Kagan failed the Kagan standard

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CONFIRMATION HEARINGS | ELENA KAGAN | SUPREME COURT

The following is a guest post by Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review. *The opinions expressed are his own.*

If you followed Elena Kagan's performance at her Supreme Court nomination hearing this week, you probably didn't learn much that you didn't already know. Yes she's engaging, knows the law backward and forward, and can rattle off clever one-liners—Jews go to Chinese restaurants on Christmas!—but we still don't know how she views the Constitution or what she thinks about various developments in constitutional jurisprudence.

In short, the hearings this week were plenty more interesting than Sonia Sotomayor's cramped and wooden performance last year, but still we can only infer the nominee's judicial philosophy from admission that she's a "lifelong Democrat" with "largely progressive" views. Shocking!

And it's all the more disappointing that this was the case given Kagan's strikingly prescient 1995 law review article, "Confirmation Messes," in which she lamented the lack of substance at these hearings: "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."

Her article continues: "What must guide any such decision [of whom to nominate and confirm], 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 . . . and the direction in which she would move the institution."

Yes, nominees should not be forced to pre-judge cases — Kagan would be fully justified in refusing to answer a question on the constitutionality of the individual health care mandate —

but how are we to learn what kind of judge a nominee will be if she declines to answer questions about her judicial philosophy? Kagan can get away with refusing to “grade” past cases or comment on the wisdom of “settled law” because of the sizeable Democratic majority in the Senate, but there is simply no principled way anyone can argue that what she wrote earlier is now somehow wrong.

The most we can discern about Kagan’s preferred approach to the law are inferences from what she didn’t say. For example, in her now-famous exchange with Senator Tom Coburn (R-OK), she responded to a hypothetical bill requiring daily consumption of three servings each of fruit and vegetables by calling it a “dumb law” while noting that “courts would be wrong to strike down laws simply because they’re senseless.” The implication is that Congress could constitutionally do this.

And in colloquies about the use of foreign law, Kagan mentioned that foreign court decisions are never binding on U.S. courts (of course) and that these decisions are useful in evaluating international treaties (of course), but left herself plenty of room for citing foreign law in interpreting the Constitution. We should get “good ideas wherever you can get them,” she concluded.

All this is eerily reminiscent of Sonia Sotomayor’s testimony last year: she accepted that the Second Amendment protected the individual right to keep and bear arms and that foreign law shouldn’t be used to support constitutional decisions. Yet Justice Sotomayor voted in stark contradistinction to that testimony.

Elena Kagan has not given us any reason to believe that things will be any different with her. Labeling District of Columbia v. Heller and McDonald v. Chicago as “well-settled” — even though both were 5-4 votes and the latter just came down on Monday — does not foreclose a vote to overturn them at the next possible opportunity.

Kagan is more than qualified to be a justice in terms of legal knowledge — and indeed better qualified in terms of temperament than to be solicitor general. But much of what I’ve witnessed these last few days bothers me.

Last year at this time I said Sotomayor had not carried her burden of persuasion, so the case for confirmation was “not proven.” This year, my verdict is simply that Kagan has not met the Kagan standard.