Kagan Stresses Deference to Congress on Federal Sentencing

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In her three-day Supreme Court confirmation hearing, nominee Elena Kagan expressed very few views on substantive issues that might give observers a clue as to how she would vote as a Justice. Criminal law and sentencing issues were no exception, as the nominee did not tip her hand much on these matters.

One interesting tidbit emerged, however. Kagan was asked on June 30, 2010, the third day of the hearings, by Sen. Dick Durbin (D-Ill.) about her views on the disparity between the sentences imposed for trafficking in crack and powder cocaine, a disparity that tends to produce racially skewed punishments, with black defendants drawing longer sentences.

She responded, "It is a policy issue, quintessentially. There's nothing that the Supreme Court or that any court can do about it. It's really one that Congress has to decide."

This reply is, of course, consistent with the views that Kagan generally espoused at the hearings about the necessarily limited role of the courts in policy-making. It is interesting, though, that she was so quick to dismiss the possibility of judicial action to resolve the disparity. It may suggest that in white-collar and sentencing cases, Kagan as a justice, if confirmed, would strongly advocate deference to Congress when criminal defendants challenge the statutes under which they are convicted or sentenced.