In Supreme Court Work, Early Views of Kagan

By CHARLIE SAVAGE

WASHINGTON — As a young law clerk working for Justice Thurgood Marshall at the Supreme Court in September 1987, Elena Kagan wrote an angry memorandum urging her boss to try to overturn a conservative appeals court ruling that had questioned the constitutionality of a rent-control ordinance.

“All in all, this opinion is outrageous,” wrote Ms. Kagan, who is now a Supreme Court nominee. The appeals court judge who wrote it, she added, “has flouted the opinions of this court and has reached a result that is sweeping in its implications. Although the decision does not invalidate the ordinance on its merits, it is an authorization for broad, wholesale attacks on rent-control regulation.”

But the Supreme Court decided to let the lower-court ruling stand.

Now, in an era in which the government’s power to encroach on property rights has been a hot issue, Ms. Kagan could face sharp Republican questions at her confirmation hearing about her strong reaction to the rent-control ruling.

The three-page memorandum is one of hundreds Ms. Kagan wrote analyzing petitions to the Supreme Court during its 1987-88 term. Those documents, housed at the Library of Congress, constitute a rare paper trail that provides insight into her early legal policy views. Largely written with a liberal sensibility on a variety of matters from criminal rights to environmental regulations, the memorandums could provide ammunition to conservative critics of her nomination, while comforting liberal skeptics.

Still, it is not clear how much the memorandums reflect her thinking today. At her confirmation hearing to be solicitor general last year, Ms. Kagan sought to distance herself from them, saying that she no longer agreed with some and that her job as a clerk was to “channel” Justice
Marshall’s views.

But she also acknowledged some personal responsibility for the views in the documents, testifying that “I don’t want to say that there is nothing of me in these memos,” and “I think that it’s actually fair when you look” at a particular memorandum “to think that I was stating an opinion.”

Most of the memorandums are terse. For example, she took just four sentences to describe a case in which a man had challenged the District of Columbia’s strict gun-control ordinance on the grounds that he had an individual right to bear arms under the Second Amendment.

In 2008, the Supreme Court would vote 5 to 4 to strike down the ordinance on precisely those grounds. But in her August 1987 memorandum, she simply dismissed that individual-rights view of the Second Amendment: “I’m not sympathetic,” she wrote.

By contrast, the rent-control case memorandum was one of several dozen in which Ms. Kagan appeared to take a stronger personal interest — writing in more emotional terms or at significantly greater length.

Several such memorandums suggested a friendly attitude toward the view that the Constitution contains unwritten rights protecting personal liberty — the so-called substantive due process doctrine that formed the basis of several famous liberal rulings, like a 1973 decision striking down abortion bans. Many conservatives are skeptical about that doctrine, saying it allows judges to make up new rights.

A three-page memorandum from September 1987, for example, discussed a case in which welfare authorities had failed to protect a child from violent parental abuse. It raised the question of whether the government had an unwritten constitutional duty to help such children.

Ms. Kagan expressed “worry” that a majority on the court would use the case to reject a broad view of substantive due process under which the doctrine can not only be used to restrict official actions, but also to require the government to affirmatively do things.

In a November 1987 memorandum about a similar case involving a child who was abused in a foster home, Ms. Kagan wrote that “some members of this court will doubtless object” to an appeals court ruling that the authorities had violated the child’s constitutional rights, but she thought it was “correct.”

Another recurrent theme was a generally liberal approach to law-enforcement issues. In roughly a dozen memorandums involving the rights of prisoners or suspects, she adopted a strategic tone aimed at limiting opportunities for the increasingly conservative Rehnquist court
to roll back liberal precedents.

In September 1987, she analyzed a case involving two men who were stopped by the police, made to lie down for five minutes, then frisked. The search turned up evidence of a crime. The men wanted the evidence suppressed, arguing that the police had arrested them without probable cause to believe they had committed a crime.

A lower court sided with the police, ruling that the five-minute incident did not amount to an arrest, but rather was a brief “stop and frisk” that does not require probable cause. Ms. Kagan was incensed — but suggested rejecting the men’s appeal lest the Supreme Court approve such police conduct, a result that she said “would be an awful and perhaps quite consequential holding.”

And in an April 1988 memorandum, Ms. Kagan criticized as “ludicrous” a lower-court ruling that had suggested that the Constitution required a sheriff's office to pay for female inmates to have elective abortions. But she argued against taking that appeal, too, warning that it “is likely to become the vehicle that this court uses to create some very bad law on abortion and/or prisoners’ rights.”

Another case suggested that she looked favorably on expansive interpretations of environmental regulations. In a June 1988 memorandum, she analyzed two cases in which an appeals court had struck down actions by federal agencies — like issuing a permit to build a ski lodge in a national forest — because they failed to make a detailed plan about how to mitigate possible environmental problems.

The Reagan administration appealed those rulings, arguing that a certain federal statute did not require such mitigation plans. But Ms. Kagan said the rulings should stand because they were “consistent with the language and purpose” of the statute — “and make a great deal of policy sense.”

That phrase could come back to haunt her: conservatives have denounced the view that policy considerations should play a role in judicial decisions as amounting to “legislating from the bench.” Still, Ms. Kagan has shown an ability to elude attacks over her old memorandums.

At her confirmation hearing last year, a Republican senator brought up an August 1987 memorandum in which she wrote that religious groups should be ineligible for government financing to provide social services because they would most likely use it to proselytize. Ms. Kagan turned aside the attack by telling him that her youthful analysis in that case was “the dumbest thing I’ve ever heard.”
Lisa Faye Petak and Bernie Becker contributed reporting.