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



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Transcript**

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## TRANSCRIPT

BOB SCHIEFFER: Today on FACE THE NATION, the Supreme Court nomination of Elena Kagan--how's it going to play out in the toxic political year when incumbents of both parties are running scared; how will those confirmation hearings unfold and what should she be asked?

We'll talk with two top members of the Judiciary Committee in the Senate, Jon Kyl of Arizona and Dianne Feinstein of California.

Then we'll talk about this week's key primary races and how the Tea Party and the anti-incumbent feeling could impact on the Kagan hearings.

We'll talk with Jan Crawford, CBS News chief legal correspondent, and Jeff Zeleny who covers politics for The New York Times.

I'll have a final word on Walter Cronkite and a new exhibit honoring his place in American history.

But first, Elena Kagan--can she be confirmed--on FACE THE NATION.

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

BOB SCHIEFFER: And good morning again.

With us, two of the Senators from the Judiciary Committee, who will be questioning Elena Kagan--Dianne Feinstein in San Francisco, Jon Kyl, who is in Phoenix.

And Senator Kyl, I want to start with you because on one of the broadcasts this morning, Newt Gingrich said, "We are in two wars. I see no reason to appoint an anti-military Supreme Court justice."

Now, I guess this grows out of the fact that when she was the dean of the Harvard Law School, she would not allow military recruiters on campus because of the "don't ask, don't tell" policy at the military. Do you think that Elena Kagan is anti-military? And is this something that's going to play a part in these hearings?

SENATOR JON KYL (R-Arizona/R-Judiciary Committee): I don't know whether she is anti-military, and it will play a part in the hearings. That will be one of the things that we will question her about.

Incidentally, Bob, she described the policy as the discriminatory policy of the military. But, of course, the "don't ask, don't tell" law was passed by Congress and signed into law by President Clinton. So, in-- in my view, it was inappropriate for her to describe it as a discriminatory policy of the military. She did not deny entry on to the campus of the President-- President Clinton or members of the Congress who had adopted the law.

BOB SCHIEFFER: But that-- that's a little beyond being anti-military, is it not? I mean you don't start out thinking that she is anti-military, or do you?

SENATOR JON KYL: I don't know. I mean, I have no basis to judge that, except for the incident that you are talking about. And then there have been some other things that she has written related to the war on terror, for example, that caused me some concern. But, other than the way she described that policy, I don't know of anything else in her background that would lead to that conclusion.

BOB SCHIEFFER: I'll come back to that.

But Senator Feinstein, what-- do you believe that this woman could be anti-military?

SENATOR DIANNE FEINSTEIN (D-California/D-Judiciary Committee): Not at all. And I think that's nonsense. I think it's Gingrich hyperbole. And I would hope that no one would fall for that. I don't happen to support the "don't ask don't tell" policy. That doesn't mean I'm anti-military, and I-- I think that's really a far reach. This is an inordinately qualified woman.

I mean, if you just look at her credentials, you will see somebody that is almost a one-off, and add to that she is a very nice, down-to-earth person. I mean it's not easy to be summa cum laude from Yale; go to Oxford, be summa cum laude when you get your law degree from Harvard; be professor of law at the University of Chicago; dean of the Harvard School; adviser to the President; and top lawyer for the government before the Supreme Court.

BOB SCHIEFFER (overlapping): Well--

SENATOR DIANNE FEINSTEIN: I mean I think that's a very unique set of credentials.

BOB SCHIEFFER: Well, Senator Kyl, you in fact voted to confirm her to be solicitor general. Does that mean that she can count on your vote this time around?

SENATOR JON KYL: No. I explained at the time that my vote for the temporary position as the government's top lawyer in the Justice Department did not suggest how I would vote were she to be nominated for a lifetime appointment to a court such as the Supreme Court, because there was talk at the time that she might receive a nomination.

We have a-- an obligation as Senators to do our due diligence to find out all we can about her background because once she is confirmed to the court, if she is, there-- there's no appeal from her decision. She is the last word. And I will tell you that the key question that I will have, and what-- I'll try to find out all of the information I can to help me answer this question, is whether she will lay her political beliefs aside, when she is deciding cases, and decide those cases strictly based upon the facts and the law of the case. That may be a little difficult in her case because she's never had to do that before as a judge, and so it's more difficult to-- to know whether she's actually able to set her views aside. But that will be the primary--

BOB SCHIEFFER (overlapping): Let me-- let me go back to what you said. You said you had some concern about some of the things she has written about terrorism. Well, what-- what concerns you?

SENATOR JON KYL: Well, in 2005, when Lin-- Lindsey Graham and I and others were drafting a law to try to deal with the terrorists who were held down at Guantanamo and others, we drafted a law, which ultimately was passed, and-- and signed into law, that defined the term enemy combatants. We provided for a system for them to be classified as such and for that determination to be appealed to the D.C. Circuit Court of Appeals and so on.

She wrote a-- a letter along with some other law professors, to the Senate, and described that-- that bill that we had at the time at most unflattering terms, and contended that we had to provide Article III or regular civilian court appeals from the decisions of the Military Commissions which would, of course, make the whole point of Military Commissions irrelevant.

She-- she compared our bill to the fundamentally lawless actions of dictators. Now, that's not very judicious, and I don't know whether she would recuse herself from cases that involved those kinds of questions, but it certainly is a question that I'm going to have to ask her--can she lay those political views aside when she deals with a case concerning terrorists.

BOB SCHIEFFER: What would be your response to that, Senator Feinstein?

SENATOR DIANNE FEINSTEIN: Well, I'm not aware of this, so I've got to look into it much more deeply. But in-- I spent about an hour with her as-- as did Jon Kyl, as did I guess most of our committee, and what I found was a woman that was very down to earth, a woman that I think Americans would respond to extraordinarily positively. She doesn't carry her intelligence like a medal on her chest. You-- you have to pull it out of her.

But I think what you see is a very mainstream-thinking individual who has a warm personality, who has qualifications for the court. Now, when she wrote as an adviser to a President, she obviously provided advice that she thought was true and beneficial to that individual. Two thousand and five, I don't know exactly what Jon is referring to, but I will certainly find out. I have seen nothing that ought to cause anything other than her being confirmed.

BOB SCHIEFFER: Well, let me just ask you this, Senator Feinstein, because she, as an adviser to Bill Clinton wrote him a memo urging him to be against Partial-Birth Abortion, late-term abortions. I know you're for a woman's right to choose. Does that-- Is that a problem for you?

SENATOR DIANNE FEINSTEIN: Well, I have looked at that memo. As a matter of fact, I showed it to her when she came in to meet with me. And essentially, what there were, were two amendments--one by Senator Daschle and one by someone by the name of Dianne Feinstein.

And she advised the President that she thought the Daschle amendment was the one that the administration should support. It was a little bit tougher with respect to the definition of health of a woman. But it dealt with the health of a woman.

And those of us who are pro-choice believe that Roe v. Wade's admonition that the health and life of the mother must be taken into consideration is important. There are some that believe that health is too ambiguous and, therefore, you should not include it. I do not happen to be one of those people. So this memo essentially informed the President-- actually, the President happened to veto this Partial-Birth Abortion bill.

BOB SCHIEFFER: All right.

SENATOR DIANNE FEINSTEIN: And, as we know, subsequently, that all changed.

BOB SCHIEFFER: All right.

Senator Kyl, I want to ask you about something else. She wrote as-- as a law professor an article that said these whole confirmation hearings are vapid, hollow exchanges. Do you think

that people will take those words and try to make this something very different from her-- for her when they bring her before these hearings?

SENATOR JON KYL: They may try. But, in fact, I am sure that my colleagues will try. But she will probably double back on-- on what she wrote about and-- and make it exactly that by speaking in generalities and not being very specific about how she would decide cases.

And, frankly, to some extent I-- I think that's the way a nominee should answer questions. You should never answer a Senator's question about how you-- how you're going to decide a case because the case is not yet before you and you don't know all the facts and the law. And that's what-- what gets back to this question of lack of judicial experience. We just don't have any way really of judging whether she can lay her views aside and-- and decide cases just--

BOB SCHIEFFER (overlapping): Well--

SENATOR JON KYL: --based on the facts and law. But-- but I don't think the way to get at it is to try to force her to answer questions because I'm sure she won't.

BOB SCHIEFFER: Well, you know, the fact is, Senator Kyl, that Republicans didn't have much trouble with Harriet Miers' lack of judicial experience when she--

SENATOR JON KYL (overlapping): I beg to differ with you on that, Bob.

BOB SCHIEFFER: --was nominated by George-- by George Bush. Well, some of the (INDISTINCT) was what-- what position did you take on Harriet Miers? I don't know the answer to that.

SENATOR JON KYL: I-- well, we were all trying to be rather judicious about the nomination at the time but you will note that her nomination was withdrawn and there were reasons for that. Let's just put it that way.

BOB SCHIEFFER: All right.

Senator Feinstein, one other question. Pat Buchanan, who has to be described as one of the leading voices on the right, wrote a column last week in which he said that while people of the Jewish faith represent about two percent of the people in this country, the nomination of Elena Kagan means that they will have thirty-three percent of the seats on the Supreme Court, if she is nominated.

Do you think a person's religion should-- is an appropriate thing to talk about when you're considering a nominee? And-- and I would go beyond that. What are the things that she should be asked about and the things she should not be asked about?

SENATOR DIANNE FEINSTEIN: Well, the answer to your question is no. I really do not believe it makes that kind of a difference. Actually, if she is confirmed, three members will be of the Jewish faith and the remainder will be Catholic. Does that bother me? The answer is no. Each one of the Catholic justices are-- are very different in how they approach the law. And I don't believe it's necessarily related to their-- their religion. And I think that they are total people. The products of their learning, their backgrounds, their experiences in life and that's the way it should be.

BOB SCHIEFFER (overlapping): Let me--

SENATOR DIANNE FEINSTEIN: I--

BOB SCHIEFFER (overlapping): Okay. I'm--

SENATOR DIANNE FEINSTEIN: --I do--

BOB SCHIEFFER (overlapping): I'm sorry we're running out time. I just want to ask Senator Kyl one key question.

Do you think there is any chance that Republicans will try to filibuster this nomination if it comes to this, Senator?

SENATOR JON KYL: I don't think so, Bob. That-- the filibuster should be relegated to the extreme circumstances and I don't think Elena Kagan represents that.

BOB SCHIEFFER: All right. Well, I'm going to thank both of you for a very enlightening discussion.

Back in a minute.

SENATOR DIANNE FEINSTEIN: Thank you.

(ANNOUNCEMENTS)

BOB SCHIEFFER: And back now with our round table. Jeff Zeleny, who is the correspondent who writes about politics for The New York Times, and our CBS News chief legal correspondent Jan Greenberg.

Jan, what's this deal about the terrorism issue that Senator Kyl brought up?

JAN CRAWFORD (Chief Legal Correspondent): Well, the thing that I find so ironic about that he's singling that out but that's where she's really getting hammered by the left because they think she's too liberal on issues of war and terror. And, in fact, some of the briefs that she has written as solicitor general--where she's presenting the Obama administration's views on the war in terror--read a lot like what some of the Bush administration lawyers were writing. So that's not a charge that's going to stick with her. And that is why the left isn't doing cartwheels over her nomination. That is the specific issue that they're most upset about. They think she is too soft on the war on terror.

BOB SCHIEFFER: And, Jeff, you've been out, you were just down in Kentucky, I know, covering that race down there. This whole toxic atmosphere in this country that we have right now, it seems to me it's going to be very difficult for any Republican to vote for anything that Barack Obama proposes for fear of what the people to-- to that person's right on the Republican Party is going to think about it. This won't be an easy vote for any Republican.

JEFF ZELENY (New York Times): I think that's right. I mean every single proposal that this White House puts forward is scrutinized. And this is more important because it's lasting. It's permanent. And-- and this Supreme Court fight is coming at the same time that people are already questioning their government, government expansion. They're very concerned about

the-- the policies that have happened in the-- in the first, you know, a year and a half of this administration.

So the voters I talked to now are suddenly paying attention to the Supreme Court. They're coming to rallies with constitutions in their pockets. So I think we sort of are seeing merging of two narratives here that is going to make it very difficult for some Republicans to support her nomination. You know that said they're going to have to come up with something to oppose her. Otherwise, you know, it's hard to believe at this point that something would stand in her way.

BOB SCHIEFFER: I-- I-- I think probably the most significant thing that Jon Kyl said this morning was he did not think that the Republicans would filibuster.

JAN CRAWFORD: Absolutely not.

JEFF ZELENY: Absolutely.

JAN CRAWFORD: And they have been saying that from the beginning. I mean, she's-- I mean inherently qualified. She's widely viewed as a-- a dazzling intellectual scholar. Her record is thin. But listen, so was John Roberts'. I mean, he was only on that D.C. Court of Appeals two years. When Clarence Thomas went on the Supreme Court, he had only been on the D.C. Circuit a year. David Souter hadn't even written a federal appeals court opinion.

So, it's going to be awfully hard for them to start saying she doesn't have judicial experience when some of the other nominees hadn't had all that much and when they've been urging Presidents for the last couple of administrations to put someone on outside the judicial monastery.

But you know what Jeff was saying, I think this is why this nomination and these hearings are going to be so fascinating because all this messaging and all this that we are hearing now about Elena Kagan is all about a lot of it is going to be about November. So, already you're seeing them struggling over what narrative it's going to be.

The President got out-front on this, when he's really took a slam at the Supreme Court in the State of the Union address, criticizing that campaign finance ruling saying the Supreme Court, the conservative-dominated Supreme Court was out of touch with everyday Americans drowning out the voices of the ordinary people.

You're going to hear that a lot in these hearings from Democrats as they try to paint her as a DC insider who is out of touch. And then like Jeff is saying on the other side, you are going to see Republicans stepping back and saying, you know, we want the court out of our business and that's what Democrats are trying to do.

BOB SCHIEFFER: My sense of it, Jeff, and I would be interested to get your opinion, I-- I think probably in the end as she will be confirmed, simply because there are more Democrats than Republicans--

JEFF ZELENY (overlapping): Right.

BOB SCHIEFFER: --in the Senate. But I think this is going to get pretty nasty before it's over.

JEFF ZELENY: It seems like that. I think (sic) it-- right now Democrats-- it looks like they have enough votes, you know, certainly to confirm her, you're right so.

But I think it's possible that she may win, Democrats may win here in the hearing rooms but will Republicans win on this overall? This is one more reason to make the point, to amplify the point, why seats in the Senate matter.

This is one more sort of big pressing reasons that Republicans can say this is why we need more seats in the Senate, more seats on these committees. So, overall, Republicans may win the short term. It's hard to picture they wouldn't get her on the court.

BOB SCHIEFFER: Let's talk about what's going on out in the country, because some people are calling this Super Tuesday of 2010, because you have these primary races coming up. One of the more interesting ones is not far from here, up in Pennsylvania, where Arlen Specter, the Democrat-turned Republican now Democrat again, is running and being challenged in a Democratic primary by a Congressman Joe Sestak, who just last week released, a devastating, in my view, ad. This-- let's-- let's look at this.

(Excerpt from Arlen Specter's political ad)

SENATOR ARLEN SPECTER: My change in party will enable me to be re-elected.

MAN: For forty-five years, Arlen Specter has been a Republican politician.

PRESIDENT GEORGE W. BUSH: Arlen Specter is the right man for the United States Senate. I can count on this man--see, that's important. He is a firm ally.

MAN: But now--

SENATOR ARLEN SPECTER: My change in party will enable me to be re-elected.

MAN: Arlen Specter switched parties to save one job...his...not yours.

BOB SCHIEFFER: And I guess you could ask Mitt Romney about this, Jeff, but it seems to me in American politics, you sometimes can get one epiphany but sometimes it's pretty hard for voters to take two. I think Arlen Specter is in big trouble.

JEFF ZELENY: He is in big trouble. You can tell just by watching what he is doing in these final days. He has gone negative incredibly. But Democrats there, who I talked to say, you know "Why should they vote for him?" These are sort of the mid-term elections where it's the core Democrats who are coming out.

This ad picturing him with President Bush is the most devastating thing and everything in the ad is true. This isn't one of those, you know, throwing a false charge. Everything in the ad seems to be true. So, he is in trouble on Tuesday. And if he loses, this will be the second senior Senator in as many weeks, to lose their primary. It's a real indication of what's going on out there.

BOB SCHIEFFER: Jan--

(Jan Crawford laughing)

BOB SCHIEFFER: --this is not a ra-- this is not a year where it's an anti-Democratic year or an anti-Republican year. I mean, I think when Barak Obama ran, people were kind of sick of having Republicans in power for a long time. But this is kind of a lot of anti, a lot of things.

JAN CRAWFORD: Everything. I mean that's why you can't say it's like 1994. I mean this is bipartisan. This is a time when if you are a DC insider or if you have got experience, and especially Washington experience, it's an-- not an asset. I mean, it's going to really come back and hurt you and that's what we're seeing across the board whether it's Scott Brown winning in Massachusetts, Blanche Lincoln in trouble in Arkansas. You know, Arlen Specter now and that ad, I mean. That's-- seeing Bush, you know, in his full glory, I think the ironic thing about that ad is that there was huge disagreement in the Bush White House about whether he should go out and try to help Arlen Specter. And so, he had decided to anyway. Well, now, he is obviously hurting Arlen Specter. (LAUGHING)

BOB SCHIEFFER: I don't think we're going to see Barak Obama in Pennsylvania.

JEFF ZELENY: He's not going to Pennsylvania. I'm not sure how much it would help at this point. But I think Jan's point, this election raises a question of are there party bosses anymore? Shouldn't the White House political operation be able to take care of this? Shouldn't the Republicans be able to take care of their problems? This is not the year of the party bosses.

BOB SCHIEFFER: We have about thirty seconds. But quickly, the-- you were just back from Kentucky. How does that one look?

JEFF ZELENY: It's an interesting race down there. Senator Mitch McConnell, the Republican leader, his candidate in the race is really struggling against the mother of all Tea Party candidates, Rand Paul, son of Ron Paul. So that is definitely a race to watch on Tuesday.

BOB SCHIEFFER: And we've got that race that you mentioned down in Arkansas which is an another one to keep our eye on--

JEFF ZELENY: Right.

BOB SCHIEFFER: --an incumbent, Bran-- Blanche Lincoln, being challenged by a Democrat in the Democratic primary. I think right now that one is too close to call.

JEFF ZELENY: It seems to be.

BOB SCHIEFFER: Thanks to both of you. I'll be back in a moment with some final thoughts.

(ANNOUNCEMENTS)

BOB SCHIEFFER: Finally today, I was at the Lyndon B. Johnson Presidential Library in Austin, Texas, this weekend for the opening of an exhibit honoring Walter Cronkite.

The exhibit has it all. Those moments in American history captured by TV--the Kennedy assassination, the moon launch, the interviews with Presidents, when Walter always seemed to be there.

Plus, the little things we never saw--Walter's scripts, his pipe, and his office, just the way it was.

That the exhibit is at the LBJ Library to me is the perfect fit. Johnson liked and respected Walter; Walter liked and respected Johnson; and history will always link them.

When Walter returned from Vietnam and concluded in a documentary the war was "unwinnable," Johnson remarked to an aide, "If I've lost Cronkite, I've lost America." And so he had.

Touring the exhibit brought back many memories for me.

Johnson was the first politician I ever saw-- I was eleven years old and he was campaigning for the Senate in 1948. And Walter was the person I always wanted to be when I was a very young reporter--the person I am still trying to be, truth be told.

When Walter came out against the war, he did something he almost never did: he took sides, and I am going to do something I almost never do: offer a vacation tip. Visit the Johnson Library this summer--it's a fascinating experience, one of the best of the Presidential Libraries and the Cronkite exhibit makes it even better.

Back in a minute.

(ANNOUNCEMENTS)

BOB SCHIEFFER: And that's it for this week. We will see you next week, right here on FACE THE NATION.

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