

SUPREME COURT: Graham joins Democrats as Judiciary panel approves Kagan

By Gabriel Nelson, E&E reporter

The Senate Judiciary Committee voted today to advance Elena Kagan's nomination for the Supreme Court, one day after the nominee received the support of a 35-member coalition that includes some of the nation's largest environmental advocacy groups.

Sen. Lindsey Graham (R-S.C.) crossed the aisle to vote in favor of Kagan's nomination, which was approved by a 13-6 vote. Graham, who also voted for Justice Sonia Sotomayor last year, said that while he disagreed with Kagan on a number of issues, President Obama "chose wisely" considering his own views.

"What's in Elena Kagan's heart is that of a good person I disagree with," Graham said, referring to Obama's statement that he would select judges based in part on their feelings. "The Constitution, in my view, puts a requirement on me as a senator to not replace my judgment for his, not to think of the hundred reasons I would pick somebody differently."

His "yes" vote, which followed four days of noncontroversial hearings before the Senate panel, will help Democratic leaders toward their goal of putting Kagan to a Senate floor vote before the August recess. Confirmed last year as solicitor general by a 62-31 margin, Kagan is expected to cruise to confirmation.

Onlookers both liberal and conservative have concluded that Kagan's confirmation would likely maintain the status quo after the retirement of Justice John Paul Stevens.

Among them are the 35 environmental organizations that backed her in a [letter](#) sent yesterday to Judiciary Chairman Patrick Leahy (D-Vt.) and Sen. Jeff Sessions (R-Ala.), the committee's ranking member.

Because Stevens was a reliable vote in favor of environmental protection, Kagan's confirmation would be unlikely to tilt the balance of the court toward environmentalists. Yesterday's letter, signed by groups such as the National Audubon Society, Greenpeace and the Sierra Club, indicates that Kagan's confirmation hearings assuaged worries among advocacy groups that she would move the high court away from their interests on those issues.

"The court is narrowly and deeply split on critical constitutional and statutory environmental protection issues," says **the letter, which was written and circulated by Defenders of Wildlife**. "Kagan's record and her Supreme Court confirmation hearing testimony demonstrate an essential understanding of the importance of fair Court decisions that uphold, enforce and correctly interpret laws that protect people, wildlife, and the environment."

The Supreme Court has delivered recent victories to environmentalists in a number of cases, most notably *Massachusetts v. EPA*, in which the court ordered U.S. EPA to decide whether to

regulate greenhouse gases as pollutants. But the justices have more frequently sided against environmentalists, often delivering 5-4 decisions with Justice Anthony Kennedy casting the deciding vote.

In their letter, environmental groups based their support of Kagan on her tenure as dean of Harvard Law School and her statements that the court should give deference to environmental laws passed by Congress.

At Harvard, she started an environmental law program and advocacy clinic, hiring high-profile law professors to lead them. And during her confirmation hearing, Kagan said that Congress has "broad authority under the Constitution to enact legislation involving protection of the environment" ([Greenwire](#), July 2).

Kagan also said during confirmation hearings that Congress has the authority to set rules for standing -- a key question for environmental lawsuits brought by citizens and advocacy groups -- and that a court should examine lawmakers' intent when determining whether the law is being followed. Both statements were praised by the environmental groups.

Sen. Ben Cardin (D-Md.) cited Kagan's statement on environmental regulations as one reason for his support, saying the Supreme Court's recent decisions on those issues have put big business ahead of citizens. He cited *Rapanos v. United States*, a 2007 opinion in which the court restricted the interpretation of the term "navigable waters" under the Clean Water Act, and *Exxon v. Baker*, a 2008 decision in which the court reduced Exxon Mobil Corp.'s penalty from the *Exxon Valdez* oil spill from \$2.5 billion to \$500 million.

With the court likely to have the opportunity to consider a case related to the Gulf of Mexico oil spill, Kagan could quickly be tested on a similar question if confirmed.

"I'm convinced that she will protect under the independence of the judiciary the interests of the people against special interests," Cardin said, referring to such a potential case.

[Click here](#) to read the letter.

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