

The New Nomination Process

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Fifteen years ago, Elena Kagan famously lamented that the Supreme Court nomination process become a "[vapid and hollow charade](#)." She bemoaned the "platitudinous statements" of the nominees, while urging the Senate to require nominees to detail specific views on hot-button issues like "[p]rivacy rights, free speech, race and gender discrimination."

We know, of course, that nominations have not become any more substantive since Elena Kagan's 1995 article. We also know that fate can't resist a good bit of irony. And so now-as demonstrated by the astoundingly simplistic White House video above (the term "vapid" comes to mind)-the same Elena Kagan who called for a more honest and probing Supreme Court nomination process finds herself the subject of one that has reached new extremes of superficiality.

Interviews of the nominees-now the centerpiece of the Supreme Court nomination process -did not become a regular feature until the nomination of [Justice Harlan II in 1955](#). In the short history since, confirmation hearings have produced some tremendous public theater, most notably in the cases of Robert Bork and Justice Clarence Thomas.

But nominees learned from the blood sport of the [Bork nomination](#) hearing in particular (where the nominee defined his views on a number of issues), and now spend their confirmation hearings playing defense. The formula is simple: nominees refuse to opine on specific legal issues, for fear of tainting a case that may come before them, while disclaiming any intent to impose their own values on the law. Chief Justice Roberts did this perhaps most famously, and simplistically, with his analogy of a judge to a baseball umpire. (Watch his [opening statement](#) at the 3:29:17 mark.)

It has been a winning formula, and has been practiced with aplomb by the nominees of the last two decades. It is probably all that Elena Kagan needs to ensure her confirmation.

The White House, however, is adding another arrow to its quiver in the nomination process. To buttress the Kagan nomination, the White House is making her case directly to the American people. Thus, within minutes of her nomination, the White House has produced a set of [extremely basic](#) talking points (e.g., Kagan is "regarded as one of the nation's leading legal minds") to dispense over the nation's airwaves. And thus, it has produced the above video, which paints a pleasant picture of her but is remarkably free of real content about the nominee. This packaging of Elena Kagan, indeed, feels like nothing so much as the modern-day presentation of a presidential candidate.

The Obama administration is shooting over the heads of the Senate, straight at a popular audience. The strategic benefits for the administration are clear: if you succeed in making the nominee popular among

the general electorate, you dissuade Senators from attacking her in the hearing. It's a logical strategy, and we only expect it to get more sophisticated with future nominations.

It's the next evolution in the nomination process, and much to the chagrin of the Elena Kagan who was writing 15 years ago, it's getting more hollow than ever.