

## **KAGAN CONFIRMATION CONTENTIOUSNESS CONTINUES PARTISAN TREND**

By **Edward C. Dawson**

On August 7, 2010, Elena Kagan was sworn in as the 112th justice of the Supreme Court of the United States. She is the fourth female justice and one of three women currently sitting together—the first time in the Court's history this has happened.

Justice Kagan is also the fourth Justice to be confirmed to the Court in the last five years—joining Justices Roberts, Alito, and Sotomayor. The four will likely have a long tenure together on the Court, since all of them are age 60 or under (Justice Kagan herself is only 50), accompanied by Justice Thomas, who despite having served for 18 years is only 62.

This new wave of appointments brings a concentrated, relatively rapid turnover in the Court's composition after a long period of stability. There was no change in Court membership between 1994 and 2005. During that long period, changes in the political culture seem to have altered the basic dynamics of the confirmation process. Whether because of increased partisanship in general, or a growing recognition of the power that courts wield over crucial social issues, between 1994 and 2005 there was an erosion of the norm that a President was entitled to easy confirmation of any qualified nominee. During that time, the change manifested in the confirmation process for nominees to the federal circuit courts, as qualified nominees of both parties were held up or blocked entirely by the opposing side.

Thus, of the pre-1994 Justices, almost all were confirmed by overwhelming majority votes (Scalia 98-0, Kennedy 97-0, Ginsburg 96-3, Breyer 89-7). The new wave, in contrast, was confirmed by narrower, more closely partisan majorities (Chief Justice Roberts 78-22, Justice Alito 58-42, Justice Sotomayor 68-31, Justice Kagan 63-37). Justice Thomas is actually closer to the newer justices in this respect, just as he is in age, because his confirmation was 52-48 and probably the most bitterly contested of any of the currently sitting justices'.

As for Justice Kagan's confirmation, the process was relatively smooth, primarily because the Democrats' large majority in the Senate basically guaranteed her confirmation. Nonetheless, the process was still contentious. At Justice Kagan's confirmation hearings before the Senate Judiciary Committee, Republican Senators pressed her on her views and tried to score political points. Senator Sessions, for example, attacked her for a perceived lack of litigation and judicial experience. Other Republicans questioned her about her decision to forbid military recruiters from Harvard Law School's career center because she believed the military's "don't ask don't tell" policy violated the school's anti-discrimination policy.

Justice Kagan, for her part, handled the confirmation questioning adeptly, and largely

without disclosing her views on specific legal doctrines or how she might rule in particular cases. In so doing, she followed a model she had earlier criticized in a 1995 law review article about flaws in the modern confirmation process. In that article, she had praised "the essential rightness — the legitimacy and the desirability — of exploring a Supreme Court nominee's set of constitutional views and commitments." As a nominee, she distanced herself from that view, explaining that she had realized it is insufficiently sensitive to the many interests a nominee must balance when being questioned. Still, she was more forthcoming than many other recent nominees as to her politics and her broad constitutional commitments, confirming that her personal politics are progressive, that she favors a broad reading of the commerce clause, and that she believes originalist analysis is a (though not the only) legitimate means of interpreting the Constitution.

While the hearings were anticlimactic, if not uneventful, the confirmation vote was notable because like other recent votes it was basically partisan. Kagan received the fewest affirmative votes for a Democratic President's nominee in the modern era. Only five Republicans supported her, and only one Democrat voted against. After the vote, Justice Ginsburg publicly criticized the partisan trend in a speech accepting a lifetime award from the ABA, saying: "May the U.S. Senate someday return to the collegial bipartisan spirit that Justice Breyer and I had the good fortune to experience." Senator Lindsey Graham, one of the few Republicans to support Kagan, similarly expressed the view that the confirmation system is broken, and that it would be desirable to return to the tradition of wide deference to presidential nominees.

For now, though, there are no signs this is likely to occur. Instead, even more contentious battles are likely yet to come, particularly when there is a nomination that could seriously shift the political center of the Court. Of the four recent nominations, three (Roberts, Sotomayor, and Kagan) did not shift the Court politically much at all. Justice Alito replaced a more liberal Justice from the same party (O'Connor), and even that incremental shift produced major changes in areas such as Second Amendment rights and campaign finance reform. If one of the Court's four more conservative justices were to leave the Court under the current Administration, if a future Republican president were to replace one of the four more liberal justices, or if the current swing vote, Justice Kennedy, were to leave under a president of either party, the resulting confirmation fight might well surpass in acrimony anything yet seen.

This trend may be undesirable, but it is probably also inescapable. As Justice Kagan wrote in her article about confirmations: "It should be no surprise by now that many of the votes a Supreme Court justice casts have little to do with technical legal ability and much to do with conceptions of value." As this proposition becomes more and more accepted, in an era when "conceptions of value" are especially hotly contested between the parties, it is likely that the confirmation process will stay contentious for at least the near future.

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