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Kagan Hearings May Have Wider Focus
By SHERYL GAY STOLBERG

WASHINGTON — At Supreme Court confirmation hearings, the nominee is usually the star. But Elena Kagan may well be a supporting player in a drama featuring two men not even there: President Obama and Chief Justice John G. Roberts Jr.

With an eye on the midterm elections, Democrats will use Ms. Kagan’s hearings, which begin Monday, to put the Roberts court on trial by painting it as beholden to corporate America.

Republicans will put Mr. Obama on trial over what they view as his Big Government agenda, and will raise questions about whether Ms. Kagan, his solicitor general and former dean of Harvard Law School, is independent enough to keep that agenda in check.

“This debate and what it says about President Obama will be part of the discussion, frankly,” said Senator Jeff Sessions of Alabama, the top Republican on the Judiciary Committee.

Americans, he said, “are not happy with the expanding power of the federal government” and want judges to “say no to the federal government when it overreaches.”

The confrontation — a clash over the size and scope of government and the proper role of judges in American society — is hardly academic. Already, state attorneys general are pursuing legal challenges to Mr. Obama’s landmark health care bill, an issue that could wind up before Ms. Kagan if she is confirmed.

In Ms. Kagan, Democrats see an intellectual heavyweight who can counter Chief Justice Roberts and other conservatives on the court. Leading up to the hearings, Democrats have been ticking off a litany of what Senator Patrick J. Leahy of Vermont, the Judiciary Committee chairman, calls “wrong-headed decisions” in cases like Citizens United v. Federal Election Commission, which lifted limits on corporate campaign spending, and Ledbetter v. Goodyear Tire and Rubber Company, a suit alleging sex discrimination in salary that was thrown out by the court.
Mr. Obama set the stage for the debate when, shortly before nominating Ms. Kagan, he accused the Roberts court of a brand of conservative judicial activism. Democrats are echoing that language; Mr. Leahy, for instance, complained of a “conservative activist majority” in the court when he previewed the hearings for reporters last week.

Caught in the middle of the debate is Ms. Kagan who at 50 would be the youngest member and third woman on the current court if confirmed. In the seven weeks since Mr. Obama nominated her to replace the retiring Justice John Paul Stevens, Americans have come to know her as an ambitious overachiever and a product of Manhattan’s liberal Upper West Side and elite Ivy League institutions.

Now, after courtesy calls to 62 senators and a period of enforced silence, Ms. Kagan will have a chance to reframe that narrative and reintroduce herself to the country. She will use it, White House officials said, to remind Americans that her past is humble and to present herself, in the words of Mr. Obama’s senior adviser David Axelrod, as a woman who subscribes to “the notion that everyone, no matter their station in life, rich or poor, gets a fair shot” before the court.

“It’s not a rags-to-riches story” of the sort that characterized Justice Sonia Sotomayor, Mr. Axelrod said. “But her grandparents were immigrants who came here for freedom and opportunity. Her mother was a public school teacher. Her father was a tenant lawyer. They had a strong sense of what American legal traditions and the Constitution mean, and that was passed on to her.”

But while Ms. Kagan’s biography may be clear, her judicial philosophy is not. She has never been a judge, and despite the release of 160,000 pages of records from her tenure as an adviser to former President Bill Clinton and her memorandums as a clerk for Justice Thurgood Marshall, experts said senators had few clues to her judicial philosophy, a subject that will be ripe for exploration when the hearings begin.

“We certainly don’t know what sort of justice she’s going to become,” said Dennis Hutchinson, a law professor and Supreme Court historian at the University of Chicago. “She may be the second coming of Thurgood Marshall; she may be the first coming of Elena the moderate. That may not come out in all the questioning, but it is a huge difference.”

The debate will play against a polarized midterm election where Democrats are expected to lose seats. Although Ms. Kagan is almost certain to be confirmed, and her nomination will hardly supersede issues like the economy and jobs, Republicans see the court fight as a way to energize their base, especially conservative Tea Party activists disenchanted with Mr. Obama.

Republicans will use the Clinton documents to press Ms. Kagan on her views on the hot issues
of the day — gun rights, same-sex marriage and the procedure opponents call partial-birth abortion, among them — and will also question her on her decision, while dean at Harvard, to briefly bar military recruiters from using law school facilities. They will also remind her of her own words in a 1995 book review, when she denounced confirmation hearings as a “vapid and hollow charade” and called for nominees to be more forthcoming.

It is unlikely that Ms. Kagan will follow her own advice, although people close to the White House said they did expect she might answer questions more fully than past candidates. Bob Bauer, the White House counsel, promised “illuminating testimony,” but said she would decline to answer questions about internal deliberations involving cases she has prepared as solicitor general.

One clue to Ms. Kagan’s thinking will come in her answer to the inevitable question about the umpire analogy articulated by Chief Justice Roberts, who at his own hearings famously declared, “It’s my job to call balls and strikes, not to pitch or bat.” (Democrats complain that he has departed from this standard with rulings like Citizens United, which overturned years of precedent.)

Republicans hold up the Roberts standard as one Ms. Kagan must embrace to win their support. “It’s a powerful, correct description of what a judge does,” Mr. Sessions said.

But it is not the description Mr. Obama uses. When he nominated Ms. Kagan, he called her someone who understands the law “as it affects the lives of ordinary people.” The phrase was a new twist on an idea Mr. Obama used last year when he nominated Justice Sotomayor and argued that judges must show empathy.

In the starkest terms, said Ed Whelan, the president of the Ethics and Public Policy Center, a conservative research organization here, the Kagan hearings may come down to the standards for judging set forth by the president and the chief justice. It will be, Mr. Whelan said, “the battle between the empathy standard and the umpire analogy.”