Written by **Jack Kenny** on May 13, 2010

Kagan Now Welcomes Confirmation "Charade"

As a professor of law at the University of Chicago, Elena Kagan wrote that the lack of substantive questions and answers in confirmation hearings for Supreme Court nominees had made those hearings "a vapid and hollow charade." As Solicitor General of the United States and nominee for the Supreme Court, she now takes a more benevolent view of the charade.

"She was asked about it 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," Ron Klain, chief of staff to Vice President Joe Biden, said in briefing reporters about Kagan's preparation for her confirmation hearings. "You will see before the [Senate Judiciary] committee that she walks that line in a very appropriate way," Klain said. "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."

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Her 1995 article, published in the University of Chicago Law Review, was written after Kagan had served as special counsel to the Senate Judiciary Committee during the confirmation hearings on Judge Ruth Bader Ginsburg, President Clinton's first Supreme Court nominee. Recalling how Ginsburg and, later, Judge Stephen Breyer repeatedly declined to answer even the most general questions about legal issues that might come before them on the Court, Kagan faulted the Senators for accepting their "non-answers" with "good grace and humor."

"When the Senate ceases to engage nominees in a 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," Kagan wrote. But appearing before the Judiciary Committee last year as the nominee for Solicitor General, Kagan was already backing away from that position. "I'm not sure that, sitting here today, I would agree with that statement," she said. "I wrote that when I was in the position of sitting where the staff is now sitting, 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."

What Kagan thinks and means about legal, and particularly, constitutional issues may be even harder to discern. For as she pointed out in that essay 15 years ago, Ginsburg did have something of a "paper trail" of articles she had written on constitutional questions relating to abortion, privacy rights, and affirmative action. Kagan does not. At least some members of the Judiciary Committee may want to know something of her own thinking on freedom of speech in light of her defense as Solicitor General of the government's ban on the televising of Citizens United's movie about Hillary Clinton; or her view of the Fourth Amendment and how it compares with her defense, again as Solicitor General, of indefinite detention, in some cases, of terror suspects; or whether or to what extent the "right of privacy," on which the *Roe v. Wade* rests, limits what states may require in the way of parental consent or parental notification before an abortion may be performed on a minor.

Kagan's article was a review of Stephen L. Carter's 1994 book, *The Confirmation Mess,* in which the Yale law professor argued that confirmation hearings had become needlessly contentious arguments over points of law and judicial interpretations. Carter based his case to a great extent on the 1987 hearings on the nomination of Judge Robert Bork, describing it as "the intellectual equivalent of a barroom brawl." Kagan conceded that the case against Bork, whose nomination was voted down by the Senate, included "distortion, exaggeration and vilification." But she argued that the debate brought public attention to "the understanding of the Constitution that the nominee would carry with him to the Court." After Bork's defeat, however, nominees were careful to say next to nothing about any issue that might be controversial. That was true of Republican nominees Kennedy, Souter, and Thomas as well as Ginsburg and Breyer. The Clinton nominees, she wrote "appreciated that, for them (as for most), the safest and surest route to the prize lay in alternating platitudinous statement and judicious silence."

She was especially critical of Ginsburg for speaking only to "the insignificant and the obvious — did anyone need to hear on no less than three separate occasions that Justice Ginsburg disagreed with *Dred Scott*?" Ginsburg's favored technique, Kagan wrote, was "a pincer movement," in which she alternately declined to answer questions that were too specific and those that were too general. "I think when you ask me about specific cases, I have to say that I am not going to give an advisory opinion on any specific scenario," the judge said in response to a Senator's question, because "that scenario might come before me." On the other hand, she declined to "talk in grand terms about principles that have to be applied in concrete cases. I like to reason from the specific case."

One aspect of this "judicious silence" that Kagan did not touch upon in her 10,000-word essay is that it can be highly selective. When David Souter's nomination to the Supreme Court was before the Judiciary Committee in 1990, the judge from New Hampshire was a blank slate on most high-profile legal issues. But pro-abortion groups, mistakenly thinking he would vote to overturn the *Roe v. Wade* decision, opposed the nomination. Souter answered questions about school desegregration, the death penalty, and church-state issues, any one of which subjects could come before him during his tenure on the court. But on any question touching upon the court's abortion rulings, the judge respectfully declined to answer in order not to prejudice his consideration of future cases. When committee member Gordon Humphrey (R-N.H.) tried to gain some insight into Souter's thinking about the Court's discovery of the right to abortion in the "penumbras" formed by "emanations" from other, enumerated, rights, his probing drew only a stony silence.

The confirmation process as currently practiced, Kagan argued, adds virtually nothing to the public's knowledge of a nominee's judicial philosophy or how he or she will approach critical constitutional questions. It is as though what we the People are entitled to when it comes to the selection of a justice

for the highest court is the proverbial pig in a poke.

Obviously, it would be wrong for a nominee to offer a judgment on a specific case pending before the Court. But what about cases already decided? Why should a nominee not share his views on whether a case was rightly or wrongly decided or where he agreed or disagree with the Court's reasoning and its application of the law? The legal briefs, tapes transcripts of the oral arguments, and the concurring and dissenting opinions are all part of the public record and available for the nominee's inspection. If expressing an opinion on a previous court ruling would compromise the judge's impartiality, then sitting justices, having ruled on a specific case, would be compromised whenever another, similar case would come before them. If that were the rule, Kagan wrote, "the Supreme Court would have to place, say, Justice Scalia in a permanent state of recusal, given that in the corpus of his judicial opinions he has stated unequivocal views on every subject of any importance."

There is, surely, a difference between refusing, as any judge or judicial nominee must, to make a commitment on a pending case and avoiding any comment on any issue that might have some bearing on some case that might some day come before the court. All the posturing and protestations about "no litmus test" and no desire to know how the nominee will approach a constitutional issue rings false. As Kagan wrote, "the President and Senate themselves have a constitutional obligation to consider how an individual, as a judge, will read the Constitution: that is part of what it means to preserve and protect the founding instrument."

Or, perhaps, part of what it used to mean, to Kagan and others. In a footnote that should not be overlooked, Kagan pointed out that William Rehnquist, a dozen years before being nominated for the Supreme Court, wrote an article criticizing the Senate for not asking a nominee about his views on equal protection and due process. "By 1986, when he appeared before the Senate Judiciary Committee as a sitting Associate Justice and a nominee for Chief Justice," wrote Kagan, "Rehnquist had changed his mind about the propriety of such inquiries."

So, apparently, has Elena Kagan.

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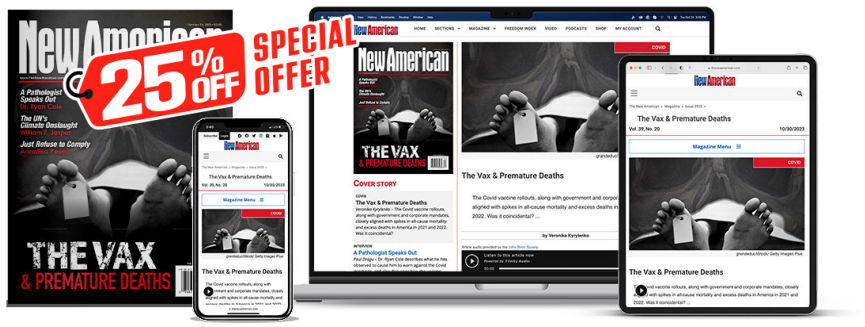

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