country?s ? choice, even if she would not have been mine.

At present, though, we do not inhabit such a world. In our world, more than 20 Democratic senators voted against Chief Justice Roberts and more than 30 (including then-Senator Obama) voted against Justice Alito ? both of whom were obviously and highly qualified -- in some cases for low partisan reasons (e.g., to curry favor in Democratic presidential primaries) and in other cases or higher, philosophical ones (e.g., because of disagreement with the nominees? approaches to constitutional interpretation). Any suggestion that Alito and Roberts were somehow less qualified or impressive, or less ?mainstream?, than is Solicitor General Kagan (who is also impressive and qualified) would be risible. So, it would seem that Republican senators can quite reasonably say, ?no one who voted against Alito or Roberts ? including the President -- has standing to invoke a rule of deference. Kagan?s views are not my views, and so I?m voting ?no? on Kagan. It?s not personal, it?s strictly business.?

Here?s a problem, though: A ?President gets his or her nominees, no matter what? view is not consistent with the Senate?s constitutional responsibilities, and a ?only nominees whose substantive views on hot-button questions are shared by a filibuster-proof majority of Senators? rule is unsustainable. Is there a way forward? I?m not optimistic. So long as Senators know that We the People know that ? for better or worse -- the answers to difficult questions of law, policy, and morality depend to a not-small extent on the membership of the Supreme Court, they will be understandably reluctant to add to the ?other side? of that membership. Of course, things might have been different, had the Court not so dramatically and tragically overreached in Roe v. Wade. .

. .

Tomorrow's Interviewee will be Mark Silk of Trinity College in Hartford, Connecticut and editor of the also excellent blog "Spiritual Politics[2]."

Source URL (retrieved on *10/22/2014 - 02:03*): http://ncronline.org/blogs/distinctly-catholic/q-rick-garnett

Links:
[1] http://www.mirrorofjustice.blogs.com/
[2] http://www.spiritual-politics.org/