

Elena Kagan's appointment to the Supreme Court

NBC videos – Previewing hearings - <http://www.today.com/video/today/37970863#37970863>

Day 1 - <http://www.today.com/video/today/37992603#37992603>

Day 2 - <http://www.today.com/video/today/38013521#38013521>

Senate vote - <http://www.nbcnews.com/video/nightly-news/38584431#38584431>

Georgetown Law Library hub page on Kagan's confirmation -

http://www.law.georgetown.edu/library/research/guides/supreme_court_nominations.cfm#nomination-of-elena-kagan-to-replace-associate-jus

Senate Judiciary Committee resources, incl webcasts, on Kagan's nomination -

<http://www.judiciary.senate.gov/nominations/supreme-court/kagan>

CBS critical piece on Sotomayor hearings - <http://www.cbsnews.com/news/sotomayor-confirmation-a-done-deal/> (also copied in below).

Fox News coverage - <http://www.foxnews.com/politics/2010/05/10/kagans-judicial-inexperience-minor-hurdle-despite-early-criticism/>

Heritage Foundation - <http://www.heritage.org/Research/Commentary/2010/07/Kagans-Red-Flags>

MSNBC - <http://www.msnbc.msn.com/id/37959702/>

Huffington Post - http://www.huffingtonpost.com/2010/08/05/elena-kagan-confirmed-to_n_672285.html

Assignment

1. Summarise Elena Kagan's background and career in 100-150 words
2. According to her advocates, why was Elena Kagan well-qualified as a Supreme Court Justice?
3. According to her detractors, why was Elena Kagan unsuitable as a Supreme Court Justice?
4. Summarise the stages in her appointment and confirmation process from the resignation of her predecessor to her swearing in by the Chief Justice, including dates and the votes taken.
5. How much difference was Kagan's appointment likely to make to the balance of the Supreme Court?
6. Read the CBS critical piece on the Sotomayor hearings from 2009 and watch a selection of video from CNN or the Judiciary Committee Resources. To what extent do the Kagan hearings confirm the criticisms made in this article?

Sotomayor Confirmation a Done Deal

By Andrew Cohen, CBS News July 16, 2009, 2:46 PM



(AP)

It takes brains, temperament and really good timing to become a Supreme Court Justice. The legal landscape is littered with the careers of brilliant jurists who weren't the right person in the right place at the right time. And the Supreme Court has been littered with yahoos who lucked out and squeaked through.

What it takes to "pass" modern-day, post-Bork confirmation hearings, however, is a completely different matter. You don't need candor. You don't need courage. You don't need to be right. You don't even have to pretend that you have all the answers. All you really need is patience, a large bladder, thick skin, and the unwavering strength to sit upright and awake, hour after hour, and speak at great length and in serious, sonorous tones without saying anything at all.

John G. Roberts, Jr. accomplished this arduous if fairly mindless feat in 2005 and is now chief justice of the United States. Samuel A. Alito, Jr. did it in 2006 and he's now an associate justice. And Sonia Sotomayor, a wise Latina woman if there ever were one, has just managed to match the boys. She is on her way to getting, oh, I'd say 70 or so votes for confirmation to become only the third woman in American history to land the law's big prize.

With the main part of the Sotomayor confirmation hearing now complete, with the judge finally off the hot seat, it's fair to say she did everything her compulsive White House handlers had hoped she would. She talked at length to her critics on the Senate Judiciary Committee about her "motivational" speeches. If some of her explanations didn't really make sense—and often they didn't—there isn't anything Senate can do about it anyway. What's left to say after you've said sorry about your many "rhetorical flourishes" that fell flat?



(AP Photo/J. Scott Applewhite)

Indeed, the lawmakers couldn't shut Sotomayor up when it came to her explanations about "Wise Latina" women and how judges don't really make policy and the *Ricci* firefighters ruling and all the rest of the third-rate *faux* controversies her enemies had ginned up against her. That none of these matters were remotely material to determining whether she's capable of handling the job—there were no high crimes or misdemeanors alleged, after all—was irrelevant. In the absence of any legitimate concerns the tribunes of politics churned up phony ones and the questions from earnest senators poured in.

Albert Einstein once said that the definition of insanity is doing the same thing over and over again thinking that you'll reach a different result. This didn't stop committee members from asking Sotomayor, over and over again, if she'd allow cameras into the court, or if she agrees that the court ought to accept more cases, or if she concedes that the Second Amendment's right to bear arms blocks state regulations, or if she believes there ought to be more (or fewer) restrictions on abortion. Over two and a half days the questions were nearly identical and so were the non-answer answers.

When it came to her core judicial beliefs, when it came to what she really thinks about the major substantive issues of the day, Sotomayor pulled a Roberts, an Alito, a Breyer and a Ginsburg. In fact, she may have out-Ginsburged Ginsburg, who first started this disappointing trend of nominees stoically and earnestly refusing to shed any light in their confirmation hearings about issues the American people care about most. In this way, *all of us* are paying the price for the sins (on both sides) of the Robert Bork and Clarence Thomas hearings, which are now a generation old.

The White House hopes that the Congress, and the American people, will judge the judge upon what she has done over 17 years on the bench and not what she has said in a few decades off of it. Indeed, that is going to happen. And, indeed, it probably should. We like to say: "Do as I say and not as I do" but in reality the only thing that matters about judging is how a judge votes in a particular case. And despite Sotomayor's inflammatory words, her record as a centrist, moderate, practical, cautious judge is very, very deep. She talks smack. She judges carefully. It's not the worst combination. Better that than those soft-spoken judges who issue wing-nut opinions, right?

Committee members soon will start scratching each other's backs with praise about having performed the "advise and consent" function given to them in the Constitution. And perhaps that solemn (if ambiguous and unworkable) duty is what pushes these windy lawmakers, hour after hour, to ask hundreds of questions to which they know they won't get an answer from the nominee. Either that or it's the cameras, and the free air-time, and the opportunity to pretend

that the rare exercise is meaningfully insightful when we all know it isn't.

What did Sotomayor prove this week? That she is smart and controlled and patient and indefatigable; that she can say the same thing over and over again, using slightly different words, to avoid direct answers to questions; that she can stare down inquisitors; that her ability to dodge and duck was greater than was the ability of committee members to pin her down; and that she really didn't want to tell us what we really wanted to know. She'll make a fine justice and if that doesn't work out clearly she'd make a really good player at the World Series of Poker, too.