



Written by [Joe Wolverton, II, J.D.](#) on July 1, 2010

Kagan Promises She'll Reread Federalist Papers

President Barack Obama nominated Solicitor General Elena Kagan on May 10 to occupy the chair that would be soon left vacant by Supreme Court Justice John Paul Stevens, who announced on April 9 that he would retire at the conclusion of the Court's summer term.

On June 28, as Senator Patrick Leahy (D-Vt.) banged the gavel to convene the Senate Judiciary Committee's confirmation hearing of Elena Kagan, Kagan, following precedent set by former nominees, began the proceeding by reading from a prepared opening statement.



In the statement, Kagan vowed to approach her role by "listening to each party with a mind as open [as retiring Justice Stevens] and striving ... to render impartial justice." While certainly a worthwhile ambition, such promises were hardly sufficient to quell the fears and quench the thirst of those members of the committee who were keen on drilling deep down into Kagan's political and legal surface for evidence of hidden pools of bias.

On Wednesday, June 30, as the nomination dog and pony show appeared to be getting ready to pack up and wait for the next performance, one of the Senators known to oppose Kagan's nomination became noticeably frustrated by Kagan's consistent refusal to reveal the details of her personal or professional views on certain key social and policy issues that the Senator believed relevant to the issue of her qualification for serving on the highest court in the land.

"I have to tell you, my hair has grayed a little bit the last two days because of your position, or lack of emphasis, on original intent [of the Founders]," Senator Tom Coburn told Kagan.

"Senator Coburn," Kagan responded, "I said in my opening statement that I was only going to make a single pledge, the pledge that I made in my opening statement, but I'll make you another: I'll re-read *The Federalist Papers*."

At that, rather than continue pressing Kagan over her current familiarity with or comprehension of the principles elucidated by the Founders in the pages of *The Federalist Papers*, Coburn almost sheepishly thanked Kagan for her promise and the hearings continued on to other points of inquiry.

Original intent, as the term is typically employed, is a theory of constitutional interpretation that maintains that in interpreting the text of the Constitution, a judge should determine what the authors of the text were determined to achieve, and then to give legal effect to that intention.

Often in such analysis, *The Federalist Papers* are cited as evidence of the Founders' purpose behind the prose of the Constitution. These letters are considered the apex of American political theory and are all but persuasive in deciding matters of constitutional interpretation.

The Federalist Papers are a series of articles published after the Constitutional Convention of 1787



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designed to convince state assemblies to ratify the newly proposed federal charter. The essays were written under the pseudonym Publius, but the authors are well-known to be Alexander Hamilton, James Madison, and John Jay.

Kagan's promise to add to her summer reading list was probably of little comfort to Senator Coburn and others similarly aligned who worry that Kagan secretly harbors a willingness or even a desire to dismantle that protections of personal liberties enshrined in the Constitution. When questioned by Senator Coburn whether she believed that sphere of freedom had contracted over the past 20 years, Kagan answered that she had not really considered it.

When further pressed by Senator Coburn to describe her own estimation of the Constitution and its safeguards of liberty, Kagan responded that she believed the Constitution was "an extraordinary document." Not exactly the free flowing praise Coburn would like to hear.

As for himself, during the nomination hearing, Coburn evinced some level of awareness of the principles outlined in *The Federalist Papers*, as he quoted from them repeatedly during the confirmation hearing, particularly citing *The Federalist*, No. 44, wherein James Madison warns against the misconstruing by Congress of the so-called "necessary and proper clause" of Article 1, Section 8 of the Constitution and the resulting exercise of powers "not warranted by its [the necessary and proper clause] true meaning."

Whether or not Kagan is well versed in the finer points (or even the broader ones) of *The Federalist Papers* is ultimately immaterial. The more vital consideration when it comes to the preservation of the Republic established by Madison and his associates is whether Kagan is able to set aside her personal leanings and interpret the Constitution in a manner consistent with the timeless constitutional principles of personal liberty, limited government, and federalism.

Photo of Elena Kagan: AP Images

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