Supreme Court nominee Kagan placates Republican right at confirmation hearing

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In two days of questioning by the Senate Judiciary Committee, Elena Kagan, President Obama's nominee to replace retiring Supreme Court Justice John Paul Stevens, sought to reassure Republican senators that she supported the military and would not pursue a liberal agenda if elevated to the high court.

At the same time, Kagan, the former dean of Harvard Law School and current US solicitor general, stonewalled Democratic senators on the committee who invited her to criticize reactionary rulings by the right-wing majority on the nine-member court.

Kagan's evasive and deferential performance, typical of the carefully scripted, pro-forma exercises that have for years served as Senate confirmation hearings of Supreme Court nominees, garnered generally favorable media reviews and increased to virtual certainty her chances for being confirmed by the Senate and elevated to the court later this month.

In the course of her testimony, Kagan defended Chief Justice John Roberts and Associate Justice Antonin Scalia, both of whom have been instrumental in reversing long-standing precedents to increase corporate power—as in January's 5-4 ruling lifting restrictions on corporate financing of candidates—and to erode civil rights. Denying that the right-wing bloc on the court is pursuing a political agenda, Kagan told the committee, "I'm sure everybody up there is acting in good faith."

At one point, she praised Miguel Estrada, a right-wing lawyer whose appeals court nomination by President George W. Bush was blocked by Senate Democrats. "Your stock really went up with me," South Carolina Republican Lindsey Graham told Kagan in response to her endorsement of Estrada.

A number of Republicans on the committee homed in on Kagan's role as dean of Harvard Law School in briefly barring US military recruiters from using the law school's facilities. Kagan insisted that she was not motivated by opposition to the military or to war, but rather imposed the ban because the military's "don't ask, don't tell" policy toward gay soldiers violated Harvard's anti-discrimination policies.

"The purpose of the policy was to express support for our gay and lesbian students…and at the same time to ensure that our students who wanted to go into the military had excellent access to military recruiters and vice versa," she said.

In choosing Kagan to replace Stevens, for years the most liberal member on the court, especially in regard to civil liberties and democratic rights, Obama selected the most conservative of the nominal liberals considered to be likely candidates for the high court position. Even if Kagan votes more often than not with the liberal bloc on the court, her presence will likely shift the general political orientation of the court further to the right.

Prior to her present position as solicitor general, in which she serves as the federal government's lead advocate before the Supreme Court, and her stint as dean of Harvard Law School, Kagan worked from 1995 to 1999 as legal counsel to the Clinton administration, rising to the position of deputy to Clinton's top adviser on domestic policy, Bruce Reed.

In all three posts she has evinced political opportunism and a readiness to adapt to the politics of the Republican right. At Harvard, she made a point of recruiting right-wing professors to the law school faculty, in the name of "diversity." In the Clinton administration, she supported the "triangulation" strategy of Clinton's second term, which included ending welfare as a federal entitlement program.

Earlier, she spent a brief period as an associate in the

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corporate law firm of Williams and Conolly in Washington, D.C. There is very little information about her experience at the firm, but its web site gives some idea of the character of its clientele and work.

The site notes that the company "represented Vice President Cheney in the Valerie Plame investigation…many corporate executives and lawyers caught up in the wave of lawsuits involving Enron…and major accounting firms with regard to tax shelter advice."

It also "successfully represented former New York Stock Exchange Chairman Dick Grasso in his fight with the New York attorney general…also serves as national coordinating and trial counsel for Merck in Vioxx-related lawsuits, Wyeth in trials over its hormone replacement therapy drug Prempro, and Bayer in claims regarding its cholesterol drug Baycol."

Kagan's role as solicitor general in the Obama administration has clarified her positions on democratic rights and the "war on terror." In her confirmation hearing for the position of solicitor general, she unflinchingly embraced the Bush administration perspective of a "global war on terror" in which the entire planet should be considered, from a legal standpoint, part of the battlefield and in which the rules of war and military justice could be applied.

As solicitor general, she has aggressively advocated that position, most notably in *Humanitarian Law Project v. Holder*—a case decided by the Supreme Court earlier this month. In this case, Kagan argued to the Supreme Court that any lawyer who filed an amicus brief in a US court on behalf of a designated terrorist organization would be "materially supporting" that terrorist organization and thus subject to criminal prosecution. A majority of the court agreed, including Justice Stevens.

In his dissent, Justice Breyer pointed out that the decision criminalized forms of political speech and association traditionally given the greatest protection by the First Amendment of the Constitution.

On the second day of this week's confirmation hearing, Senator Graham warmly commended Kagan's work, recognizing that she had made good on her prior oath of allegiance to the "war on terror." He said, "I think some of your supporters may be shocked by your positions…. In my point of view, you have represented the United States very well."

At another point, Graham pressed Kagan on the 2006 *Hamdan v. Rumsfeld* decision, authored by Justice Stevens, which invalidated the executive order by which Bush initially established military tribunals at Guantánamo Bay. Graham asked her if she believed the current version of these tribunals, which allow hearsay evidence and deny the defendant the right to see the evidence against him, was fair. Kagan responded, "I do. I wouldn't be in this administration if…"—at which point she was cut off by a satisfied Graham.

More such advocacy by Kagan can be found in *Kiyemba v. Obama*, where her office successfully argued that a federal court lacks authority to order the release of Guantánamo detainees even where the court has found and the government had conceded that the detainees were not enemy combatants.

In *Al Maqaleh v. Gates*, Kagan's office successfully argued that detainees in Afghanistan cannot file habeas corpus petitions to challenge the basis for their detention because Afghanistan is a war zone, even though they were brought to Afghanistan after being captured elsewhere.

An American Civil Liberties Union report warns that Kagan's advocacy of empowering the executive branch is cause for concern. The report describes Kagan as a "forceful advocate" for "presidential administration."

On fundamental legal and constitutional issues regarding the "war on terror" and democratic rights, Kagan's positions—like those of the Obama administration as a whole—are fully compatible with those of the Republican Party and the Bush administration.

As for the economic and social conditions of the general population, Kagan evinces the indifference that characterizes Democratic Party liberalism as a whole. During her confirmation hearing for solicitor general, she was asked whether she believed the Constitution confers a right to basic living standards, to which she responded, "The Constitution has never been held to confer a right to a minimum level of welfare."

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