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Senators test Kagan questions during Matheson confirmation hearing

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WASHINGTON — The confirmation hearing of 10th Circuit Court of Appeals nominee Scott Matheson Jr. morphed Thursday into a pre-battle test of weapons that senators may use in upcoming hearings on new Supreme Court nominee Elena Kagan.

Senators on the Judiciary Committee tested arguments on such issues as whether high-court nominees should have experience as a judge (neither Kagan nor Matheson does), and whether judges should be able to make laws or just interpret them (Matheson said laws should be interpreted).

In the end, senators of both parties generally praised Matheson's performance. "You're very impressive, sir," said Sen. Al Franken, D-Minn. The committee usually votes on nominations a few weeks after confirmation hearings.

Matheson, a University of Utah law professor (and former dean), former U.S. attorney for Utah and a former Democratic gubernatorial nominee, told senators that he worried an accident suffered before the hearing by his mother, former Utah first lady Norma Matheson, might have been a bad sign.

"She arrived in Washington last night, promptly slipped at the Metro and dislocated her finger," he said as he introduced her. "But she's OK. I just hope that wasn't an omen for the hearing." He then faced some questions that Kagan will likely see later from the same senators.

While eyeing some Republicans who are attacking Kagan for never having been a judge, Sen. Ben Cardin, D-Md., asked Matheson, who also has not been a judge, if that should be a qualification for appeals court judges.

Matheson said he had a wide breadth of other experience that is just as good, including being a U.S. attorney, a Salt Lake County prosecutor, a lawyer for a big private firm and a law school professor and dean.

"I think those experiences will serve as a substitute, I suppose, for serving as a judge," he said. Matheson added that serving as a judge "is very good and relevant experience, but it doesn't have to be the only experience leading into a position of this nature."

Sen. Orrin Hatch, R-Utah, tested an approach through which he could back some academics like Matheson who have not been a judge, but still attack other Obama nominees — including Kagan — for being nearly pure academics.

"Scott is not the first of President (Barack) Obama's nominees to come from the world of academia. Scott, however, has a greater variety of experience, including the real world practice of law, especially as service as a federal prosecutor," Hatch said.

Hatch has also said a major yardstick he will use to decide whether to back Kagan is whether she will legislate from the bench, or be bound by the law. So he asked Matheson his views in that area and found at least one Democrat who agrees with Hatch's stands.

Matheson said he agreed with a speech that Hatch gave to the Cato Institute last week, when he asserted that judges don't control the Constitution, the Constitution controls the judges.

"I believe in that principle, and it's one that I would take to the bench," Matheson said.

While some senators such as Hatch have feared Obama's statements that judges should have empathy for the poor, and the senators have worried that the president may seek judges who give too much deference to poor people, Cardin asked Matheson how he would treat the poor and other groups.

Matheson vowed to be impartial, to follow the rule of law and to keep an open mind as he hears cases.

The only truly tough questioning that Matheson faced came from Sen. Jon Kyl, R-Ariz., who did not like assertions Matheson made about President George W. Bush in a book he wrote about presidential decision-making when national security is threatened. The book suggests that Bush may have violated constitutional rights after 9/11 in seeking intelligence on terrorists.

"You're accusing them of not caring about the Constitution," Kyl said. "That's kind of a tough charge against people who tried very hard to be public servants." Kyl argued at length that Matheson's portrayals in his book about what is constitutional may be wrong.

Still, overall, Matheson found many friends on the committee who sang his praises.

Hatch called Matheson a "man of integrity, ability and dedication." He added he has "nothing but the highest opinion of him. He's a person who will distinguish himself on the court, as he has in every other endeavor of his life."

Sen. Russ Feingold, D-Wis., noted that he and Matheson were Rhodes scholars together at Oxford University. "I couldn't possibly recommend anybody more strongly," Feingold said.

He added that while he knows Matheson had been deeply involved in Utah politics as the son of a governor and brother of a congressman, "in my opinion, he was born to be a judge. Beyond his outstanding intellect and experience, his fair-mindedness and probity make him perfect for the role. Scott never hesitates to do the right thing, even when it is unpopular."

This story was reported from Salt Lake City.

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