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TELEVISION PROGRAM TO "CBS NEWS' FACE THE NATION."



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TRANSCRIPT

BOB SCHIEFFER: Today on FACE THE NATION, it's a tale of two hearings--the Senate confirmations of Elena Kagan and David Petraeus.

The White House was hoping for a quick and easy confirmation when it nominated Elena Kagan to the Supreme Court. But it is shaping up as anything but. We'll get the latest from the Chairman of the Senate Judiciary Committee Pat Leahy, the ranking Republican Jeff Sessions, and our chief legal correspondent Jan Crawford.

It should be smoother sailing for General David Petraeus, who's been chosen to replace Stanley McChrystal as our top commander in Afghanistan, but that hearing will provoke a review of American strategy in a war that is not going well. We'll talk about that with the Chairman of the Senate Armed Services Committee Carl Levin and CBS News national security correspondent David Martin.

I'll have a final thought on presidential responsibility.

But first, what to expect at the Kagan hearings on FACE THE NATION.

ANNOUNCER: FACE THE NATION with CBS News chief Washington correspondent Bob Schieffer. And now from Washington, Bob Schieffer.

BOB SCHIEFFER: And, good morning, again. Senators Leahy and Sessions are with us in the studio this morning. And because she's going to be covering the hearings and frankly because she knows a lot more about this than I do, our legal correspondent Jan Crawford is at the table as well.

Senator Sessions, I want to start with you because from almost from the hour that the President announced that he was going to nominate Elena Kagan to be his nominee to the Supreme Court, you have offered and your office has been putting out just a steady stream of press releases and comments questioning her qualifications. You have noted that her legal experience is very thin, that she's a political operator--just almost every day something new. I want to ask you, are-- are you trying to block this nomination? And how far do you intend to take this?

SENATOR JEFF SESSIONS (R-Alabama/Ranking, Judiciary Committee): I-- I--

BOB SCHIEFFER (overlapping): Do you think she's unqualified?

SENATOR JEFF SESSIONS: I think this is a very important nomination. And she has the least experience of any nominee, at least in the last fifty years. And so, I think that raises questions and I've been using the phrase, you know, this is the confirmation not a coronation. Many were suggesting it's just a done deal and the committee hearings would make no difference. But I think this nominee does have serious deficiencies, issues that need to be raised. The American people are concerned about their courts. They're concerned about a growing expansive government that seems to be beyond anything they've ever seen before. And they'd like to know where-- what their judges might have to do about it. So, I think that's kind of where we are.

BOB SCHIEFFER (overlapping): Well--

SENATOR JEFF SESSIONS: And she's entitled to a full and fair hearing. And-- and I've told Pat and the President she'll get that and-- and I'm committed to that.

BOB SCHIEFFER: Well, how far are you going to go with this? I mean, could a filibuster-- the option of-- of Republicans filibustering this nomination. Is that still on the table? Is that still possible?

SENATOR JEFF SESSIONS: I think the first thing we need to decide is, is she committed to the rule of law even if she may not like the law? Will she as a judge subordinate herself to the constitution and keep her political views at bay? And then, secondly, if things come out that indicate she's so far outside the mainstream--it's conceivable a filibuster might occur. The Senate rule that our Democrats led us to establish was that you shouldn't filibuster except in extraordinary circumstances. I think that's a legitimate rule and that will be what I would judge as to whether a filibuster is necessary.

BOB SCHIEFFER (overlapping): At this point, do you think she's unqualified?

SENATOR JEFF SESSIONS: I think her nomination has real problems that need to be examined. I believe she's entitled to a fair hearing and a chance to respond. But this nominee has a very thin record legally, never tried a case, never argued before a jury, only had her first appearance in the appellate courts a year ago. And, she just is not the kind of nominee you would normally expect to have. Of course, never been a judge. And so, this raises questions because her political instincts have been strong. She's been aggressive in an issue after issue from the liberal side of the political issues.

BOB SCHIEFFER: Senator Leahy, I'm-- I expect I don't even have to ask you a question.

SENATOR PATRICK LEAHY (D-Vermont/Chairman, Judiciary Committee): Well, you know, it's-- it's funny we're talking about not being a judge. Of course, up until recent years, almost half the nominees, members of the Supreme Court, have not been judges. Bill Rehnquist who became Chief Justice-- Chief Justice William Rehnquist was not a judge. He came from the Nixon administration to go on to the Supreme Court. But then, some of the greats like Hugo Black and-- and Robert Jackson were not judges. So that's-- that should not be a thing. In fact, right now, on the-- on the Supreme Court, there is only one member who is a trial judge and that's Sonia Sotomayor. So it's-- I-- I'm more interested in seeing what their qualifications are. And now with-- with Elena Kagan, first woman to become dean of the Harvard Law School indicates her legal abilities. First woman to become solicitor general, who's sometimes referred to as the tenth justice. And, she's very good. But I-- I worry and I-- I told President Obama this that it's reached the point that if he had-- if he had nominated Moses, the Lawgiver, some would have said we can't have him because among other things he hasn't produced a birth certificate. I mean, let's-- let's look at the person-- let's-- in fact, I got a sort of a half-hearted laugh out of the President on that one, but the-- let's look at her qualifications. I mean, we can make all these charges in the back and she's at a point where she can't answer any of these because by tradition, as you know, they don't say a word to the public or to the press after they've been nominated until the hearing. Starting tomorrow, she'll have a chance to answer these. I think you're going to see a brilliant woman, a brilliant legal mind, and you're going to see somebody who is going to be the hundred and twelfth Justice of the U.S. Supreme Court.

JAN CRAWFORD (CBS News Chief Legal Correspondent): But Senator Leahy, I mean, Justice Alito, obviously President Bush's nominee was widely viewed as highly qualified, intellectual

giant. He got the highest rating by the American Bar Association. He had support from liberals just like Elena Kagan has support from conservatives. Yet, you not only voted against Justice Alito, you and the President and the vice president then in the Senate thought that she should be filibustered. So how can you--

SENATOR PATRICK LEAHY (overlapping): No, actually-- actually we had-- we-- we had--

JAN CRAWFORD: --criticize Republicans for kind of doing the same thing?

SENATOR PATRICK LEAHY: We had, sort of, a test vote on-- on him. Everybody knew that was more symbolic.

JAN CRAWFORD (overlapping): Well, twenty-five Democrats voted not to have--

SENATOR PATRICK LEAHY: Sure. And-- and then we immediately went and we still could have held it up for a day. We went immediately to a vote on him, so-- let's get past that. That was symbolic at best. I also voted for John Roberts. John Roberts--very, very conservative--had been in the Reagan and Bush administration. But I-- I felt that he gave us direct and honest answers. I felt that Justice Alito did not. And that is why I voted against him. I voted--

JAN CRAWFORD (overlapping): But--

SENATOR PATRICK LEAHY: Keep in mind, I voted for hundreds, even thousands of judges nominated by Republicans, President Reagan both President Bushes, President Ford who are-- who were not the people I would have nominated had I been President. But I felt after going through the hearing that they were people that I could trust to uphold the law. I didn't feel that way and I hope that Justice Alito proves me wrong.

JAN CRAWFORD: But-- but Senator Biden-- then Senator Biden said it was okay to filibuster a nominee, he believed based on their ideology. And there was no question Alito wasn't qualified--

SENATOR PATRICK LEAHY: No.

JAN CRAWFORD: --had support from liberals.

SENATOR PATRICK LEAHY: I--

JAN CRAWFORD: Some of the same things now that we're hearing from Senator Sessions.

SENATOR PATRICK LEAHY (overlapping): I didn't-- I-- I didn't feel that either Robert Bork or Justice Thomas were qualified, but I resisted any effort to have a real filibuster on either one of them. I then-- when you get to the Supreme Court Justice, you have a different level and I think the American people deserve a vote. You know--

JAN CRAWFORD (overlapping): But is ideology is-- is-- is-- is ideology a reason to filibuster a nominee?

SENATOR PATRICK LEAHY: Ideology is one of many considerations. Consistency and honesty is another consideration. In many ways, the consistency and honesty in my mind trumps ideology.

SENATOR JEFF SESSIONS: Ah--

JAN CRAWFORD: What-- what--

BOB SCHIEFFER: Go ahead.

JAN CRAWFORD: Well that--

SENATOR JEFF SESSIONS: I would just say that the whole critical a thing about a-- a-- a nominee, experience is important. Lack of experience is very significant in my view as a practicing lawyer. But-- and when you have a-- the question is what does the judge understand that they can't utilize the power, the lifetime appointment, to redefine the meaning of the constitution, to have it promote an agenda in an activist way that the American people won't vote for. And when you put somebody on the bench who is prepared to do that, then they're not serving as a judge. They're serving as a politician.

JAN CRAWFORD (overlapping): But, can I ask you--

SENATOR PATRICK LEAHY (overlapping): Well, let me-- let me use an example.

JAN CRAWFORD: Wait-- wait-- wait, no let me ask this one.

SENATOR JEFF SESSIONS: Yeah, okay.

JAN CRAWFORD: Senator Sessions, though because it's almost like you're taking opposite positions that you took ten years ago. In 2003, when the Democrats were filibustering, you told Jim Lehrer it was a very, very grim thing. You said it would weaken the hand of the President and a constitutional alteration of power. Now you told Bob. There had been this compromise between the senators, so that that would allow a filibuster, but those-- in 2003, you were saying that that would undermine the constitution and democracy to filibuster--weaken the courts. So how is your views changed now on that?

SENATOR JEFF SESSIONS: We just have to live with the world we're in, Jan. And, what happened was we had a big debate over that. The filibuster was ongoing by the Democrats on quite a number of Bush judges for the first time in history. And the compromise that was reached with the gang of fourteen was that you should not filibuster, except in extraordinary circumstances. I've never filibustered a Supreme Court justice. I hope I don't have to. And we didn't with Sotomayor.

BOB SCHIEFFER: But Senator Leahy, this nominee herself has said that these hearings have been hollow and a charade in the past.

SENATOR PATRICK LEAHY: I know, I-- I asked her about it.

BOB SCHIEFFER (overlapping): Is this going to be hollow and a charade.

SENATOR PATRICK LEAHY: I-- I hope not. I think, when we did the Sotomayor hearings and I was chairman and-- and Jeff was ranking member, we got a lot of praise from both Republicans and Democrats for the fact that we-- we made those as thorough as we did, including people who voted against her said, they were fair, they're open, they're clear. I intend to hold the same kind of a hearing here. I'm going to make sure every Republican senator and every Democratic

senator has an opportunity to ask all the questions they want. But right now, we-- we debated almost in a vacuum. Let's hear from her. The end of the week, people's views may be entirely different. Let her answer these questions. I asked her that question. I asked her that question thought and I said, you're probably going to hear your words quoted back to you on-- on that and a whole lot of other areas and I expect she will. But there-- they'll be legitimate questions. I wish we could ask more questions. Obviously, you can't ask how would you vote in this upcoming case. What are you going to recues yourself from that, you can't ask? But you know, all the justices that were on the-- the Warren Court, when Brown versus Board of Education came up, probably all said, of course, we would follow--

BOB SCHIEFFER: Mm-Hm.

SENATOR PATRICK LEAHY: --started decisive. But they overturned Plessy versus Ferguson. They did away with segregation. They turned their back on what the court had done. Thank goodness for the country. It was the right thing to do.

BOB SCHIEFFER: Let me just say Senator Sessions quickly, you said at one point that Republicans might simply boycott these hearings because they weren't getting all of the documents that they needed. Have you got what you need now? Is that still--

SENATOR JEFF SESSIONS: We've gotten--

BOB SCHIEFFER: --an option?

SENATOR JEFF SESSIONS: --quite a lot of documents. That came in a little sooner than I expected frankly. We got them at least a week before the hearing instead of a day or hours. But there were three-- several things we did not get. We asked for e-mails in which Elena Kagan was mentioned. Senator Leahy joined me in that request.

BOB SCHIEFFER: Mm-Hm.

SENATOR JEFF SESSIONS: And we did it for the community. That has not been produced, any of those. Also they've withheld sixteen hundred documents on privacy issues.

BOB SCHIEFFER: At this point you're not ready to boycott though?

SENATOR JEFF SESSIONS: So I-- no. That was-- I was pressed it would-- that could had ever happened.

BOB SCHIEFFER: All right.

SENATOR JEFF SESSIONS: And I acknowledge it might, but I've never intended to do that.

BOB SCHIEFFER: All right.

SENATOR JEFF SESSIONS: The problem is the White House, Obama and President Clinton's lawyers are reviewing these documents without any second independent review. They are deciding what we get. And I think that's--

SENATOR PATRICK LEAHY: They're--

SENATOR JEFF SESSIONS: --not good.

SENATOR PATRICK LEAHY: --they're doing the same review we had of Justice Roberts by the Reagan Library. And I felt that was fair and honest.

BOB SCHIEFFER: Okay.

SENATOR PATRICK LEAHY: And this is fair and honest and there's a lot more material for her than-- than we've ever had before.

BOB SCHIEFFER: I don't think these are going to be hollow and a charade. That's for sure--

SENATOR PATRICK LEAHY: Okay.

BOB SCHIEFFER: --from this conversation. Thank you, gentlemen, so much.

SENATOR JEFF SESSIONS: Thank you.

BOB SCHIEFFER: Back in a moment. Thank you, Jeff.

(ANNOUNCEMENTS)

BOB SCHIEFFER: And we're back now with the chairman of the Senate Armed Services Committee, Carl Levin, who will have a hearing of his own to preside over this week, and CBS News national security correspondent David Martin. General Petraeus, who is going to replace General McChrystal, will be before your committee. Is there any question in your mind as to whether he's going to be confirmed?

SENATOR CARL LEVIN (D-Michigan/Chairman, Armed Services Committee): None.

BOB SCHIEFFER: I take it you agreed with the President when he said he had no choice but to replace General McChrystal?

SENATOR CARL LEVIN (overlapping): I think he made the right decision. It was a very tough decision for him. I know it-- it was something which is difficult for him to do because he had and has respect for General McChrystal. But it was something that he thought needed to be done. And I think generally there was a consensus around here or near consensus that it was a fair and appropriate decision for a commander in chief to make.

BOB SCHIEFFER: David, I want to just ask you a question. You know, I think as Senator Levin says, I think there's general agreement that the comments that General McChrystal and his staff made were totally inappropriate and-- and simply cannot be tolerated from someone down in the chain of command. But you are at the Pentagon every day and have been there for years and years and probably have more sources out there than any other single reporter. And I think, even people from other networks would agree with my comment on that. While the comments were improper, were you surprised by the sentiments that these military people expressed?

DAVID MARTIN (CBS News Nationals Security Correspondent): I wasn't, Bob. And I think that's what made this story such an instant firestorm. I think everybody who follows Afghan policy closely immediately recognized those sentiments as authentic. You do not have to go to Afghanistan to hear military officers complain about the civilian leadership. But they do it off the

record and they do not do it in a disrespectful way. I've heard plenty of people complaining about the National Security Advisor Jim Jones. But I've never heard anybody on the record or off the record call him a clown, which is incidentally about the last word I would use to describe Jim Jones. So it was-- it really was the tone that cost McChrystal his job and the fact that it got out there. But this is the status of relations between the Pentagon and the White House.

BOB SCHIEFFER: Well, what's the problem?

DAVID MARTIN: Well, there's, I think fundamental doubt on both sides. The-- the White House thinks-- or is worried anyway that the Pentagon is going to suck them in by continually asking for more troops if we just get another ten thousand we can turn the corner. And the-- the military simply is unsure that the President means it when he says he will do whatever it takes to succeed in Afghanistan.

BOB SCHIEFFER: Well, let me ask you that, Senator Levin, because the President said that the other day when he announced this change in command. He said he has a responsibility to succeed. Do you think he is prepared to do whatever it takes to prevail there?

SENATOR CARL LEVIN: I do. I think his policy is the right policy. I think General Petraeus, who's the originator of a counterinsurgency policy and where your goal is to protect the population basically, so that the population will turn on the Taliban, not support the Taliban, work with the Afghan National Army, which is so critical here. I think that's the right policy. It was the Petraeus policy. McChrystal supported that policy. Petraeus has said publicly and privately to me that he agrees with both pieces of this policy, which was the additional troops but also setting a date of July, 2011, as a way of showing urgency to the Afghan government that they must take responsibility through their army mainly for their own security because the Afghan army is the Taliban's greatest nightmare.

DAVID MARTIN: But it's not that date that is the fundamental question about whether the President is prepared to do whatever it takes. He has defined that as simply the beginning of a transition. But people like the vice president are on record as saying, "Read my lips. There will be significant withdrawals starting in July, 2011." If you take that as the policy, it sounds like there's already a decision that, come success or failure, this time next year the U.S. is getting out.

SENATOR CARL LEVIN: Well, the President's been very clear. It's the beginning of reductions. But the pace of those reductions has not been determined. Circumstances will determine that. But where the President seems to me is right on target and I think Petraeus is totally with him on this. I've talked to Petraeus about it. I talked to McChrystal about it. The size and the strength of the Afghan army is critical. The Afghan army is popular in Afghanistan. Our presence is not popular in Afghanistan. And our number one mission, it seems to me and I think there's almost a very strong support in our military for this is to get the Afghan army to the point in terms of numbers, equipment, capability, that that they can be the primary source of security for Afghan-- for Afghanistan. This is what the elders told us when we visited with elders in southern Afghanistan. When I said, do you want us here? And their answer was, we want you here so long-- just as long as is needed to train the Afghan army and then leave. So that is our principal mission it seems to me now.

BOB SCHIEFFER: Oh--

SENATOR CARL LEVIN: And by the way, I hope that we do not have greater operations in Kandahar until we bring up or the Afghan army brings up more of their troops. There are not enough Afghan troops. There's only eight or nine thousand in Kandahar. There should be more. There are many more capable of taking on the Taliban and the principal responsibility for security. That's been my number one goal for-- for years now. But I think that is the number one mission.

BOB SCHIEFFER: There are some would-- who say that-- that-- that many in the military are worried about the current policy, which a big part of the President's policy and-- and McChrystal's strategy is to protect the civilian population. Do you think that General Petraeus-- would you ask General Petraeus about that? Because some are saying that it's leaving the military with-- fighting with one hand behind their back, that they need a little more leeway to go after these combatants.

SENATOR CARL LEVIN: Our military always have the right to protect themselves. And I think General Petraeus' counterinsurgency strategy makes that clear. But he also makes clear that if we want to-- if we want to win this, if we want to succeed, the Afghans have got to succeed. It is their success that we must assist and protecting that population and being careful in terms of what actions we take against that population that could wound or kill that-- those people in Afghanistan--the innocents is something that we must avoid. We will ask to answer your question, General Petraeus, about that. There's been some grumbling about that. It's understandable that there is some grumbling.

DAVID MARTIN: Senator, is it reasonable to expect General Petraeus to deliver results faster than General McChrystal could?

SENATOR CARL LEVIN: I think he has a very great capability of bringing people together. He has shown that, that he's able to bring together our civilian side in Afghanistan. He's shown that in Iraq when he was able to do that and he's going to able-- I believe to do that in Afghanistan. Well, I would hope his relationship with our ambassador to Afghanistan is better than was the case with General McChrystal, I hope his relationship with our number-- our key State Department person there, Ambassador Holbrooke will be better than was the case with General McChrystal, which was the source of some of the McChrystal's staff grumbling. So yes, I think he can improve that situation.

DAVID MARTIN: Should there be changes on the civilian side?

SENATOR CARL LEVIN: I don't think I'm in a position to conclude that. I don't think that's where General Petraeus is coming from and so the President has said he's comfortable with that. And that's key.

BOB SCHIEFFER: Let me just ask you quickly. What will be the mood in the Congress if the administration comes to you and says it may not be possible to begin withdrawing those troops on these deadlines that we've outlined here? Will Congress go along with that?

SENATOR CARL LEVIN: Um-- it depends on the circumstances at the time. We set deadlines in Iraq three times. President Bush set a deadline to remove our troops from the Iraqi cities. President Bush set a deadline to remove all of our troops from Iraq. President Obama had one of three deadlines that were set in Iraq. It worked. The only way to get things done is by setting dates. And that date was set by President Obama with the support of the military. Obviously, if the circumstances change down the road and the case is made out that things are different,

then the President can change his mind just the way General Petraeus can change his mind. He agrees with the policy now but could he change his mind? Of course, he can. If he does so--

BOB SCHIEFFER: All right.

SENATOR CARL LEVIN: --he'll tell the President.

BOB SCHIEFFER: Thank you so much, Mister Chairman.

Back with a final thought in just a second.

(ANNOUNCEMENTS)

BOB SCHIEFFER: Finally today, not many countries in the world can say it, but America can. We have never had a military coup, not because a coup would be impossible or because it's against the law. It is, of course. But it would be difficult, it would not be impossible. No, we've never had a coup because civilian control over the military is so ingrained in us, so much a part of our core values, that a coup is unthinkable, unimaginable. That is why the President had no choice when it came to dealing with General McChrystal. He didn't just insult the President and nearly every civilian who outranked him with his sophomoric rant. Whether he meant it or not, he insulted the office of the presidency, and showed disdain for the traditions on which our country is built.

The presidency is something special only so long as we choose to make it special. When those down the chain of command feel free to insult our-- their superiors without consequence, it weakens the presidency and sends a message--not just through the military ranks, but around the world that the President is no longer in control of those he commands. That is a dangerous message that can never be allowed to stand.

General McChrystal is a patriot who has served his country with courage and valor, and that service ended in a tragic way. But the responsibility that looms above all others for the President, any president, is first and foremost to protect America's core values. There can be no joy taken in any of this for anyone, but the President did what had to be done.

Back in a minute.

(ANNOUNCEMENTS)

BOB SCHIEFFER: That's it for us this week. Thank you for watching FACE THE NATION.