Glimpses of Kagan’s Views in Clinton White House

By SHERYL GAY STOLBERG

WASHINGTON — A new cache of documents from Elena Kagan’s days as an adviser to President Bill Clinton shows that she frequently scribbled notes in the margins of memorandums yet rarely expressed forceful views. But on at least one question that came before the Clinton White House — whether to make assisted suicide a federal crime — Ms. Kagan was adamant.

“I think this is a fairly terrible idea,” she wrote in January 1998.

Ms. Kagan’s missives in the margins offer little hint of how she might behave if confirmed to the Supreme Court. But the 46,700 pages released Friday by the National Archives do offer glimpses into her thinking, revealing a woman who, like the president she worked for, was trying to balance competing policy objectives and chart a centrist course on matters as varied as abortion, race relations, immigration, AIDS, gun rights and embryonic stem cell research.

She endorsed a legal strategy aimed at avoiding a sweeping Supreme Court ruling against affirmative action. She urged the Department of Health and Human Services to be more candid about the lack of scientific evidence for medical marijuana. She expressed skepticism about a drive to bar schools from tracking students by ability. She cautioned against imposing tough marketing restrictions on the tobacco industry — a hint of her background as a First Amendment scholar.

“I’m not sure I buy the argument re speech restrictions,” Ms. Kagan wrote.
The documents — including e-mail messages — are only the first batch of roughly 160,000 pages that the Senate Judiciary Committee is seeking. They cover her time as deputy director of Mr. Clinton’s Domestic Policy Council, where she worked from 1997 to 1999 under Bruce Reed, a friend and former classmate from Princeton University. (She also served for two years in the White House counsel’s office.)

The archivist has promised that the full trove of 160,000 pages will be made public by June 28, when the Judiciary Committee is scheduled to start confirmation hearings.

However, 263 pages will be withheld from the public because of “statutory restrictions,” a White House official said. Though Mr. Clinton could have barred their release under executive privilege, he has permitted senators to review them on a confidential basis, the official said.

Republicans were not pleased. Senator Jeff Sessions of Alabama, the top Republican on the Judiciary Committee, issued a statement saying he now had “new concerns that even when the documents are produced, they will not be produced completely and transparently.”

Ms. Kagan apparently kept voluminous records, though the files do not contain her personal replies to many of the e-mail messages sent directly to her. Most of the formal recommendations to Mr. Clinton were written under Mr. Reed’s name, and many of the files are less than revealing.

A folder about the government’s “don’t ask, don’t tell” policy of barring gay men, lesbians and bisexuals from serving openly in the military — which Ms. Kagan termed a “moral outrage” while dean of Harvard Law School — consisted largely of a lengthy report by a group critical of the policy. It contained few markings.

Often, the files show Ms. Kagan trying to channel her boss, the president, as was the case when she tried to arrange an awkward political compromise around legislation banning the controversial procedure opponents call partial-birth abortion.

Mr. Clinton vetoed the ban; when the White House drafted a letter from the president to the archbishop of Boston, Ms. Kagan suggested language for the president to use to explain that he backed a ban, but only if it included a health exception for the mother — a position that infuriated abortion rights advocates and opponents alike.
“I understand that many who support this legislation believe that any health exception will be so broad as to eviscerate the ban,” wrote Ms. Kagan, adopting Mr. Clinton’s voice. “That is not the kind of exception I support. I support an exception that takes effect only when a woman faces real, serious adverse health consequences.”

She had a knack for balancing policy and politics on tough issues, the documents show. They include a note she scrawled atop a memorandum about a lawsuit filed by a white teacher who, for diversity reasons, had been laid off instead of a black colleague with equal seniority.

The author of the memorandum, the acting solicitor general, Walter Dellinger, argued that the Justice Department should file a brief backing the white teacher, but with very narrow reasoning, to avoid jeopardizing affirmative action programs.

“I think this is exactly the right position — as a legal matter, as a policy matter, and as a political matter,” Ms. Kagan wrote.

While the files consist largely of articles and draft memorandums, at least one document personally attributes a policy idea to Ms. Kagan. In March 1997, with the Supreme Court considering whether to strike down legislation requiring background checks on gun buyers, she proposed having the president tighten gun restrictions unilaterally, according to an e-mail message that cited “Elena’s suggestion.”

Ms. Kagan was also immersed in Mr. Clinton’s yearlong initiative to improve race relations in America, a central go-between among various players inside and outside government on issues like affirmative action, profiling, crime and education. In one note, she sounded skeptical of a proposed executive order instructing the Justice Department to coordinate civil rights enforcement across agencies and of a drive to eliminate tracking young students by ability.

“I’m not keen on the paired testing proposal — it will only encourage Gingrich in his opposition to this enforcement technique,” Ms. Kagan wrote on the memo, referring to the House speaker, Newt Gingrich. “And I have to admit that the use of ability groupings seems to me properly a local issue, but I may be wrong about this.”

Most of the notes struck a neutral chord, but sometimes Ms. Kagan took a sharper tone.

Asked to weigh in on a 1997 letter from a Social Security Administration official concerning...
legislation to deny benefits to Nazi war criminals, she took no position on whether, as some contended at the time, such a law would interfere with criminal prosecutions. But she did object to the official’s tone.

“This is a pretty snotty letter,” Ms. Kagan wrote.

*Peter Baker, Adam Liptak and Charlie Savage contributed reporting.*