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What the Senate should ask Elena Kagan

June 28, 2010

Supreme Court nominee Elena Kagan is but a supporting actor in the drama that will unfold at her nomination hearings, which begin today. With the political composition of the Senate, the solicitor general will be confirmed. advertisement

The more interesting question is whether the hearings will elevate above the usual spate of buzzwords and gotcha games into meaningful discussion of constitutional interpretation. Indications are stronger than usual that they might.

For the first time in decades, the Constitution is a major issue in an election year. This is not because of reliably inflammatory social issues like abortion and gay marriage but because of fresh questions in the public consciousness about the role of the federal government. After over \$1 trillion in bailouts and the hard-won Obamacare colossus, Americans are correctly asking: Are there any limits to government power anymore?

To that end, here are some lines of questioning senators should explore with Ms. Kagan:

- *Can the federal government regulate activity that is neither commerce nor crosses state lines?*

The interstate commerce clause says no, but the 1942 case of *Wickard v. Filburn* allowed the government to fine a farmer for growing too much wheat and not taking enough of it to market — because his actions, when aggregated with those of other farmers, could affect national wheat prices. How would Ms. Kagan have decided that case? If aggregating economic activity transforms that activity into interstate commerce, ask her to give examples of activities the government cannot regulate.

- *What can Congress force people to do under its power to regulate commerce?*

The government only imposes three duties: register for the draft, sit on a jury, and pay income tax. All are fundamental duties of citizenship tied to specific constitutional provisions that have nothing to do with the Commerce Clause.

Senators can't ask about the individual health care mandate — the issue will come before the Supreme Court — but how about a requirement to buy spinach or join a gym?

- *Can Congress make any crime a federal crime?*

In 1946, Congress passed the Hobbs Act, which allows the federal prosecution of extortion and robbery that impedes the flow of commerce across state lines. The act is now used to prosecute crimes having no effect on interstate commerce. In *United States v. Baylor*, for example, the Sixth Circuit allowed the federal prosecution of a man who robbed a Cleveland-area pizzeria because the shop obtained its flour, sauce and cheese from various states outside Ohio. There are many other examples where the federal government intrudes on states' police powers.

- *Can the government rewrite leases, mortgages and other contracts?*

The Depression-era Supreme Court said yes because constitutional protections for property and contract rights can be sacrificed to "protect" homeowners. More recently, the court allowed the Chrysler bankruptcy to proceed even though the government subverted the rights of secured creditors. How would Ms. Kagan have voted in those cases?

• *What kind of protections does the Fifth Amendment's takings clause give to private property?*

In the infamous 2005 case of *Kelo v. New London*, the city condemned people's houses and gave them to a company that promised to use the land to create jobs and increase tax revenue. The court, in an opinion by Justice John Paul Stevens, whom Ms. Kagan would replace, approved this eminent domain abuse because the Fifth Amendment's "public use" requirement included the "public benefit" contemplated here.

Justice Sandra Day O'Connor dissented: "Nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." Which opinion would Ms. Kagan have joined?

Of course, Ms. Kagan will attempt to deflect these queries — or give a law professor's explanation without providing her own views (which caused Sen. Arlen Specter to vote against her nomination to be solicitor general).

But the role of a Supreme Court justice is different from that of the solicitor general, who merely uses existing law to argue the government's case. Moreover, as a leading scholar argued in an influential 1995 article, "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."

That scholar? Elena Kagan.

She continues: "The critical inquiry as to any individual similarly concerns the votes she would cast, the perspective she would add and the direction in which she would move the institution."

If senators ask tough questions about the scope of government power and Ms. Kagan refuses to answer, Ms. Kagan will have failed the Kagan standard.

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