

SUPREME COURT: After week of hearings, Kagan seen as taking Stevens' place on enviro cases

By Jennifer Koons, E&E reporter

During four days of testimony before the Senate Judiciary Committee, Supreme Court nominee Elena Kagan suggested little to challenge what supporters and critics already believed: that she isn't likely to shift the dynamic on the high court.

Kagan tried to reassure skeptical Republicans that she has no political agenda and declined repeated prompting from Democrats on the committee to criticize the current court under Chief Justice John Roberts. Nonetheless, her stated views on a variety of issues imply her opinions will fall squarely in line with those of her predecessor, Justice John Paul Stevens, and the three other liberal justices.

"This means we will probably get an addition to the court who will play an important role and have an important legacy in protecting the development of energy and environmental policy and the ability of the executive branch to implement these policies," said Jim Rossi, a Florida State University law professor. "If that was in doubt for anyone, it shouldn't be after this week."

"I already assumed she would vote with the court's liberal bloc on almost everything, and the hearings have done nothing to change that," said Hans Bader, an attorney at the Competitive Enterprise Institute.

Environmentalists welcomed Kagan's comments in support of judicial deference to Congress and federal agencies, which have typically been responsible for setting and implementing federal policies that mandate environmental protections.

Kagan defended Congress' "broad authority under the Constitution to enact legislation involving protection of the environment," later adding, "I think that when Congress enacts such legislation, the job of the courts is to construe it consistent with congressional intent."

Kagan further suggested that it was the proper role of the federal agencies, and not the courts, to interpret ambiguous legislation, particularly as it relates to environmental regulation.

Environmental groups have preferred this approach because federal agencies have typically read the Clean Air Act, Endangered Species Act and others more broadly than lower court and some Supreme Court judges.

This has been an area of particular interest for the nominee, who has a background in administrative law and authored a widely read 2001 law review article on the subject. In the article, Kagan praised the 1984 Supreme Court ruling in *Chevron v. Natural Resources Defense Council*, which upheld U.S. EPA's decision on stationary air pollution sources and established a two-step test for deference to federal agencies.

Chevron set an important precedent for the defense of government agencies' ability to interpret ambiguous legislation, which in that case enabled EPA to set effective clean-air standards.

Stevens authored the majority opinion in *Chevron*; in 2007, he wrote another landmark decision that defended government agencies' ability to regulate based on vague legislation. *Massachusetts v. EPA* held that the agency had the authority to regulate greenhouse gases under the Clean Air Act.

Kagan also divulged her views on the legal standing doctrine, another hot-button topic frequently before the high court. She told lawmakers she believed it was possible for citizens to show they have been injured in certain environmental cases and that they therefore have standing to initiate a lawsuit.

In recent years, the court has heard a number of cases over who should be able to sue to protect the environment. High-profile climate change cases currently making their way through the lower courts have turned on whether individuals or states have standing to sue businesses over their emissions and whether the challenges present political questions that go beyond the authority of the federal courts.

The nominee said judges ought to leave it to Congress to determine which people have standing to file suit. "Congress does that in legislation and if Congress does do that, the court should respect that and hold that such a suit complies with Article III" of the U.S. Constitution, which governs judicial standing, Kagan said.

"Kagan encouragingly emphasized the role of Congress in defining within broad limits who should have standing to enforce the Clean Air Act, Clean Water Act, Endangered Species Act and other laws," said Glenn Sugameli, a staff attorney at Defenders of Wildlife, who leads the advocacy group's Judging the Environment project.

Kagan pressed on Gulf spill

If confirmed, it is reasonably likely that Kagan will eventually hear an appeal in one of the many lawsuits that have resulted from the Gulf oil spill. But her views on liability and potential damages in such a case or others remain a mystery, much to the consternation of the Democrats who asked her numerous times about the incident.

Kagan listened but offered no opinion as several lawmakers criticized the Supreme Court's 2008 decision in *Exxon Shipping Co. v. Baker*, in which the majority held that the \$5 billion punitive award against Exxon for its 1989 oil spill in Alaska's Prince William Sound was excessive.

She further declined to comment when Sen. Ted Kaufman (D-Del.) lamented that the *Exxon* decision might have actually reduced the incentives for oil companies to correctly follow procedure and to take all reasonable precautions against future oil spills like the one in the Gulf.

A committee vote on the nomination is expected after senators return from next week's recess.

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