Elena Kagan and the 'Hollow Charade'

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Body

Yesterday President Obama nominated Elena Kagan to fill the fourth Supreme Court vacancy in less than six years. This nomination presents an opportunity for a teaching moment about what the court does, how it affects the lives of ordinary citizens, and how individual justices make a difference in this enterprise.

It would certainly be a departure from the unsatisfying confirmation hearings Americans have recently observed. Senators ask important but highly predictable questions, and the nominee is coached to choose from certain stock answers. As we saw in last year's hearings for Justice Sonia Sotomayor, a nominee must repeatedly allege fidelity to the law. But somehow, despite days of testimony, the process fails to capture what a nominee actually means when he or she describes faithfulness to the law.

Each nominee will have a different conception of fidelity. Anyone paying attention knows that the two most recent appointees to the high court -- Justice Samuel Alito and Ms. Sotomayor -- will disagree on most of the Court's difficult 5-4 decisions. Yet their confirmation hearings displayed little evidence of their philosophical differences.

Sticking to the script means that nominees are confirmed based on platitudes, and public discourse suffers as a result.

One can only hope that Ms. Kagan will go off-script. In a 1995 book review published in the University of Chicago Law Review, she lamented that recent confirmation hearings were nothing but "a vapid and hollow charade." She explained that the Senate should view confirmation 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."

Ms. Kagan is right. I think Americans can understand that judges draw on a variety of tools in interpreting the law, and that these tools differ for judges based on their constitutional values.

For example, when a statute is unclear, Justice Antonin Scalia might press harder on the language of the law, look at the context of specific words, and generally seek to understand what the written law means. He seeks to limit his own discretion, in part because the Constitution gives Congress, not the courts, the power to enact laws.

By contrast, Justice Stephen Breyer might focus on the purposes of the law and look to sources outside of the Constitution -- including foreign law -- to come to a decision. He may consider the outcome that makes the most sense to him because he considers judges to be a part of the democratic process. These are fundamentally different ways of dealing with difficult cases and they reflect two distinct attitudes about the proper role of a judge.

If President Obama wants to pick judges that are more like Justice Breyer and less like Justice Scalia, that's his prerogative. Elections have consequences for the appointment of judges, just as they do for public policy. But it would elevate the debate substantially if Ms. Kagan, former dean of Harvard Law School, could explain her views of the judicial process.

Right now we know little about those views since Ms. Kagan has never been a judge and has not written on the topic. If President Obama is true to his campaign promises, his nominee will differ substantially from his predecessor's nominees. Will Ms. Kagan articulate this difference in her hearings?

Ms. Kagan and those preparing her face a simple, political problem: "progressive" views of judging are difficult to defend. It may be why no recent nominee has tried. The simple statement that "judges should interpret the law, and not make it" resonates with Americans in a way that "judges should figure out the best answer" does not.

The reality may be more complicated than either of these formulas, but an attitude that emphasizes the rule of law has more appeal not merely because of its simplicity but because it captures the idea that judges are not policy makers. It emphasizes that judges should interpret the language of the law and try, as best they can, not to impose their own personal views of justice or the good when deciding cases.

After Justice Sotomayor's hearings, some prominent liberals were disappointed that a "sophisticated" understanding of the law as open-ended, and of judging as personal -- widely accepted in the legal academy -- was not defended publicly by the nominee before a solidly Democratic Senate.

Perhaps this indicates that conservatives have won the debate over the type of judges Americans want. But it is a Pyrrhic victory if nominees with very different philosophies are confirmed based on incantations of the right formulas without an examination of their actual beliefs.

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Notes

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