



Report on Elena Kagan's Testimony

Following an impressive performance at her Senate confirmation hearing, the Senate should act swiftly to confirm Elena Kagan to the Supreme Court. When she is confirmed, three women will sit on the Court for the first time in United States history. Kagan demonstrated a masterful command of the Constitution and a razor-sharp intellect. Her statements make clear that she understands the important role the Court plays in ensuring that all Americans are able to obtain justice. "The obligation of the courts is to provide that level playing field," she said, "to make sure that every single person gets the opportunity to come before the Court, gets the opportunity to make his best case, and gets a fair shake." Her statements also give us increased confidence that she will stand against the Roberts Court's activism and bias in favor of powerful interests; she remarked that "results-oriented judging is pretty much the worst kind of judging there is."

The hearing provided insight into many previously unexplored areas of Kagan's record and beliefs. Specifically, the hearing gave Kagan the opportunity to elaborate on her judicial philosophy, her respect for Thurgood Marshall, and her actions taken as Dean of Harvard Law School in protest of Don't Ask, Don't Tell. It also allowed her to clarify her views on issues like campaign finance reform, executive power, abortion, and gun rights. While she spoke at length about her involvement as Solicitor General in issues like national security and First Amendment restrictions on campaign finance reform laws, she was clear that "the positions that I've taken as Solicitor General do not necessarily represent positions that I would take as a justice." Yet Kagan did make some statements that shed light on what sort of justice she might be.

Overall, Kagan's testimony gave credence to President Obama's promise that she will maintain a "commitment to protect our fundamental rights" and understands that "in a democracy, powerful interests must not be allowed to drown out the voices of ordinary citizens."

Judicial Philosophy

Almost every senator that questioned Kagan spent time asking her about the judicial philosophy she would bring to the Court. In her opening statement, she framed her view of the Court's role in terms of modesty: "[T]he Supreme Court is a wondrous institution. But the time I spent in the other branches of government remind me that it must also be a modest one – properly deferential to the decisions of the American people and their elected representatives." Kagan thoroughly answered senators' questions regarding her judicial philosophy; explaining her views on originalism, statutory interpretation, the role of the judiciary, deference to legislatures, and more.

- "The Constitution is a document that does not change, that is timeless, and timeless in the principles that it embodies. But it, of course, is applied to new

- situations, to new facts, to new circumstances all the time. And in that process of being applied to new facts and new circumstances and new situations, development of our constitutional law does indeed occur.”
- While she recognized the significance of the framers’ intent, Kagan also acknowledged that “in [some] cases, the original intent is unlikely to solve the question. And that might be because the original intent is unknowable or it might be because we live in a world that is very different from the world in which the framers lived....”
 - Kagan declined to adopt Chief Justice Roberts’ deceptive judge-umpire analogy. “Judging is not a robotic or automatic enterprise, especially on the cases that get to the Supreme Court. A lot of them are very difficult. And people can disagree about how the constitutional text or precedent, how they apply to a case. But it’s the law all the way down, regardless.” She did, however, agree that judges and umpires should both be impartial and free from bias, and that judges, like umpires, should realize that they are not the most important people in our democratic system of government.
 - Explaining her approach to statutory interpretation, Kagan emphasized the respect owed to Congress, and stated that “the most important thing in interpreting any statute, in fact, the only thing that matters is Congress’ intent.” When the text of a statute is ambiguous, she endorsed the idea of using “whatever evidence is at hand to understand Congress’ intent” – including the statute’s history – “and that includes exploration of Congress’ purpose by way of looking at the structure of the statute, by way of looking at the title of the statute, by way of looking at when the statute was enacted and in what circumstances and by way of looking at legislative history.”

Don’t Ask, Don’t Tell

Some Republican Senators doggedly attacked Kagan for her decision as Dean of Harvard Law School to enforce the School’s anti-discrimination policy and exclude military recruiters from the Office of Career Services. Despite the fact that Kagan clearly explained that recruiters were accommodated through the student veterans’ organization, Republicans persisted in mischaracterizing her record.

- “I always tried to make sure that the military had excellent access to our students... But I also felt a need to protect our -- to defend our school's very long-standing anti-discrimination policy and to protect the men and women, the students, who were meant to be protected by that policy: the gay and lesbian students who wanted to serve in the military and do that most honorable kind of service.”
- “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.”

Justice Thurgood Marshall

Some Republicans chose to spend their time questioning Kagan’s relationship with Justice Thurgood Marshall, in an effort to portray her as a “legal progressive.” Kagan was stalwart in her defense of Justice Marshall against Republicans’ disparaging remarks.

- “I think Justice Marshall’s whole life was about seeing the courts take seriously claims that were not taken seriously any place else...It was the courts’ role to make sure that even when people have no place else to go that they can come to the courts, and the courts will hear their claims fairly.”
- She also stated that: “I don’t want to spend a whole lot of time trying to figure out exactly what Justice Marshall would have said with respect to any question, because the most important thing – I love Justice Marshall. He did an enormous amount for me. But if you confirm me to this position, you will get Justice Kagan. You won’t get Justice Marshall, and that’s an important thing.”

Guns

Various Senators asked Kagan to comment on the *McDonald v. Chicago* decision, which was handed down on the same day as her confirmation hearing. Kagan expressed willingness to follow the Court’s precedent in this area.

- Referring to *McDonald* and *District of Columbia v. Heller*, Senator Feinstein asked “Why is a 5-4 decision – in two quick cases, why does it throw out literally decades of precedent in the Heller case in your mind? Why does it --why do these two cases become settled law?” Kagan responded, “Senator Feinstein, because the Court decided them as they did. And once the Court has decided a case, it is binding precedent.” She later reassured Senator Grassley that “I accept the Court’s analysis and will apply it going forward.”
- She also acknowledged that before *Heller*, “it had long been thought, starting from the *Miller* case, that the Second Amendment did not protect such a right” (an individual right to bear arms). She called the *Heller* decision a “very fundamental moment in the Court’s jurisprudence.”

Abortion

Kagan was clear in her belief that there is a constitutionally protected right to privacy, and that the right covers the right to terminate a pregnancy.

- On abortion, Kagan expressly affirmed her belief in the holding of *Roe v. Wade*: “The continuing holding of *Roe* and *Doe v. Bolton* is that women's life and women's health have to be protected within -- in abortion regulation...the woman's life and that the woman's health must be protected in any abortion regulation.”

Executive Power & National Security

As was the case with her Solicitor General hearing, one of the most notable exchanges took place between Kagan and Senator Graham, regarding the President’s ability to detain enemy combatants and suspected terrorists. While it is still not entirely clear where Kagan stands on this important issue, what is clear is that the Court badly needs a Justice who will stand strong against the cavalier course of action instigated during the Bush Administration.

- Kagan recognized that “the law of war typically grants [detention] authority in a wartime situation.” But she also acknowledged that the Court has not yet answered a number of questions about the extent of the government’s detention authority, such as the scope of the definition of an enemy belligerent, where the

battlefield is, whether there may be authority to detain someone captured outside the battlefield, and what level of support gives rise to detention authority.

- When Senator Graham asked Kagan if she was “personally comfortable” with the government practice of trying suspected terrorists in military commissions, she replied “I wouldn’t be in this administration if I didn’t.”
- Kagan was clear in stating her belief that habeas rights should not extend to detainees at military bases like Baghram, Afghanistan, emphasizing the fact that as Solicitor General she chose to sign her name to the government’s appellate brief making this argument, an action she described as “a very, very rare thing in the appellate courts.”

Campaign Finance Reform

Kagan has an extensive record on the interplay between the First Amendment and campaign finance reform drawn from her scholarship, experience in the Clinton White House, and her position as Solicitor General. She discussed the issue extensively and repeatedly emphasized the arguments she made on behalf of the government in *Citizens United*, though for the most part, she focused on her role as an advocate rather than expressing her personal beliefs.

- Kagan hinted that her personal beliefs aligned with the arguments she made as Solicitor General in defending the McCain-Feingold Act in *Citizens United*, saying “the first person I convince is myself. And so, you know, I did believe that we had a strong case to make.”
- She also stated her belief that Congress established a compelling interest in preventing corruption sufficient to justify the restrictions in the McCain-Feingold Act: “I said to Justice Scalia, **and I think it’s true**...all the empirical evidence suggests that ... Congress determined [the Act] was necessary in order to prevent corruption.”
- Yet, she was also clear that she would accept *Citizens United* as binding precedent: “I want to make a clear distinction between my views as an advocate and any views that I might have as a judge. I do think *Citizens United* is settled law going forward. There’s no question that it’s precedent, that it’s entitled to all the weight that precedent usually gets.”
- When pressed by Senator Hatch, Kagan disavowed a handwritten note from her Clinton files indicating her belief that the Court is mistaken in equating money with speech, making clear that the note was likely drafted for the purpose of creating talking points and did not necessarily represent her personal opinion.

*For more information, or for questions about this report, contact the Alliance for Justice,
www.afj.org, 202.822.6070*