SCOTUSblog Briefing Paper

Elena Kagan – Detailed Answers to Senators' Questions

July 16 2010

I. Summary and our take

While it may be true that every Supreme Court nomination is characterized by a certain level of speculation as to whether the nominee will provide sufficiently candid and forthcoming answers to the questions posed by Senators, this speculation was especially strong in the lead-up to Elena Kagan's confirmation hearings because of her past outspokenness on the quality of the Supreme Court confirmation process. In her now-famous 1995 University of Chicago Law Review article, *Confirmation Messes, Old and New*, Kagan harshly criticized the level of discourse common at the confirmation hearings of then-recent Supreme Court nominees, calling the hearing process a "vapid and hollow charade" and asserting that "[w]hen the Senate ceases to engage nominees in meaningful discussion of legal issues, the confirmation process takes on an air of vacuity and farce." She argued that judicial nominees should be compelled to give detailed answers to the Senators' questions during their confirmation hearings, giving the Senate and the public an impression of "the votes she would cast, the perspective she would add (or augment), and the direction in which she would move the institution."

In 2009, during Kagan's Solicitor General confirmation hearings, she backed off these claims substantially, telling Senators that she did not necessarily still agree with her earlier arguments and conceding that most judicial nominees had certain interests to protect which dictated the nature of their answers to Senators' questions. Nonetheless, her 1995 article was the focus of a great deal of scrutiny following her nomination to the Supreme Court, as critics urged the Senate to hold Kagan to her earlier beliefs that nominees should provide detailed answers to probing questions.

During her Supreme Court confirmation hearings, Kagan responded to Senators' questions about her article by maintaining that although she still agreed with some of its substantive points, she "had the balance a little bit off." Although she still believed that Senators would be justified in questioning a judicial nominee about her judicial philosophy and the approach she might take, Kagan told the Committee members, it would be inappropriate for a nominee to give detailed answers to certain questions – those about pending or potential cases, for example – and that it would be inappropriate for Senators to ask such questions, even in a "veiled" manner.

A few Senators, expressing frustration with Kagan's unwillingness to give direct answers to their questions, pointed to her article during the hearings to try to elicit further elaboration, or as evidence that she was taking a hypocritical approach to the confirmation process. In particular, Senator Specter chided Kagan at one point for her evasive responses, reminding her that "we are searching for a way how Senators can succeed in getting substantive answers, as you advocated in the Chicago Law Review, short of voting 'no.'" Despite Specter's dissatisfaction with Kagan's answers during the hearings, however, he has since pledged to vote for her, conceding that she did "just enough" to win his endorsement.

Although Kagan's law review article was raised several times during her confirmation hearings, we believe that any discrepancy between the stance she took in that article and her apparent approach to her confirmation hearings will not pose a significant hurdle to her confirmation. The Senators' dissatisfaction with the substance of Kagan's answers was minimal in comparison to other recent confirmation hearings, and while a few Senators have expressed frustration, those Senators might not necessarily have been expected to vote in favor of Kagan, even in the absence of a controversy such as this. Further, we believe that the approach which Kagan took towards her prior stance on Senate

questioning during her hearings sufficiently resolves any discrepancy enough to refute claims that her position is hypocritical. Her assertion that she "got the balance off" in her article allows Kagan to stand by her previous position while justifying the evasion of some questions during her hearings. Therefore, although Kagan may continue to dodge some pointed questions – as many nominees have done before her – that strategy will not significantly impede her chances of being confirmed.

II. The relevant source materials

A. *Confirmation Messes, Old and New* (62 U. Chi. L. Rev. 919 (1995)) (book review of *The Confirmation Mess* by Stephen L. Carter)
   - "When the Senate ceases to engage nominees in meaningful discussion of legal issues, the confirmation process takes on an air of vacuity and farce, and the Senate becomes incapable of either properly evaluating nominees or appropriately educating the public. Whatever imperfections may have attended the Bork hearings pale in comparison with these recent failures. Out, then, with the new mess and in with the old!" (920)
   - "Carter (I think rightly) rejects this claim [that the Senate should defer to the President with regard to assessing the substantive views of a nominee], adopting instead the position that the Senate and the President have independent responsibility to evaluate, by whatever criteria are appropriate, whether a person ought to serve as a Supreme Court Justice." (931)
   - "It is an embarrassment that the President and Senate do not always insist, as a threshold requirement, that a nominee's previous accomplishments evidence an ability not merely to handle but to master the 'craft' aspects of being a judge." (932)
   - "What must guide any such decision [the selection of a Supreme Court Justice], stated most broadly, is a vision of the Court and an understanding of the way a nominee would influence its behavior. This vision largely consists of a view as to the kinds of decisions the Court should issue. The critical inquiry as to any individual similarly concerns the votes she would cast, the perspective she would add (or augment), and the direction in which she would move the institution." (934)
   - "[T]he Senate's consideration of a nominee, and particularly the Senate's confirmation hearings, ought to focus on substantive issues; the Senate ought to view the hearings as an opportunity to gain knowledge and promote public understanding of what the nominee believes the Court should do and how she would affect its conduct. Like other kinds of legislative fact-finding, this inquiry serves both to educate members of the Senate and public and to enhance their ability to make reasoned choices. Open exploration of the nominee's substantive views, that is, enables senators and their constitutuents to engage in a focused discussion of constitutional values, to ascertain the values held by the nominee, and to evaluate whether the nominee possesses the values that the Supreme Court most urgently requires. These are the issues of greatest consequence surrounding any Supreme Court nomination (not the objective qualifications or personal morality of the nominee); and the process used in the Senate to serve the intertwined aims of education and evaluation ought to reflect what most greatly matters." (935)
   - "The kind of inquiry that would contribute most to understanding and evaluating a nomination is the kind Carter would forbid: discussion first, of the nominee's broad judicial philosophy and, second, of her views on particular constitutional issues." (935)
   - "I do not mean to argue here that the President and Senate may ask, and a nominee (or potential nominee) must answer, any question whatsoever. Some kinds of questions, as Carter contends, do pose a threat to the integrity of the judiciary." (939)

- "[W]hat is worse even than the hearings themselves is a necessary condition of them: the evident belief of many senators that serious substantive inquiry of nominees is usually not only inessential, but illegitimate—that their insistent questioning of Judge Bork was justified, if at all, by his overt 'radicalism' and that a similar insistence with respect to other nominees, not so obviously 'outside the mainstream,' would be improper." (941)

B. Transcript of Kagan's Solicitor General confirmation hearings (February 2009)
   - "I'm not sure that, sitting here today, I would agree with that statement [that nominees should answer specific questions]. . . . I wrote that when I was in the position of sitting where the staff is now sitting [referring to her time on then-Judiciary Committee chairman Joe Biden's staff], and feeling a little bit frustrated that I really wasn't understanding completely what the judicial nominee in front of me meant and what she thought." (p. 118)
   - "The Senate has to get the information that it needs but, as well, the nominee, for any particular position – whether it's judicial or otherwise, has to be protective of certain kinds of interests, and you named the countervailing ones." (p. 118)

C. Webcast of Kagan's Supreme Court confirmation hearings (day 2, part 1) (June 2010)
   - LEAHY: You wrote a law review article, a book review, in which you argue that these proceedings should be occasions to engage in a meaningful discussion of legal issues. Now: you set the standard. You probably reread those words.
     KAGAN: Many times.
     LEAHY: I'll bet. As have I, and I guarantee you, as have every single member of this committee.
     KAGAN: And you know what? They've been read to me many times too.
     LEAHY: Probably will again. How are you going to live up to that standard?
     KAGAN: … I have looked at that book review many times, and been pointed to it, and here's what I think. I still think that the basic points of that book review were right, and the basic points were that the Senate has a very significant role to play in picking Supreme Court Justices, that it's important who serves on the Supreme Court, that everyone should treat it as important, and that the Senate should – has a constitutional responsibility and should take that constitutional responsibility seriously. And also that it should have the information it needs to take that responsibility seriously. And part of that is getting some sense, some feel, of how a nominee approaches legal issues, the way they think about the law, and I guess that's my excuse for giving you a little more than you wanted about constitutional change. But I would say that there are limits on that, and some of the limits I talked about in that article itself. I mean, that article makes very clear that it would be inappropriate for a nominee to talk about how she will rule on pending cases, or on cases beyond that that might come before the Court in the future. So the article was very clear about that line. Now, when I came before this committee in my SG hearing, Senator Hatch and I had some conversation, because Senator Hatch said to me – and I'm sorry he's not here – he said to me he thought that I had the balance a little bit off. He said, you know, in addition – he basically said, it's not just that people can ask you about cases coming before the Court. They can ask you a range of questions that are a little bit more veiled than that, but they're really getting at the same thing. And if it's not right to say how you would rule on a case that's going to come before the Court, or that might, then it's also not right to ask those kinds of questions, which essentially ask you the same thing without doing so in so many words. And I went back and forth a little bit with Senator Hatch, both in these hearings and on paper, and I basically said to Senator Hatch that he was right, that I thought that I did have the balance a little bit off, and I skewed it too much towards saying that answering is appropriate even when it would provide some

kind of hints. And I think that that was wrong. I think that in particular, it wouldn't be appropriate for me to talk about what I think about past cases, you know, to grade cases, because those cases themselves might again come before the Court. (At 11 min., 50 sec.)

- KOHL: Well, I think this is a good time to refer to your 1995 law review article, in which you criticize Supreme Court …
  KAGAN: It's been half an hour since I heard about that article.
  KOHL: Here we are. You said back then "when the Senate ceases to engage nominees in meaningful discussions of legal issues, the confirmation process takes on an air of vacuity and farce, and the Senate becomes incapable of either properly evaluating nominees or appropriately educating the public." However, more recently, in the meeting that we had, you indicated that you had reconsidered these views, and I think we're getting some indication of that here at the moment. How do you feel about that reconsideration versus what you said back in 1995?
  KAGAN: Well, Senator Kohl, I do think that much of what I wrote in 1995 was right, but that I – at some measure – got a bit of the balance off, so what I wrote in 1995 was that the Senate had an important role to play, that the Senate should take that role very seriously, that the Senate should endeavor to think about what a nominee was – what kind of Justice a nominee would make, and that that was all appropriate. And I also said that I thought that it was appropriate for nominees to be as forthcoming as they possibly could be, and I continue to believe that, and I am endeavoring and will endeavor to do so. I did think that – as I suggested earlier – that I got the balance a little bit off. I said then – even then in that 1995 article – that it was inappropriate for a nominee to ever give any indication of how she would rule in a case that would come before the Court. And I think, too, it would be inappropriate to do so in a somewhat veiled manner, by essentially grading past cases. But I do think its very appropriate for you to question me about my judicial philosophy, on the kinds of sources I would look to in interpreting the constitution or interpreting a statute, about my general approach to judicial decisionmaking, about the degree to which I would defer or not defer to acts of Congress and the states – all of those things I think ought to be the subject of debate.
  KOHL: Well, back in that 1995 article you wrote that one of the most important inquiries for any nominee, as you are here today, is to "inquire as to the direction in which he or she would move the institution." In what direction would you move the Court?
  KAGAN: Senator Kohl, I do think that that is the kind of thing that I – all I can say, Senator Kohl, is that I would try to decide each case that comes before as fairly and objectively as I can. I can't tell you I'll move the Court in a particular way on a particular issue because I just don't know what cases –
  KOHL: But you said in 1995 that it is a fair question to ask a nominee, "in what direction" – this is your quote – "would you move the Court?"
  KAGAN: Well, it might be a fair question.
  KOHL: Alright, let's move on. Comparison to other – General Kagan: the basic purpose of this hearing is to learn what kind of a person you are and what kind of a Justice you will be when you are confirmed. One way to gain insight into your judicial philosophy is to learn which Justices you most identify with. Yesterday you spoke highly of Justice Stevens; you said his qualities are those of a model judge. In addition to Justice Stevens, can you tell us the names of a few current Justices, or Justices of the recent past, with whom you most identify in terms of your judicial philosophy and theirs?
  KAGAN: I do very much admire Justice Stevens, and I wanted to say so as he left the Court because I think he has done this country a long and honorable service, that he has been a simply marvelous Justice, and his commitment to the rule of law and his commitment to principle – that's not to say that Justice Kagan, if I'm so lucky as to ever be called that,

Justice Kagan would be Justice Stevens; it's just to say that I have great admiration for the contribution that Justice Stevens has made over many period of years … I think it would be just a bad idea for me to talk about current Justices, and I've expressed admiration for many of them.
KOHL: My oh my oh my. All right, let's move on. (At one hour, 15 min., 53 sec.)

D. Webcast of Kagan's Supreme Court confirmation hearings (day 3, part 2) (June 2010)
   - SPECTER: You have followed the pattern which has been invoked since Bork, and you quoted me in your law review article that someday the Senate would stand up on its hind legs; it would be my hope that we could find some place between voting "no" and having some sort of substantive answers, but I don't know that it would be useful to pursue these questions any further. But I think we are searching for a way how Senators can succeed in getting substantive answers, as you advocated in the Chicago Law Review, short of voting "no." (At one hour, 44 min., 4 sec.):

III. Statements by supporters and opponents

A. Opponents:

- Committee for Justice: "[G]iven her thin record, Kagan owes it to the American people to engage in an open and honest debate with senators about her judicial philosophy and other controversial views. One hopes that Kagan agrees, given her assertion that 'when the Senate ceases to engage nominees in meaningful discussion of legal issues, the confirmation process takes on an air of vacuity and farce.'"
- Judicial Crisis Network (via SCOTUSblog): "Senators have a solemn duty to thoroughly examine each nominee's views and to reject those who would not fairly apply the law, but would redefine it to accommodate their own values and beliefs. In the past Solicitor General Kagan has advocated Senate hearings that thoroughly examine a nominee's judicial philosophy; senators must hold her to her own standard, particularly given the scant record of her personal viewpoints she has carefully maintained. Nothing less than the Constitution itself is at stake."
- Senator John Cornyn (via Twitter): "Kagan once called judicial hrgs a 'vapid and hollow charade.' We'll see."

B. Presumably neutral or undecided:

- David Yalof, political science professor at UConn (via ABC News): "The Bork hearings were the last hearings where a nominee was able to engage the Senators … But Bork lost. Candidates since have followed the anti-Bork blueprint. The Souter blueprint if you will: say as little as possible without the appearance of stonewalling and you will be successfully confirmed … It's a noble notion that you should do what Bork did. But Bork didn't succeed. I don't know how any incentive system can be set up when by engaging Congress a candidate might lose."
- Nancy Northup, President of the Center for Reproductive Rights (via SCOTUSblog):

    - "The last Supreme Court decision on abortion was 5 to 4 and further diluted constitutional protections for abortion. As such, it is absolutely critical that the Senate Judiciary Committee conduct a rigorous confirmation process and thoroughly explore

Ms. Kagan's views on the constitutional protection that should be afforded to women seeking abortions. Failure to pursue such questions creates dangerous uncertainty regarding a constitutional right that has already been significantly weakened."

- "As Ms. Kagan wrote herself in a 1995 University of Chicago Law Review article, 'When the Senate ceases to engage nominees in meaningful discussion of legal issues, the confirmation process takes on an air of vacuity and farce, and the Senate becomes incapable of either properly evaluating nominees or appropriately educating the public.'"

C. **Supporters:**

- Ron Klain, advisor to Joe Biden (via the Daily Caller): "She was asked about [the book review during her confirmation hearings for Solicitor General] and said that both the passage of time and her perspective as a nominee had given her a new appreciation and respect for the difficulty of being a nominee, and the need to answer questions carefully. … You will see before the committee that she walks that line in a very appropriate way. She will be forthcoming with the committee. It will be a robust and engaging conversation about the law, but she will obviously also respect the conventions about how far a nominee should or shouldn't go in answering about specific legal questions."
- Harvard Law Professor Carol Steiker, a friend of Kagan's (via the L.A. Times): "I think she would say what every nominee says, that it is improper for a judicial candidate to speak in detail about issues that will come before the court."
- Senator Arlen Specter (via USA Today): "On balance, Kagan did little to move the nomination hearings from the stylized 'farce' (her own word) they have become into a discussion of substantive issues that reveal something of the nominee's judicial philosophy and predilections. . . . In addition to her intellect, academic and professional qualifications, Kagan did just enough to win my vote by her answers that television would be good for the country and the court, and by identifying Justice Marshall as her role model."

IV. News sources:

- Ariane de Vogue, *Elena Kagan: Confirmation Hearings "Vapid and Hollow Charade"*, ABC News (May 7, 2010)
- David Savage, *Kagan's Words May Return to Haunt Her*, L.A. Times (May 7, 2010)
- Garrett Epps, *Kagan in 1995 Wanted Tough Grilling for Court Picks*, The Atlantic (May 10, 2010)
- Mike Sacks, *Please, No Vapid Charade*, First One @ One First (May 10, 2010)
- Ashby Jones, *On Kagan: Where the GOP Might Attack*, WSJ Law Blog (May 10, 2010)
- Adam Liptak, *Kagan's View of the Court Confirmation Process, Before She Was Part of It*, New York Times (May 11, 2010)
- Chris Good, *Elena Kagan and the 'Vapid and Hollow Charade'*, The Atlantic (May 12, 2010)

- Jon Ward, *Elena Kagan No Longer Thinks Supreme Court Nominees Should Have to Answer Direct Questions*, The Daily Caller (May 10, 2010)
- Jonathan Chait, *Vacuity and Farce*, The New Republic (May 21, 2010)
- David Ingram, *Specter Gives Kagan a Confirmation Tip Sheet*, The BLT (May 26, 2010)
- Tony Mauro, *For Kagan, Craftiness and Candor Are Key to Hearings*, USA Today (May 27, 2010)
- *In Old Article, Kagan Invites Tough Questioning*, The Associated Press (via MSNBC) (June 3, 2010)
- Greg Stohr, *Kagan Hearing Gives Nominee the Chance to Make Good on Her Call for Candor*, Bloomberg (June 21, 2010)
- Joan Biskupic, *Will Kagan Be as Open as She Wanted Others to Be?*, USA Today (June 23, 2010)
- Charlie Savage and Sheryl Gay Stolberg, *Kagan Follows Precedent by Offering Few Opinions*, New York Times (June 29, 2010)
- Nathan Koppel, *Kagan Backs Away from 1995 Article*, WSJ Law Blog (June 29, 2010)
- Senator Arlen Specter, *Specter: "Kagan Did Just Enough to Win My Vote"*, USA Today (July 15, 2010)