

**SCOTUSblog Briefing Paper****Elena Kagan – Privilege and Release of Kagan Documents****June 30, 2010****I. Summary and Our Take**

Shortly after Elena Kagan was nominated on May 10, 2010, the Senate Judiciary Committee set June 28, 2010 as the first day of an estimated four days of confirmation hearings. This meant that there were forty-nine days between the nomination and start of the hearings (as compared to forty-eight for Sonia Sotomayor last summer). The Committee almost immediately began the process of requesting documents related to Kagan's service in both the Clinton and Obama Administrations. Senators, the Republicans in particular, hoped that these documents might shed new light on her judicial philosophy in a way that her relatively sparse written record had not.

Under the [Presidential Records Act](#) (PRA) and [Executive Order 13489b](#), all documents requested by the Judiciary Committee must be searched for, pulled, and read by archivists, who vet each page for possible legal restrictions. Then, representatives for both Presidents Clinton and Obama have the right to read and review documents related to their respective administrations and get the final say on which documents (or pages of documents) are released or withheld. Additionally, as the incumbent administration, Obama's representatives have the right to review the documents of its own administration as well as those from the Clinton administration (Clinton representatives are not permitted to review documents from the Obama administration).

When Kagan was nominated, it was unclear what documents, if any, the Obama or Clinton Administrations might choose to withhold, or whether there was a potential bombshell within these documents that might put the nomination in jeopardy. Because Kagan's formal writings indicate very little about her judicial philosophy, many Senators were eager to begin reviewing these documents quickly.

Logistically, there were initially serious concerns over whether it would be possible for the Clinton Library and the National Archives to review and release the approximately 171,000 pages in time for Senators to review them prior to June 28. Both Republican Judiciary Ranking Member Jeff Sessions and Clinton Library Director Terri Garner expressed [skepticism](#) that the documents could be released in time. Sessions indicated on several occasions that he would seek to delay the hearings if documents were not released in a timely fashion. By the time the hearings began, the overwhelming majority of documents have been released, and the Republicans have not attempted to delay the hearings.

In a June 1 [letter](#) from President Obama's top lawyer, Bob Bauer, the Administration asserted that it did "not intend to assert executive privilege over any of the documents requested by the Committee . . . [although] consistent with the document productions for

the nominations of Chief Justice John Roberts and Justice Sonia Sotomayor, the Committee would not receive classified national security information or personal privacy information.” President Obama’s decision not to claim executive privilege eliminated a major potential roadblock in the release of documents.

Additionally, Bauer wrote, “To the extent President Clinton has confidentiality interests in the documents that should be protected, we will first work with his representative to try to reach a mutually satisfactory accommodation with the Committee, as such interests traditionally have been resolved by the Executive and Legislative Branches.”

Under the PRA, roughly two thousand documents from the Clinton Administration have been withheld from the public and deemed “Committee Confidential,” under the PRA statutory restrictions related to privacy. In multiple [letters](#) detailing each release of selected documents, Gary Stern, General Counsel for the National Archives, wrote that the privacy restrictions applied in each instance are “consistent with . . . the records provided in Chief Justice Roberts’ confirmation.” In addition, Stern wrote that “we have made every effort to withhold as little as possible and to provide portions of documents where possible, rather than withholding an entire document.”

The withheld documents have become the focal point of recent [criticism](#) by Senator Sessions, who argued that Kagan “did a lot of things like on the impeachment for Clinton, things that he may not want to be revealed that may be very important for the committee. I don’t know that; I’m just saying hypothetically.”

On Thursday, June 24, Sessions [added](#) that, in his view, the American public is entitled to know why some of these documents have been withheld, and that “we have no certification that the archivists . . . have fully complied with the request of the committee. . . I just hate to go forward with the hearings before all documents have been received.” However, Senator Sessions backed off an earlier comment that Republicans might boycott the hearings if they are unable to view all the documents.”

Senator Patrick Leahy, the Chairman of the Judiciary Committee, responded that he is “not willing to accept that these professional archivists are biased . . . I’m not going to have a double standard.” Throughout the process, Senator Leahy has been adamant that the National Archives and the Clinton Library “have produced more information about Elena Kagan’s record - and fast - than for any previous Supreme Court nominee.” In a June 23, 2010 [letter](#) to Senator Sessions, Senator Leahy wrote that the “Clinton Library has withheld a far smaller number of documents from the Committee [during the Kagan nomination] than were withheld by the Reagan Library for the Roberts nomination, despite the production of more than twice as many documents.

To put these claims into perspective, it might be helpful to look back briefly to the nomination process of now-Chief Justice John Roberts. Chief Justice Roberts was nominated on July 19, 2005, with Senate confirmation hearings scheduled to begin September 6, 2005, forty-nine days from the day he was nominated. (The timing of the hearings was pushed back a week in light of the death of former Chief Justice William

Rehnquist and Hurricane Katrina.) At the time, White House officials [claimed](#) that they could withhold papers at the Reagan Library with “national security implications, personal privacy concerns and other concerns.” The White House cited attorney-client privilege when it declined to release several documents from Roberts’s time as Deputy Solicitor General under President George Bush. Senator Leahy [objected](#) to this line of argument, asserting that there was no attorney-client privilege and that he couldn’t “imagine why the White House wouldn’t release them.” After an expedited review, which resulted in several thousand pages being withheld, approximately 70,000 pages were released from the Reagan Library and the National Archives.

In sum, the fact that document release has not become a major issue during the Kagan nomination process indicates to us that the process has gone relatively smoothly. From a logistical standpoint, approximately 171,000 pages were reviewed and released in a sufficiently timely fashion to allow Senators (and their staffs) adequate time for review. Had this not been the case, there surely would have been far more criticism from the Republicans. The Obama administration’s decision not to claim executive privilege or attorney-client- privilege in withholding documents diffused a potentially contentious political standoff.

We take National Archive General Counsel Gary Stern’s word that the same standards applied to document release during the Roberts nomination process have also been applied to Kagan’s. Our sense is that Senator Sessions’ comments and threats regarding release of documents withheld from the public under the PRA privacy restrictions are attempts to make political points, just as Democrats sought to make similar points during the Roberts nomination.

## II. Relevant letters and statements related to documents

- A. Letters from Gary Stern, General Counsel, National Archives, to Chairman Patrick Leahy and Ranking Member Jeff Sessions
- [June 4, 2010](#) - Letter
  - [June 8, 2010](#) - Letter
  - [June 11, 2010](#) – Letter
  - [June 18, 2010](#) – Letter
  - [June 19, 2010](#) – Letter
- B. [June 1, 2010 letter From White House Counsel Bob Bauer to Senator Jeff Sessions](#)
- “President Obama does not intend to assert executive privilege over any of the documents requested by the Committee. . . . To the extent President Clinton has confidentiality interests in the documents that should be protected, we will first work with his representative to try to reach a mutually satisfactory accommodation with the Committee, as such interests traditionally have been resolved by the Executive and Legislative Branches.”

- “[C]onsistent with the document productions for the nominations of Chief Justice John Roberts and Justice Sonia Sotomayor, the Committee would not receive classified national security information or personal privacy information.”
- C. Letters/statements from Senator Leahy, chairman of the Senate Judiciary Committee
- [May 21, 2010 press release](#)
    - “The National Archives and Records Administration and the Clinton Library are undertaking an exhaustive and thorough search for records responsive to the requests of the White House and the Senate Judiciary Committee. The search methodology they have outlined appears to be more comprehensive than that undertaken in response to Senate Democrats’ narrow request for high-priority documents related to the Roberts’ [sic] nomination in 2005. I also appreciate their willingness to provide materials to the Committee on a rolling basis, and their efforts to begin making these documents available to the Committee by June 4.”
    - “In recent years, the Committee has taken great care to make the confirmation process for judicial nominees, particularly Supreme Court nominees, as transparent as possible. Solicitor General Kagan has provided thorough and complete responses to the Committee’s bipartisan questionnaire. The Obama administration has gone to great measures to request the expedited production of an unprecedented volume of materials in connection with this nomination, and I applaud the administration’s decision not to assert executive privilege in connection with these documents. Right now, the Committee has available for its review thousands of pages of documents from Elena Kagan’s service as Solicitor General, from her tenure as Dean of Harvard Law School, her time in the Clinton administration, and her work as a law clerk for Justice Thurgood Marshall. These materials provide a strong foundation for the Committee’s preparation for her confirmation hearing.”
  - [June 4, 2010](#) letter to Gary Stern, General Counsel, National Archives
    - “I also appreciate that no documents were withheld from the Committee on national security grounds and that you did your best to minimize the impact of other concerns. As you noted, you did not provide the Committee with Presidential records withheld under the personal privacy restriction in connection with the nomination of Chief Justice Roberts. In this production of records

in connection with the nomination of Solicitor General Kagan, however, you note that you ‘have made every effort to withhold as little as possible and to provide portions of documents where possible, rather than withholding an entire document.’ I thank you for making these extra efforts.”

- “With respect to that group of documents on which statutory restrictions are being asserted by President Clinton with respect to public release at this time, I appreciate your willingness, nonetheless, to provide them to the Committee on the condition that they be designated and treated as ‘Committee Confidential’ and the Committee will accept them on that basis. This, too, is an accommodation to the Committee. No such accommodation was made for any documents withheld by the Bush administration during our consideration of the nominations of Chief Justice Roberts or Justice Alito.”

- [June 4, 2010 press release](#)

- “With this initial delivery of documents, the Judiciary Committee has received more information from the administration than was made available at this point in the confirmation process for either the Roberts or Alito nominations. I commend the staff at the Clinton Presidential Library and the National Archives for their prompt work in responding so thoroughly to the Committee’s request.”
- “The Obama administration and the Archives are continuing to work to make available an unprecedented volume of information relating to Elena Kagan’s work in the Clinton administration. I appreciate the Obama administration’s willingness not to assert executive privilege with respect to this information. The materials that we have received today show that the Obama administration and the Archives are working hard to ensure that Senators have the information relevant to Solicitor General Kagan’s nomination before her confirmation hearing begins on June 28.”

- [June 11, 2010 press release](#)

- “Any argument that the Committee does not have the materials necessary to evaluate this nomination is misguided and misplaced. All paper files related to Elena Kagan that were located by an extensive search at the Clinton Library have now been produced to the Committee. With more than two weeks before the start of the confirmation hearing, the Archives has completed its review and

production of her White House files and there is more than enough time for Senators and their staff to review them. This has been the timeline the Archives anticipated and presented to Committee staff several weeks ago. The staff at the Archives and the Clinton Library has worked quickly and thoroughly to produce these materials.”

- [June 18, 2010](#) press release
  - “The National Archives and the Clinton Library have produced an unprecedented volume of materials related to Elena Kagan’s nomination, in response to the Committee’s bipartisan request. They have completed the production of documents as outlined in the Archives letter of May 21, and done so well in advance of the Committee’s hearing. In fact, they have produced more materials, and faster, than were produced in connection with previous Supreme Court nominations.”
  - “The Committee and the public also now have unprecedented access to Elena Kagan’s electronic mail files from her time as a White House attorney. The evaluation of her record and qualifications has been the most open and transparent in history. There is no chapter from her professional life for which we do not have significant records to review.”
- [June 23, 2010 letter to Senator Sessions](#)
  - “The Clinton Library has fulfilled the commitment made in the May 21 letter from the National Archives to complete its production of both paper records and email records in a timely manner, well in advance of the confirmation hearing. In so doing, the Clinton Library produced more materials than were produced in connection with previous Supreme Court nominations and did so more quickly. The paper records were all produced by June 11, more than two weeks before the start of the hearing, after an extensive search at the Clinton Library. They numbered nearly 90,000 pages, which is more than were produced in connection with either the Roberts or Alito nominations.”

D. Formal statements/letters from Senator Jeff Sessions, ranking member of the Senate Judiciary Committee

- [Statement from May 19, 2010](#)

- “Chairman Leahy and I met yesterday afternoon to discuss his plans for scheduling the hearings on Solicitor General Elena Kagan’s nomination to serve as an Associate Justice of the United States Supreme Court. It was a good meeting, and I appreciate the Chairman taking the time to hear my views and those of my Republican colleagues on the Committee.”
  - “I expressed the strong view at our meeting that we should conduct the hearings after the 4th of July recess. This would give the Committee adequate time to review Ms. Kagan’s record and to prepare for the hearings—including a careful review of the hundreds of thousands of pages of documents we expect to receive from the Clinton Library pursuant to yesterday’s bipartisan request. It is the Chairman’s prerogative, however, to set the hearing date and he has chosen to begin on June 28th.”
  - “At this time, it remains to be seen whether the schedule set by the Chairman will be adequate to allow us to meet our important constitutional responsibility to thoroughly review Ms. Kagan’s record on behalf of the American people and to hold respectful and substantive hearings that reflect well on both our Committee and the entire Senate. Additionally, as I told Chairman Leahy, developments may occur during the course of such a review that simply require additional time—such as issues relating to document production or the need for more information connected with substantive controversies. If that is the case, we would be obligated to demand additional time.”
- [Statement from May 25, 2010](#)
    - “I am trying to make clear to my colleagues that we are heading toward what could be a train wreck... The public record of a nominee to such a lifetime position as Justice on the Supreme Court is of such importance that we cannot go forward without these documents. I hope we will get those in a timely fashion. If not, I think we will have no choice but to ask for a delay in the beginning of the hearings.”
  - [June 2, 2010 letter](#)
    - “Records obtained by the Committee in connection with Ms. Kagan’s nomination indicate that the Department of Defense had a series of interactions with Harvard University and Harvard Law School over the Law School’s policies regarding the United States Armed Forces’ recruitment activities at Harvard Law School,

beginning in the late 1990's. In order for the Committee to conduct a full review of Ms. Kagan's record, please provide to the Committee all records in the possession or control of the Department of Defense related to the Department's law school recruitment efforts and Harvard University or Harvard Law."

◦ [Statement from June 4, 2010](#)

- "The batch of documents received today represent less than a third of the 160,000 pages of material we have been told exist from Elena Kagan's time as a senior policy aide to President Clinton. We are now a mere 24 days away from the hearing and the committee still has yet to receive over 100,000 pages of documents, called for in a bipartisan request, from Ms. Kagan's lengthy time in the White House. Making matters worse, there are new concerns that even when the documents are produced, they will not be produced completely and transparently. A carefully worded letter this week from White House Counsel Bob Bauer confirmed that neither President Obama nor President Clinton has waived Executive Privilege with respect to these records. In the same letter, Mr. Bauer made no guarantee that all of the documents will arrive in time for meaningful review prior to the hearing."

◦ [Statement from June 11, 2010](#)

- "A good portion of Ms. Kagan's record has still not been provided to the Committee. But based on what we already know... I am also concerned that so many of the documents already provided are being hidden from public view. In the first batch, approximately 200 pages were set aside by the Clinton Library as 'Committee Confidential.' Today, the public and the press have been denied access to another 1,351 pages of material. Additionally, we have learned that another 500 pages of material are being withheld from both the Committee and the public alike."
- "Measures must be taken to ensure that documents are being withheld only for appropriate reasons and that nothing necessary to Ms. Kagan's evaluation before the Committee—and before the public—is being unnecessarily kept from public view."

◦ [Statement from June 18, 2010](#)

- "I remain concerned by the both [sic] the pace and the timing of document production... A troubling pattern has already emerged in Ms. Kagan's record... With the hearing rapidly approaching, the

Committee has just now received, late this Friday afternoon, another delivery of documents from Ms. Kagan's time as a senior aide to President Clinton. We will now begin a diligent review of these email records and will need to assess the completeness of this latest batch and to determine that nothing has been improperly withheld."

- "There is a significant amount of material to review in a short period of time. I remain concerned by the both the pace and the timing of document production, as well as the fact that the Committee, the press, and the public have been denied access to a number of documents."
- "It is also likely that that [sic] a number of documents received will require follow-up and the production of additional material. Any such requests must be expeditiously fulfilled so the Senate can properly carry out its duties."

### III. News Sources

- AP, [\*Senators await Kagan papers from Clinton library\*](#) (June 1, 2010)
- The Hill, [\*Fight over Kagan documents heats up\*](#) (June 2, 2010)
- The Caucus: The Politics and Government Blog of The New York Times, [\*Papers Released From Kagan's Clinton Years\*](#) (June 4, 2010)
- BLT, [\*More Kagan Memos Coming Friday, But Not All\*](#) (June 10, 2010)
- Liveshots at Foxnews.com, [\*Kagan Docs on Whitewater and Paula Jones\*](#) (June 11, 2010)
- Talking Points Memo, [\*WH On Kagan Docs: Transparentest Administration Ever!\*](#) (June 18, 2010)
- Politico, [\*GOP may boycott Kagan hearings\*](#), (June 21, 2010) and [\*GOP 'expects' to attend Elena Kagan Hearings\*](#) (June 22, 2010)
- CQ Politics, [\*Sessions Questions the Withholding of Kagan Files\*](#) (June 24, 2010)