



Written by [Raven Clabough](#) on June 30, 2010

First Days of Kagan's Judicial Hearings

On May 10, President Barack Obama nominated Solicitor General Elena Kagan to the position of Supreme Court Justice as a replacement for Justice John Paul Stevens. Monday, June 28, marked the first of a series of Kagan's Senate confirmation hearings, where the nominee appeared to be on the defensive.



On day one of the hearings, opening statements were given by Republican Senator Jeff Sessions and Democratic Senator Patrick Leahy, both ranking members of the Senate Judiciary Committee. Sessions began by explaining the GOP's concerns over Kagan's nomination. He reiterated that Kagan has never served as a judge and "barely practiced law" and that despite her experience working for presidential administrations, "there is no substitute for being in the harness of the law, handling real cases."

Articulating similar concerns, Democratic Senator Herbert Kohl said: "We have less evidence about what sort of judge you will be than on any nominee in recent memory...we do have a right to understand your judicial philosophy."

Likewise, her college thesis which took a favorable view of socialism, her support of Michael Dukakis, and her overall progressive politics were areas of concern addressed in Senator Sessions opening remarks.

In her opening statements, Kagan pledged that she would serve the court with "even-handedness and impartiality."

During the first session of hearings, Kagan was targeted for her decision to ban military recruiting on the Harvard campus. By banning military recruitment, Sessions accused the nominee of treating the U.S. military as "second-class."

Kagan coolly defended her decision by explaining that it was inspired by the military's "Don't ask, don't tell" policy, which she perceives to be discriminatory towards homosexuals and, as such, unjust. She contends, "I have repeatedly said that I believe that the 'Don't ask, don't tell' policy is unwise and unjust. I believed it then and I believe it now" — a sentiment with which President Obama agrees.

Seemingly unconvinced, Sessions accused Kagan of willingly and openly disrespecting the military. He responded, "The tone of your remarks are unconnected to reality."

Senator Sessions also questioned whether Kagan would call herself a legal progressive, an epithet assigned by Vice President Biden's chief of staff, Ron Klain. While Kagan considers Klain a good friend,



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she argued that she feels more comfortable labeling herself.

Kagan also claims that her politics are “completely separate from my judging.”

Despite her response, Sessions concluded that “having looked at your overall record...I would have to classify you as someone in the theme of the legal progressive.”

Republicans also touted Kagan’s reverential association with Justice Thurgood Marshall as a cause for concern, considering Marshall’s reputation as a judicial activist. Senator Jon Kyl claims that Marshall “might be the epitome of a results-oriented judge.”

Similarly, Senator Lindsey Graham voiced concerns over Kagan’s confession that former Israeli Supreme Court Chief Judge Aharon Barak was her “hero.” Graham said You’re hero is an interesting guy and you’re going to have a lot of explaining to do.”

On Monday’s episode of the Glenn Beck program, Judge Andrew Napolitano served as guest host and discussed the first day of hearings. Napolitano addressed the importance of scrutinizing Supreme Court nominees when he asserted, “When it works as it should, the judiciary is the anti-Democratic branch of the government. It keeps the other two branches confined to the laws of the Constitution. If this were not so, nothing would prevent the majority from taking the liberty and property of the minority.”

Napolitano briefly spoke with Senator Sessions, who reiterated concerns over Kagan’s progressive ideologies, since “Progressivism is on the rise again and it considers the Constitution an impediment ... this is a dangerous philosophy.”

On the program, guest Mark Levine, former congressional attorney, remarked that Kagan is not an “originalist” and does not adhere to the same philosophies of the Founding Fathers.

Guest Jay Sekulow of the American Center for Law and Justice argues that Kagan views the Constitution as a “Living document” that can be stretched to accommodate a progressive agenda.

Tuesday’s session proved to be a more dramatic day as Kagan was questioned by the members of the Senate Judiciary Committee. The six senators on the committee for Tuesday’s proceedings were Republicans Orrin Hatch and Lindsey Graham, and Democrats Arlen Specter, Dick Durbin, Chuck Schumer, and Al Franken.

During questioning by the Chairman of the Senate Judiciary Committee, Senator Patrick Leahy, Kagan remarked that it would be inappropriate to talk about her views on pending cases or cases that might appear before her if she were to be appointed, despite her past remarks that Supreme Court nominees should be more open and specific about their constitutional views.

On the other hand, Kagan was willing to comment on the recent Supreme Court decision in *Citizens United* citing it as an example of “conservative judicial activism.”

When questioned by Leahy on her philosophy of constitutional change, Kagan answered that she believes there are contrasts between clear constitutional provisions such as senators having to be at least 30 years old, and the Fourth Amendment which prohibits unreasonable search and seizure. It is the latter type of provisions which Kagan claims are “meant to be interpreted over time.”

To this, Sessions asserted, “You’re not empowered to alter that document and change its meaning — you’re empowered to apply its meaning faithfully in new circumstances, wouldn’t you agree?”

Kagan replied, “I do agree.”



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The nominee avoided providing her views on key issues like abortion, gun rights, and treatment of terrorism suspects prompting even Democratic Senators like Arlen Specter to grow frustrated.

Republican Senator Tom Coburn described Kagan's performance as a "dance."

Fortunately, for those seeking comic relief, the inscrutable Senator Al Franken was on the job, doodling cartoons of Senator Sessions and taking brief catnaps throughout the hearing. Ironically, the nap came just as Elena Kagan remarked, "I've learned that we make progress by listening to each other."

Overall, Kagan appeared more confident on day two of the hearings as she cracked jokes. When asked where she was during the attempted terrorist attack on Christmas Day, she responded, "Like all Jews, I was probably in a Chinese restaurant."

While the Republicans have vehemently grilled Kagan, the Democrats appear to have more than enough votes for Kagan to be appointed, and the Republicans have indicated no interest in blocking the vote.

Photo: Supreme Court nominee Elena Kagan smiles as she takes her seat on June 30, 2010, prior to the start of her continuing confirmation hearing before the Senate Judiciary Committee: AP Images



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