Searching for Elena Kagan

President Obama may know that his new nominee to the Supreme Court, Elena Kagan, shares his thinking on the multitude of issues that face the court and the nation, but the public knows nothing of the kind. Whether by ambitious design or by habit of mind, Ms. Kagan has spent decades carefully husbanding her thoughts and shielding her philosophy from view. Her lack of a clear record on certain issues makes it hard to know whether Mr. Obama has nominated a full-throated counterweight to the court’s increasingly aggressive conservative wing.

Ms. Kagan would fill the seat held for 34 years by Justice John Paul Stevens, whose ringing opinions defined modern liberal jurisprudence, particularly as the decibel level of his dissents grew in recent years. The quality of his voice and his persuasive power raise the bar to a high level for his successor, and at this point there are little more than entrails and tea leaves to suggest that Ms. Kagan will meet the standard he set.

It is gratifying that the president has nominated to this court what would be its third female justice, one who is relatively young, well spoken and, by all accounts, brilliant and collegial. Though Republicans already are deriding her for never having worn a judicial robe, the current court, dominated by former appeals court judges, could use more members who have engaged more closely with the world than with a trial transcript.

But where, precisely, has Ms. Kagan been during the legal whirlwinds of the last few years, as issues like executive power, same-sex marriage, the rights of the accused and proper application of the death penalty have raged through the courts? As dean of the Harvard Law School, she spoke out against the military’s discrimination against gay and lesbian soldiers, but many students and professors there have expressed chagrin that she did not take a more forceful stance. And she has stated that “there is no federal constitutional right to same-sex marriage.” Her positions on other current issues are either unclear — or possibly to the right of Justice Stevens.

In a 2001 Harvard Law Review article, Ms. Kagan defended a robust assertion of presidential
power unless specifically limited by Congress — albeit in the service of “progressive goals” on the domestic front. She told the Senate last year that she agreed the government has the right to indefinitely detain enemy combatants captured around the world. As Mr. Obama’s solicitor general, she has supported his administration’s positions, little changed since the Bush administration, on the use of military force against Al Qaeda, the habeas corpus rights of military detainees and the state secrets privilege. (In 2005, however, she did oppose a Republican attempt to remove judicial review from the cases of detainees at Guantánamo Bay, Cuba.)

It may be unfair to blame Ms. Kagan for some of the positions she has taken as solicitor general, a job that requires her to defend the government’s views. But a search for her own views on dozens of other matters yields little. Though she has said that she respects precedents on abortion, she has said virtually nothing on racial preferences, gun rights or private property rights. When the constitutionality of President Obama’s health care law reaches the Supreme Court, as it probably will, given the forceful challenges now being waged in several states, would she reject the argument that Washington has overstepped its role in requiring health insurance? There is no record to suggest an answer.

The White House undoubtedly hopes the ellipses in Ms. Kagan’s record will help her avoid a rocky confirmation hearing. That expedient approach, unfortunately, reflects the widespread sentiment that the right holds the upper hand in judicial debates, forcing the left to duck and cower. But in one of Ms. Kagan’s few forcefully stated positions, she wrote in 1995 that she detests “polite and restrained” confirmation hearings, calling them a “vapid and hollow charade” and urging senators to fully explore a court nominee’s substantive views. We hope the Senate follows her advice and gets Ms. Kagan to open up a little.