

FROM SOLICITOR GENERAL TO THE SUPREME COURT: DECIPHERING THE
JUDICIAL PHILOSOPHY AND VOTING TENDENCIES OF ELENA KAGAN

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ABSTRACT

The purpose of this paper is to examine the judicial philosophy, voting tendencies, and potential impact of newly appointed Supreme Court Justice Elena Kagan. She is a woman who has revealed little about her personal views. Elena Kagan has a great potential to impact the Supreme Court and thus determining her judicial philosophy and voting tendencies is of great importance. Kagan has shown herself to be liberal; though, upon closer inspection, she exhibits conservative stances on some major issues of today, such as executive power and the First Amendment. Replacing Justice Stevens, she embodies some of the same characteristics and tendencies; yet, there are key areas in which they differ. Due to these differences it is clear that there is a great potential for Kagan to produce a shift on the Court. Known for her ability to bring people of different minds together, she is likely to perform in this capacity in her role as Associate Justice as well. This paper examines the impact Elena Kagan will have on the Supreme Court and evidence that supports this impact given her judicial philosophy and tendencies.

INTRODUCTION

William Howard Taft once said “Presidents come and go, but the Supreme Court goes on forever.” His statement reveals one of the utmost reasons that the judicial philosophies of United States Supreme Court nominees are so important and thoroughly analyzed. Lifetime appointments make the Supreme Court unique and help justices function without worry of being re-elected, allowing complete concentration on the cases at hand. The lifetime appointment requires a more intensive confirmation process, and thus, almost every aspect of a nominee’s life is scrutinized, both good and bad. Nominated to the Supreme Court nearly one year ago, Elena Kagan understands this process all too well. Known for her closely guarded nature, there is little information available regarding her judicial philosophy or views on current issues. She has also been reluctant to divulge much about her personal views; although, through a variety of sources and information brought forward, some light has been shed on her personal beliefs about the law. Kagan’s jurisprudential philosophy and style must be considered in the context of the modern Supreme Court’s social and legal roles, however, which is where this paper begins.

The Supreme Court is called the court of last resort for a logical reason. For many litigants it is their last hope or last resort to win their case. Although many Americans do not fully understand the Court’s important roles, the Court’s decisions affect everyone (Pendlebury, 2010). The Supreme Court is the only governing body that can determine if an action, statute or law is unconstitutional; through its holdings, the Court modernizes the meaning of the constitution, written over 200 years ago, making it a living, breathing document.

The United States Supreme Court was established by Article III of the Constitution although the Constitution does not specifically articulate the Court's powers, duties, or organization (U.S. Constitution, Article III). The Judiciary Act of 1789 was the first piece of legislation to provide a framework for the judicial branch (Ch. 20, 1 Stat. 73-93). Passed in 1789, the act provided for the division of the country into thirteen judicial districts which were then further organized into circuits that make up the circuit Courts today (Ch. 20, 1 Stat. 73-93). The act gave further organization to the Court by specifying the number of justices who would serve on the Court at a time, one chief justice and five associate justices (Ch. 20, 1 Stat. 73-93). The number of justices on the Court at any given time fluctuated greatly for a number of years, changing six times before finally arriving at nine total justices in 1869 (16 Stat 44). The Judiciary Act of 1789 also required the Court to meet in the nation's capital and twice a year hold Court in each of the 13 judicial districts, which were discontinued 101 years later (Ch. 20, 1 Stat. 73-93). The Judiciary Act of 1789 also created the U.S. Attorney General position and assigned nomination powers of the Court to the President with approval by the Senate (Ch. 20, 1 Stat. 73-93). Today the Supreme Court is revered as a very powerful branch of government and possibly the most powerful branch of government.

The Supreme Court is often spoken of in a collective sense; but it is at its most basic form a group of people working in conjunction to interpret the Constitution to the best of their ability and understanding. The Supreme Court is not comprised of one mind but rather nine, all working independently of one another with different backgrounds, understandings, and philosophies. Newly appointed and confirmed Supreme Court

Justice, Elena Kagan, is one of these nine minds and thus deciphering her judicial philosophy is essential to fully understanding today's Supreme Court.

ELENA KAGAN'S NEW COLLEAGUES

Elena Kagan's impact on the Court would be incomplete without understanding fully the views that her new colleagues hold as they could certainly have an impact on her decisions and views. Kastellac found, that a judge's decision is influenced by the other judges on the panel with them (Kastellac, 2009). These influences were termed panel effects (Kastellac, 2009). Kastellac has certainly not been the only one to speak of panel effects as Cross, for example, stated that panel effects were of enormous importance in determining the outcome of the case and the judge's vote (Cross, 2007). Panel effects have also been shown to be relevant in an array of cases from the environment to the Voting Rights Act (Revesz, 1997; Cox and Miles, 2008; Sunstein et al, 2004). The degree to which collegiality and panel effects are relevant in decisions made on the appellate level evokes some disagreement by scholars. Edwards, a leading scholar in the field, suggests collegiality has a much greater influence than many other scholars will acknowledge (Edwards, 2003). Others have stated that the influence of ideology and political leanings are crucial and more important than collegiality in decision making (Cross and Tiller, 1998; Revesz, 1997). Because of the impact of collegiality and panel effects, no matter the degree, learning more about Kagan's new colleagues is essential. The first of those colleagues is Associate Justice Sonia Sotomayor.

Associate Justice Sotomayor was appointed by President Obama after serving on the federal Courts for seventeen years (Nation, 2009). She is known for her pragmatic

centrist views, but does not have a specific interest in any civil rights campaign (Nation, 2009). Sotomayor has been criticized by some of the left for rendering seemingly conservative business decisions (Nation, 2009). She has proven to be a bold questioner who is straightforward and determined in her questioning of counselors before the Court (Dispute Resolution Journal, 2010). Sotomayor assuredly does not show any signs of a freshman justice, lacking the fear and apprehension of a new member.

Associate Justice Ruther Bader Ginsburg is the third female Justice currently sitting on the Supreme Court, serving in the capacity of Associate Justice since 1993 (Kay, 2004). Ginsburg was also the first female Jewish Justice appointed to the Supreme Court and the second woman ever appointed (Kay, 2004). One of Ginsburg's foremost passions is her work with the American Civil Liberties Union and women's rights issues (Campbell, 2002). Her passion for women's rights likely stems from an act of discrimination she experienced following her graduation from law school. Despite a superb recommendation from the dean of Harvard Law School, Ginsburg was refused an interview for a Supreme Court clerkship because she was a woman (E.A.A., 2010). With the highest rating by the American Bar Association, she was able to discredit those that felt she lacked the necessary qualifications simply because she was a woman (E.A.A., 2010).

The lone moderate on the Supreme Court, Associate Justice Anthony Kennedy, plays the crucial role of the deciding vote (Shapiro, 2009). Kennedy offers the deciding vote many times in cases that are previously tied with both the conservative and liberal blocs offering four votes each (Shapiro, 2009). Since O'Connor's departure from the Court in 2006, Kennedy has received colossal amounts of attention with respect to his

deciding vote status, most of which is undesired (Shapiro, 2009). When appointed, much uncertainty surrounded his views and a “lack of an identifiable ideology” (Williams, 1998). In many cases the most important question has become “what [does] Anthony Kennedy think?” (Verbruggen, 2011).

Scalia has been a consistent advocate of the Court’s right since his appointment in 1986 (Liptak, 2009). He frequently aligns himself with Justices Roberts, Alito, Thomas, and often Kennedy as the deciding vote (Mears, 2009). Scalia has been known for his method of Constitutional interpretation which involves the use of the plain meaning of the statute (Karkkainen, 1994). This approach centers on the ordinary understanding of the words in the statute and its structure (Karkkainen, 1994). His approach has not been fully accepted by his peers and has only appeared in concurring and dissenting opinions thus far (Karkkainen, 1994). Scalia’s plain meaning approach has been labeled as “new textualism” by Eskridge (Eskridge, 2006). Eskridge further states Scalia feels that looking at sources outside of the plain meaning of the text fosters opportunities for too much judicial discretion (Eskridge, 2006).

Nominated by President George H. W. Bush, Justice Clarence Thomas rose to the Supreme Court in 1991 (North Carolina Lawyers Weekly, 2007). Thomas has not been in the public eye very often like some of his colleagues (North Carolina Lawyers Weekly, 2007). He is firm in his conservative ways and joins with the other conservative Justices to form the majority in many decisions (North Carolina Lawyers Weekly, 2007).

The ascension to the judiciary was rather unique for Associate Justice Samuel Alito. Alito received a call from the White House following the failed nomination of

Harriet Miers by President Bush in 2005 (Coats, 2005). Because of Miers' failed nomination and the uproar it created, Alito's nomination process offered few surprises. Alito had fifteen years on the federal bench and a long paper trail filled with numerous opinions revealing his views (Coats, 2005). Alito has shown to be far-right in his views and consistently sides with Justices Thomas, Scalia, Roberts, and Kennedy (in the swing vote capacity), forming the conservative bloc (Shapiro, 2006).

Stephen Breyer is of the liberal camp and has been shown to embrace the living document approach to interpretation of the Constitution (Coats, 2005). Despite consistently voting with the left, Breyer does not fit any conventional model of a liberal (Caplan, 2010). With Stevens' retirement, he is now assuming the leadership role of the liberal justices (Caplan, 2010).

As President Bush's first Supreme Court nomination, now – Chief Justice John Roberts, was originally intended to replace retiring Justice Sandra Day O'Connor (Coats, 2005 and Nation, 2005). However, with the retirement of Chief Justice Rehnquist, he assumed the role of Chief Justice immediately without serving as Associate Justice (Coats, 2005). The immediate ascension to Chief Justice increased scrutiny of the Roberts nomination ten-fold (Nation, 2005). Roberts is a clear Republican and conservative with respect to religion and other controversial issues (Nation, 2005). Because of his views, Roberts votes consistently with members of the previously established conservative bloc (Nation, 2005).

ELENA KAGAN, A BIT OF HISTORY

Associate Justice Elena Kagan is the newest member of the Supreme Court and the fourth woman to serve in the Court's history. Kagan is a scholar, having spent the majority of her legal career in classrooms or in an education setting, highlighted by her time spent as the first female Dean of Harvard Law School. In her fourteen years in academia she published only nine articles, two of those being book reviews (Kyl, 2010). Those articles that she did publish were of two central topics, the First Amendment and executive power (Lipnak, 2010). While her well – regarded reputation as a legal scholar would be appreciated in most settings, it became a bone of contention for those in the Republican Party and the main focus of their attacks against her in the confirmation process.

Upon graduating from Harvard Law School, Elena Kagan applied for a clerkship in Justice Thurgood Marshall's office (Palazzolo, 2009). She remembers meeting with Marshall following her application and the difficulty in learning to understand his humor (Palazzo, 2009). Thurgood Marshall and Elena Kagan both served in the capacity of Solicitor General before moving up to the next vacant Supreme Court Justice position (Palazzolo, 2009). As the Solicitor General is often billed as the 10th Supreme Court Justice, this jump makes obvious sense (Markon, 2011). The only downfall of this jump is the need for recusal from certain cases on which the Solicitor General's office has participated (Jeffrey, 2011). At times the number of these cases can be voluminous and so it will seem as though the new justice is not hearing a large number of cases, yet that is simply due to compromising the case. Kagan's personal and professional connection with Marshall was so meaningful to her that she chose his portrait to hang in her office as

Solicitor General (Palazzolo, 2009). Her deep connection with Marshall provides some insight into her legal views but the comparison of Kagan's judicial philosophy with Marshall's would be an absurd practice (Savage, 2010). They are two separate individuals who possess different views of the legal world (Savage, 2010).

A justice's background offers additional insight into her views. Although, background should not be the only thing taken into account because experts say that it is difficult to solely rely on background to determine views (Kim, 2010). Kagan's background and résumé certainly provide small insights into her views. At the most fundamental level, Kagan leans left but not to the extreme left (Kim, 2010). Several events in her history have yielded this view and these views will be examined in greater depth later in this paper. It is not surprising that Kagan was nominated as her liberal tendencies match that of her nominator, President Obama.

But beyond a general favoring of "liberal" causes and perspectives, Kagan has been elusive concerning her views on controversial legal issues, thus causing much discussion and debate during her confirmation hearings. Even legal scholars are so unsure of her opinions that the question as to what she actually believes has been repeatedly asked (Totenberg, 2010). Her Harvard colleagues are likewise unsure of her personal views, despite having worked alongside her for a number of years (Totenberg, 2010). Due to her lack of disclosure, attempts to understand her views have resorted to analyzing her background and scholarly writings. Although these methods are not ideal, they can provide some insight but it is a very tedious and uncertain process (Kim, 2010). By using scholarly writings, one is able to predict how the nominee will act as a justice through the use of their analytical technique (Kim, 2010).

THE SENATE CONFIRMATION PROCESS

Before undertaking a specific analysis of Kagan's likely jurisprudential philosophy, the nomination and confirmation processes for a Supreme Court justice must first be explained. The sculpting of a Supreme Court Justice begins with the nomination process.

The Senate Committee on the Judiciary is an esteemed panel of members of the United States Senate, who are responsible for vetting the President's nominations for the federal judiciary. These nominations can range from federal judgeships to Supreme Court Justices or other non-judge positions that are held on the national level such as Attorney General. The Committee on the Judiciary was established in 1816 as one of the first standing committees in the United States Senate and is one of the most powerful committees in the United States Congress (Wermiel, 1993). Much of the power of the Senate Committee on the Judiciary comes from its jurisdiction. Jurisdiction, in the legal world, is a term that relates to the authority that is granted to a governing body over certain processes, procedures, and areas (Wermiel, 1993). The jurisdiction of the Senate Committee on the Judiciary is one of the most broad in the legislature and hence the great influence and power of this standing committee (Wermiel, 1993). The committee performs one of the most fundamental forms of checks and balances by regulating many decisions made on the executive level. In addition, all nominations for the federal judiciary must first begin with a confirmation hearing in the Senate Committee on the Judiciary (Wermiel, 1993). This confirmation hearing occurs in the initial stages of the confirmation process after the nomination for a federal judgeship has been made by the sitting President. Beginning in 1868, the Senate began to delegate all nominations to the

correct standing committee and since that time the Committee on the Judiciary has assumed the pivotal role it currently holds (Wermiel, 1993). The Committee on the Judiciary has even begun to expand its influence, as it now considers not only nominations for the federal judiciary, but those for positions within the Department of Justice, such as Director of the FBI and the Attorney General.

Presumably, one of the most important roles of the U.S. Senate Committee on the Judiciary is the nomination of people to the United States Supreme Court. The reason for the importance placed on these nominations relies on one simple component of the job description of a Supreme Court Justice, a life term. The implications of a poor decision for the appointment of a Justice are amplified ten-fold when the appointment is for life. Therefore, Supreme Court appointments are carefully thought out and highly debated.

The nomination process for a Supreme Court Justice; however, does not begin with the Senate Committee on the Judiciary. A new nomination begins with the announcement of retirement or death of a current justice (Szmer and Songer, 2005). Following that announcement, rumors immediately begin to swirl as to their replacement and the media infused process begins once again. The nominee for the Supreme Court is chosen by the President, who takes into account many factors before making his ultimate choice (Szmer and Songer, 2005). Two important factors in regards to the presidential nomination are the political ideology of the nominee and the relative ease with which the nominee will be confirmed by the Senate (Szmer and Songer, 2005). Occasionally, presidents are surprised when, on the bench, the justices they nominated do not conform with ideological expectations---as in the case of Justice Souter, for example, generally,

the nominee's political views will be aligned with the nominating President (Szmer and Songer, 2005). Ultimately, the nomination of a Supreme Court Justice is one unyielding mark that a President can make on the judiciary and so it would be illogical to nominate one who was not in political agreement.

The intensive confirmation process would be a waste of the time of everyone involved if there are thoughts that the nominee would most likely be rejected. A nominee that fails to be confirmed by the required majority vote in the Senate is a major downfall for any President. Ronald Reagan experienced this first hand in his nomination of Robert H. Bork (Greenhouse, 1987). Bork's nomination was one of the "fiercest battles ever waged" and ended in defeat for President Reagan (Greenhouse, 1987). The Senate's rejection of Bork was by the largest margin ever and only spurred President Reagan in his quest to find another nominee with the same beliefs (Greenhouse, 1987). In the simplest of terms, a Supreme Court nominee is a person whom has a law degree, substantial legal experience, aligns themselves with the sitting President's political thoughts, and will most likely be confirmed in the Senate.

ELENA KAGAN'S EXPERIENCE WITH CONFIRMATION HEARINGS

Elena Kagan has been party to three confirmation hearings by the U.S. Senate Committee on the Judiciary, a few considering her young status in the federal judiciary realm. By her third, the hearing for her Supreme Court nomination, she was a seasoned professional, perhaps one of the reasons behind Senator Leahy, chairman of the Committee on the Judiciary's comment, "I've been involved in hearings either as a member or conducting them for 35 years of various judicial nominees. I can't remember

anybody who's been asked such a wide variety of questions or answered them as forthrightly as you have (Confirmation Hearing, June 29).” Her first interaction with the Committee on the Judiciary was in 1999 when she was nominated for the D.C. Circuit of the Federal Appeals Court by then-President Bill Clinton but she was not confirmed because the Senate did not act on her nomination, as they were a Republican – led Senate (Newsmax, 2010). Kagan further stated that her nomination was “the greatest honor of her life,” although she was unaware that an even greater nomination would be in her near future (Newsmax, 2010).

Elena Kagan’s second experience with the Senate Committee on the Judiciary occurred in 2009 following her nomination by President Obama to the role of Solicitor General. She was the first woman to hold the role of Solicitor General and her nomination for the role was somewhat contested because of her lack of experience (Confirmation Hearing, June 29). Before assuming the role of Solicitor General, the majority of Kagan’s experience was outside of the courtroom and it was even noted that she had not argued a case on her own in a courtroom before that point (Totenberg, 2009). She assured the senators who were skeptical that her lack of experience that they need not be worried but not all of the senators were convinced by her argument. In particular, Senators Colburn and Kyl stated that they would not want a surgeon who had so little hands-on experience performing surgery on them (Totenberg, 2009). Her focus was primarily on the world of academia and policy, as she served as the assistant policy counsel for Clinton during his administration (Newsmax, 2010). During this time Kagan also served as a professor at both University of Chicago and Harvard Law Schools, where she earned her reputation as a thoughtful legal scholar.

Kagan's third and final experience with the Committee on the Judiciary was perhaps the most significant as the reason for her appearance was the most prestigious of her legal career. Her third interaction with the Committee was the most rigorous as well; however, since her previous experience with the committee had been little more than a year earlier she was familiar with the process. Senator Patrick Leahy, Chairman of the U.S. Senate Committee on the Judiciary even praised Kagan for the depth of her answers and stated that he had been present for all three of her Senate Confirmation Hearings, and that almost certainly this would be her last (Confirmation Hearing, June 30). Perhaps one of the most poignant quotes concerning Senate Confirmation Hearings for the Supreme Court comes from Chair Leahy, "I expect that you and I will not always agree. I do not agree with every decision that Justice Stevens has written, or Justice O'Connor, or Justice Souter. But I have such a great respect for their judgment" (Confirmation Hearing, June 30) Leahy goes on to state that each of those three justices were nominated by Republican presidents and he voted for them despite his Democratic tendencies, but he has never once regretted it (Confirmation Hearing, June 30).

In Kagan's confirmation hearing for Supreme Court Justice, the main concern from the Republican Party centered on her lack of experience in a courtroom (RPC, 2010). This concern was voiced in her previous confirmation hearing for Solicitor General and was voiced once again a year later. Upon assuming the role of Solicitor General she had not even argued a case before any court (Totenberg, 2010). The Republican Policy Committee revealed this concern and continued to use this to focus their attack (RPC, 2010). They went on to state that those justices that had no previous judicial experience had extensive practice experience, averaging 21 years before their

appointment to the Court (RPC, 2010). In her Solicitor General confirmation hearing she showed little concern about her lack of experience in the court room and stated that she would bring her time spent immersed in the learning and study of the law to the position (Totenberg, 2010). Kagan's background in academia is one of her most valued strengths and her love of the law is something to be admired. In an effort to put to rest the debate about her lack of experience, Associate Justice Scalia stated in the *Washington Post* that her lack of experience should in no way bar her from becoming one of his colleagues (Barnes, 2010). Perhaps the most thought provoking statement in the article surrounded Scalia's retrospective looking back at his own nomination in 1986. Scalia stated that when he assumed his current role nearly 25 years ago, three of the sitting Justices had also had no experience as a judge (Barnes, 2010). He further went on to say that Kagan's lack of time spent on the bench would actually be a good thing because it would bring a fresh perspective to the Court (Barnes, 2010).

Despite her numerous interactions with Senate Confirmation Hearings, or perhaps because of those numerous interactions, Kagan has expressed her views about confirmation hearings. Particularly in a 1995 article, brought up in her confirmation hearings, Kagan characterized the confirmation hearings of her predecessors as a show that is put on and choreographed (Kagan, 1995). Kagan further states that Ginsburg, Breyer, Kennedy, and Souter would not reveal any views on controversial issues and their non-answers were met with acceptance and humor during the hearings (Kagan, 1995). This attitude towards confirmation hearings creates a lack of seriousness and substance (Kagan, 1995). Aside from her vehement opposition to the acceptance of non-answers, during her own confirmation hearings, Kagan practiced a similar form of

providing limited answers and refusing to reveal any of her personal views or passions (Confirmation Hearing, June 29).

JUDICIAL DECISION-MAKING AND JUDICIAL PHILOSOPHY

The study of judicial decision making, although relatively young in the world of legal scholarship, is rooted in the legal realist movement of the early 1900s (Lammon, 2009). Legal realists argue that precedent and statutes are not the only components behind a legal decision but rather other external components are involved (Lammon, 2009). These external factors are examined by both political science and legal scholars, each looking at how cases are decided differently (Lammon, 2009). Empirical studies of judicial behavior attempt to model judicial decision-making to understand better what factors actually determined judges' votes (Lammon, 2009). The attitudinal model of judicial decision-making posits that a judge's ideology is the determining factor in their decision making process (Lammon, 2009). This attitudinal model has become the central tenet of judicial decision-making and is thought of as the prevailing model (Lammon, 2009).

Judicial decision-making models can be applied to any level of the court, not just the Supreme Court. The basics of judicial decision-making are at the heart the same no matter the level. Despite the Supreme Court's elevated status and prestige, the same basic models apply to decisions made in the Supreme Court building as decisions made in an ordinary municipal court (Edwards, 2003). Striking similarities exist between an elected municipal court judge and an appointed Supreme Court Justice. Both assume the role of interpreter of the law; and yet both are aligned with a political party which in

some way influences their ideology, further providing evidence for the esteemed role of the attitudinal model in judicial scholarship (Edwards, 2003 and Lammon, 2009).

Despite the likeness, there are several factors that make Supreme Court decision-making unique in comparison with other forms of judicial decision-making. The lifetime appointment of a justice affects the decisions made by a Supreme Court Justice because they are isolated from the outside world and are not required to be reelected. The decisions made on the Supreme Court also require more attention and certainty, as once a case reaches the Supreme Court it is of great significance and in the public spotlight, with influence to be felt for years to come.

Ultimately, the attitudinal model concludes that judges decide cases on their political values and feelings (Lammon, 2009). These values and feelings have been shortened most recently to one term, ideology (Lammon, 2009). Because ideology is a relatively new term in the scholarship, it has no concrete definition or universal explanation (Lammon, 2009). It is understandably difficult to quantify ideology; yet, if one is able to quantify it then a relationship between the ideology of a judge and the ideology of their vote can be determined (Lammon, 2009). Furthermore, if this relationship exists then it gives support to the attitudinal model, further proving its existence (Lammon, 2009). Much evidence has been found to support this relationship, including the appointment of judges by U.S. Presidents. Though it may seem predictable, this evidence shows judges appointed by Democratic presidents tend to be more liberal than their counterparts appointed by Republican presidents (Lammon, 2009). Many would first look to the more controversial topics of interest; nonetheless, this relationship

has been found to exist in both controversial and noncontroversial topics of interest (Lammon, 2009).

A second model of judicial decision-making is the strategic model. This model does not necessarily apply to Supreme Court decision-making. The strategic model provides that judges decide based on the possibility that their decision could be reversed by a higher Court or legislature and therefore act strategically (Lammon, 2009). Since the Supreme Court is the highest court in the United States this component of the strategic model, does not apply to the Supreme Court. However, the notion that the legislature could reverse or even overturn a ruling by the Supreme Court could most certainly cause a justice to act in a strategic manner. There is the idea that a decision handed down by the Supreme Court could be overturned by a future Supreme Court, but this idea would have little validity or weight in the mind of a justice because when the ruling was overturned they would be no longer on the Court due to retirement or death. Their lifetime appointment would make it so that they would always be able to voice their opinion on the decision if the decision were to be retried or overturned during their tenure on the high Court.

While the attitudinal model is the prevailing model in the field of judicial scholarship and the strategic model is useful in determining motivation of some lower court judges, Elena Kagan is more likely to conform to a third model, the legal model of decision-making. Several pieces of evidence support this contention. First, when asked about her passions in the legal world Kagan stated that the “rule of law” was her passion (Confirmation hearing, June 29). This statement is best understood when taking into account another statement she made on that same day. Kagan was asked if she felt that a

method purported by the President in which 95% of a case was decided by the law and the last 5% was heart was accurate, she passionately disagreed (Confirmation hearing, June 29). She stated that this is incorrect and that a decision was made with the “law all the way down” (Confirmation hearing, June 29). This sole utilization of the law in her decision making reveals that she will adhere to the legal model and not the attitudinal or strategic models. Second, Kagan has promoted a clear separation between any personal views and decisions made on the Court (Confirmation hearing, June 29). She states that judging is about the case that comes before the Justice and how the law applies to their case but not at all about how personal or political views are involved in the case (Confirmation Hearing, June 29). This statement made during her confirmation hearing is an obvious rejection of the attitudinal model of judicial decision-making. In her view, there should be no personal influence brought into the case and only what the statute says should matter (Confirmation hearing, June 29). In Kagan’s words, “the question is always what the law says” (Confirmation hearing, June 29). Based on the abovementioned pieces of evidence, Kagan’s adherence to the legal model is apparent.

However, the legal model does not provide that all judges will interpret the law in the same manner (Lammon, 2009). Two judges could both adhere to the legal model and yet interpret a statute differently, highlighting the importance of the next topics, judicial philosophy and methods of constitutional interpretation.

In the interpretation of the Constitution there are two views that prevail. The originalist view is one in which the only satisfactory approach is to apply the text and original meaning of the Constitution (Meese, 1988). The activist view, on the other hand, has been privy to numerous definitions. Definitions have been offered from deciding a

case contrary to the original meaning in order to promote political views to simply interpreting the constitution as a living, breathing document (Roosevelt, 2006). Elena Kagan was criticized as being an activist during her Senate Confirmation hearing (Confirmation hearing, June 29). During those same hearings, she stated that the Constitution can be updated with and applied to current circumstances to be relevant to present day (Confirmation hearing, June 29). This shows an activist view towards interpretation; yet, it is not as extreme as many other activist views (Roosevelt, 2006). This is the most centered of the activist views. Despite showing some activist tendencies, Kagan also revealed some originalist outlooks. She agreed that the only true way to change the constitution is to amend it (Confirmation hearing, June 29). Kagan assuredly is not of the more extreme camp of activists, proven by her “law all the way down” statement. It is clear that Kagan, while activist, is of the moderate camp of activists because of her conservative tendencies.

As the Supreme Court is an appellate court, there is yet another unique piece of the jurisprudential puzzle to consider. Recently, research in judicial voting behavior on appellate courts has changed from looking at each judge’s voting independently to include all of the judges on the appellate panel (Kastellec, 2009). This method is known as the contextual approach, taking into account the composition of the appellate panel and its effect on the individual judicial decisions. These appellate panels of three judges are similar to the Supreme Court, just a smaller version, and therefore this approach could most certainly apply to the Supreme Court.

ELENA KAGAN'S JUDICIAL PHILOSOPHY

With a lack of judicial history and very few writings on which to assess her judicial philosophy, one must turn to other means in order to determine her views. One of the methods that has been supported in like instances, is to look at the philosophies of the nominee's judicial role models (Kyl, 2010). Elena Kagan has stated on several occasions her admiration for Justice Barak, the long time chief justice of Israel (Kyl, 2010). Her admiration of Justice Barak became an extreme cause for concern for Republicans, because of Barak's extremely activist views and this concern was certainly expressed in her confirmation hearing (Confirmation hearing, June 29 and Kyl, 2010). Although Kagan has called Justice Barak her "judicial hero," she stated that his judicial philosophy is not the reason he is her judicial hero but rather his creating of an independent judiciary in Israel, a country that is near to her heart because of her Jewish heritage (Confirmation hearing, June 29). Kagan further asserted that Barak's thoughts that a judge should have a role in the legislative realm is certainly not accurate for the United States (Confirmation hearing, June 29). She explicitly states that her "admiration for Justice Barak comes from his important role of the state of Israel in ensuring an independent judiciary and most fundamentally in ensuring that Israel is this strong rule of law nation" (Confirmation hearing, June 29).

Despite the lack of definite views and leanings from Kagan, she has given some insight into her basic theories of judging and how she will assume the role of a Supreme Court Justice. She has been cautious to avoid revealing distinct views and would not share her personal views in almost every instance. Kagan further went on to state numerous times that she would not "grade" or "judge" any decision or characterize the

current Court in any way (Confirmation hearing, June 29). Even when evoking some emotion by speaking about her father's passions as a lawyer, she would not divulge her passions (Confirmation hearing, June 29). Kagan seems to feel that revealing her passions would make it seem as though she would be more interested to decide on those cases as opposed to others. This would go against one of the other views she has about the Court being a place where everyone can have their say and being an even playing field for all (Confirmation hearing, June 29). Kagan also states that she is open to being persuaded on almost every issue and is more than willing to be proven wrong if the argument is sound (Confirmation hearing, June 29). This directly correlates with her willingness to follow the law even if she does not personally agree with it, an issue that was brought up by several Senators during her Confirmation hearing (Confirmation hearing, June 29). This is a key attribute of a Supreme Court Justice because there will certainly be cases that will come before the Court, of which some of the Justices will not agree personally with the law but which the law must be followed.

One phrase that is repeated constantly throughout her testimony is "rule of law" showing that this phrase is of great importance to both her and her judicial philosophy. Kagan stated that "safeguarding the rule of law" is crucial and perhaps the most important thing to her (Confirmation hearing, June 29). Without the rule of law there is not any protection of rights and essentially a collapse of the legal system, eliminating its main purpose.

When Kagan was questioned about her political views, she acknowledged that she has been a Democrat for the entirety of her life. She further acknowledged that her political views are progressive and implied that her political views would in no way

impact her judicial philosophy (Confirmation hearing, June 29). When asked if she agreed with the president's view of judging, the 'empathy' standard, that most of the case is decided by precedent and the last bit must come from the judge's heart, she disagreed strongly (Kyl, 2010). Kagan stated that the judge's heart should not be a factor in their decision-making further enforcing her adherence to the legal model of decision – making (Confirmation hearing, June 29).

KAGAN'S VIEWS ON SPECIFIC ISSUES

Although many of Kagan's judicial views are still held close to her chest, throughout the course of her confirmation hearing she has given some indication as to her thoughts on certain issues. Her Supreme Court Senate Confirmation hearing offered some excellent evidence of her judicial philosophy and how she would decide on certain cases, answering the popular question, "What kind of justice will you be?"

One issue which was discussed at length in the confirmation hearings was the Second Amendment and the right to bear firearms. In a memo, written during Kagan's time as a clerk to Justice Thurgood Marshall, she provided what some thought to be her view on the Second Amendment. She stated the "Petitioner's sole contention is that the District of Columbia's firearms statutes violate his constitutional right to keep and bear arms. I am not sympathetic." (E. Kagan, personal communication). It would seem that she was not an advocate of Second Amendment rights and would not be as willing to protect those rights in the instance that they were challenged. On June 29, 2010, during the second day of her Senate Confirmation hearing, she disproved this notion. She stated that when she wrote this memo and recommended to deny certiorari in that case it "was

20 years before Heller. The state of the law was very different.” (Confirmation hearing, June 29). Kagan further goes on to state that when she wrote the memo nearly 20 years prior, “no Court had held that the Second Amendment protected an individual right.” (Confirmation hearing, June 29). In accordance with her earlier thoughts on adherence to precedent, it logically follows that she wrote the above memo because being “not sympathetic” was what precedent yielded. This is made clear in her discourse with Senator Grassley of Iowa, when she discusses that the situation would have been different had Heller existed at the time of her memo (Confirmation hearing, June 29).

To understand Elena Kagan’s views on the Second Amendment, one must also understand the Heller case as it is often referenced throughout her hearing. *District of Columbia v. Heller* was a milestone case that provided that the right to bear arms was protected on an individual level, something that had not been protected before by any court (554 U.S. 570 (2008)). The decision fell short by not addressing whether or not that protection extended to the state level. This shortcoming was remedied only two years later in *McDonald v. Chicago*, providing that the protection extended to the state level (561 U.S. ___, 130 S.Ct. 3020 (2010)). The decision in the McDonald case was handed down on June 28, 2010, the first day of Kagan’s confirmation hearing.

In her discourse with both Senators Grassley and Feinstein, Kagan assured them both that she would apply Heller in all future cases, as she believes that it is the correct law going forward (Confirmation hearing, June 29). Senator Grassley, as well as many other Senators, asked for her personal beliefs but she has yielded little room on her closely guarded beliefs. Senator Grassley asked outright for her belief on whether or not the Second Amendment includes an individual right as well as a collective right but her

answer was far from a direct response (Confirmation hearing, June 29). The closest thing to an answer she gave was that she would apply *Heller* and *McDonald* fully as the Court's analysis was proper and that she does not believe that it was incorrect in any manner (Confirmation hearing, June 29). While she did not provide a direct answer when questioned about her personal views, it is clear that in her choice to apply the "good precedent" set forward by *Heller* fully that she does support the Second Amendment as an individual right.

The use of foreign law as an example to fill in the gaps of unexplored legal issues is another issue which was discussed at length in Elena Kagan's confirmation hearing. Again, Senator Grassley participated in dialogue with Kagan concerning this matter. The use of foreign law in judicial decision-making in the United States is a topic that has also been debated, most notably by Associate Justices Breyer and Scalia (Debate at American University, 2005). Within the debate there is a distinction that must be made in order to more fully understand the role of foreign law. This distinction centers on precedential use of foreign law, which is the source of the debate. In Kagan's view, she is in agreement with the use of foreign law to spur ideas and different approaches, but she does not feel that foreign law should have any "independent precedential weight" except in extremely rare cases (Confirmation hearing, June 29). She provided an example of these circumstances in her testimony, referring to a brief concerning the immunity of foreign officials and the actions taken by other countries (Confirmation hearing, June 29).

Yet another event of importance occurred during her time at Harvard and revealed her stance about one of the most controversial issues today. Kagan joined with other professors of law at Harvard to sign an amicus brief in *Rumsfeld V. FAIR* in 2005 (547

U.S. 47). *Rumsfeld v. FAIR* surrounded the Solomon Amendment and the U.S. military's "Don't Ask, Don't Tell" policy. The Solomon Amendment states that federal funds will be denied if a university prevents military recruiting or ROTC recruiting on their campus (10 U.S.C. § 983). Kagan's problem with the Solomon Amendment was that it allowed unprecedented access to recruiting on the Harvard Law campus bypassing the non-discrimination laws that Harvard had put forth decades ago (547 U.S. 47). Harvard Law School, itself, did not receive any of the funds that would be barred if it did not comply with the amendment; however, about 15% of the funding for Harvard's other schools would be taken away if they failed to comply with the amendment (E. Kagan Personal Communication). The amicus brief filed by law professors at Harvard stated that their objection was in no way concentrated on military recruiters but rather that it was the recruiters who were not following the non-discrimination policy (547 U.S. 47). This case quickly became very popular and was immediately forced into the media spotlight because of the involvement of the military. The case was even elevated to the Supreme Court; however, Chief Justice Roberts stated that schools could not simply comply with the Solomon Amendment by denying access to all recruiters who do not meet their compliance requirements (547 U.S. 47). Ultimately, upon the Supreme Court's decision, ironically that of her future colleagues, Kagan was forced to allow military recruiters on campus despite their discrimination policies or face losing federal funding (E. Kagan, personal communication).

Despite not prevailing, this event reveals great insight into Kagan's views on gay rights. Her fierce opposition was not only a product of the Harvard Law School policies but also her own personal policies. She certainly leans liberal in reference to gay rights

as evidenced by many of her statements during the course of *Rumsfeld v. FAIR*. Kagan stated that she “abhor(s) the military’s discriminatory recruitment policy” and sees it as “a profound wrong (and) a moral injustice of the first order” (E. Kagan, personal communication). She further states that the military’s policy “causes me deep distress,” showing her support for equal opportunity for all regardless of sexual orientation (E. Kagan, personal communication). She states in multiple emails to the Harvard Law School community that the military’s policy is immensely wrong and “both unwise and unjust,” (E. Kagan, personal communication).

Although elusive in her views, Kagan has been seemingly upfront about several key issues, mostly from her time spent in the White House. Perhaps one of the more controversial issues, abortion has been a topic that she voiced her opinion on during her time working for the Clinton Administration. She advised then-President Clinton to take a middle of the road approach with the hotly contested abortion issue (E. Kagan, personal communication). To the casual observer it would seem that her work with the Clinton Administration would be an accurate representation of her judicial views, yet according to statements at her confirmation hearing this is not the case (Confirmation Hearing, June 29). In the second day of her confirmation hearing, she stated that during her tenure at the White House she was working to advance the policies and views of President Clinton and not her own views (Confirmation Hearing, June 29). Kagan further went on to state that nothing that she did while working in the White House for Clinton has much influence on what she would do as a judge (Confirmation Hearing, June 29). In a general application of how she would deal with abortion regulation, Kagan stated that a woman’s

life and health must be protected in any abortion regulation that would be implemented (Confirmation Hearing, June 29).

The power of the executive is another issue which is of vast importance. When asked about presidential power during times of war and the scope of the President's power, Kagan referred to *Hamdi v. Rumsfeld* (Confirmation Hearing, June 29). She stated that Hamdi addressed the Presidential power to detain American citizens without trial only if they were captured in the battlefield (Confirmation hearing, June 29). As for those that are not captured on the battlefield, the question has not been answered as of yet. The scope of the Presidential power is the true issue and it is derived from the Authorized Use of Military Force Act, passed by Congress not long after the September 11th attacks (Confirmation Hearing, June 29). Kagan stated that this Executive power is not expressly granted in Article II of the Constitution with the enumeration of the President's other powers, but is solely derived from the AUMF (Confirmation Hearing, June 29). As for determining the power to detain those captured in places other than the battlefield, Kagan suggests the three-prong test that is presented in *Youngstown Sheet and Tube Co v. Sawyer* (Confirmation Hearing, June 29). This three-prong test was crafted in Justice Jackson's opinion on the Youngstown case and created a precedential analysis used for the President's interactions with Congress (343 U.S. 579 (1952)). Jackson's test divided the President's authority with respect to Congress in three distinct types: (1) when the President is acting in accordance with Congress's wishes, (2) when Congress has said nothing about the issue thus far, and (3) when the President is explicitly defying Congressional orders (Jackson's opinion (343 U.S. 579 (1952))). Kagan stated that this analysis would be used to determine Executive power in the above situation. In the

simplest terms, if the President is told by Congress that he cannot do something, he cannot do something (Confirmation Hearing, June 29).

The First Amendment, with respect to Congress and federal officials, has also been a topic on which Kagan has seemingly offered some inclinations of her views. She stated that the First Amendment certainly limits the actions of public officials and that political speech is at the core of the First Amendment (Confirmation Hearing, June 29). *Citizens United v. Federal Elections Commission* was a case that was brought up often during her confirmation hearings and centers on the First Amendment. The thoughts and memos about *Citizens United* were a position argued by the government and the Solicitor General's office and not Kagan's. She was simply defending the government's position as an advocate, and not as her own personal judicial views (Confirmation Hearing, June 29).

The question of when it is appropriate for the Court to overturn the decision of a federal agency is a topic on which Elena Kagan has written and one on which she has expressed her views. She states when there exists ambiguity in a statute, deference is given to the federal agency instead of the Supreme Court (Confirmation Hearing, June 29). This deference is because of a piece of legislation known as the Chevron Doctrine. It is more logical, in Kagan's opinion, for deference to be given to the agency because they are more competent in the area (Confirmation hearing, June 29). The agency is politically accountable, something that the Supreme Court is not, and the agency also possesses the expertise in the given area which the Supreme Court does not (Confirmation Hearing, June 29). Kagan feels this is also an example of the Supreme Court practicing self-limiting of its powers and that the Court should be limited in its

powers (Confirmation Hearing, June 29). Although the Supreme Court is known as the supreme law of the land, it does not have the expertise that many federal agencies do and thus deferral in many decisions is a logical choice.

While there were a few indications of Kagan's views on several issues during her confirmation hearing, her scholarship proves to reveal more about her views. During her first few years as a professor, most of her scholarship was in the area of the First Amendment (Liptak, 2010). Although touted as a liberal in most instances, Kagan's views seem to more closely resemble those of her conservative colleagues than her liberal colleagues (Liptak, 2010). According to Sullivan, Kagan's articles on free speech show that she is more likely to agree with Justices Scalia, Kennedy, and Thomas (Sullivan, 2010). Further evidence is available that she is likely to be at odds with Justice Stevens on First Amendment cases. In *Private Speech, Public Purpose*, one of Kagan's First Amendment articles, she states that the government is not allowed to limit speech because it has been deemed offensive by other citizens (Kagan, 1996). This is in direct opposition to Justice Stevens' views on free speech that are expressed by his majority opinion in *Federal Communications Commission v. Pacifica Foundation* (491 U.S. 397 (1989)). In the case, George Carlin's "Filthy Words" was heard by a young boy and his father sued the radio station on grounds of obscenity (491 U.S. 397 (1989)). The government ruled in a 5-4 vote, with Stevens writing the majority, that the remarks were not obscene but rather simply indecent (491 U.S. 397 (1989)). Justice Stevens' majority opinion is diametrically opposed to Kagan's views presented in her writing and shows that she is more closely tied with the conservative counterparts on this issue. In *Private Speech, Public Purpose*, Kagan furthers her conservative tendencies in regards to the

First Amendment with her discourse about *Texas v. Johnson*, the flag burning case (Kagan, 1996). Kagan states that the Court made the proper decision invalidating the statute by striking down the ban on burning flags (Kagan, 1996). As Justice Stevens wrote the dissent in this case, this is yet another example of their dissimilarities in view on the First Amendment (491 U.S. 397 (1989)). Justice Scalia was also the author of the majority opinion for *Texas v. Johnson* showing Kagan's siding with conservatives again (438 U.S. 726 (1978)). As Kagan's and Stevens' views differ on the First Amendment, this is a potential area in which she will impact or shift the Court.

ELENA KAGAN'S IMPACT ON THE COURT

It would be difficult to determine and correctly assess Elena Kagan's impact on the Court without looking to the Justice she is replacing. Therefore, one must examine the role of the Justice she is replacing, Justice John Paul Stevens, and determine the similarity of his role to Elena Kagan's potential role. Logically, if their roles prove to be similar then the impact on the Court will be less than if their roles were different.

Stevens was nominated to the Supreme Court by Republican President Gerald Ford in 1975 (Rosen, 2007). He is well known for his liberal views; however, when he was appointed he was a moderate Republican and stated that his views have not changed and that he still considers himself "pretty darn conservative" (Rosen, 2007). Although the nomination of Stevens followed the traditional alignment of President's and Justice's views, Stevens was certainly heralded as a liberal and not a conservative on the Court. He further stated that he considers himself a conservative but he seems to be a liberal because of the increasing number of conservative nominees to the Court (Rosen, 2007).

Stevens has been the anchor of the liberal coalition for the past several years and has been the senior member of that coalition (Lane, 2006). His influence has grown extensively in the past several years and he has helped a Republican influenced and conservative headed Court produce a large amount of liberal decisions (Lane, 2006). This is because of his ability to build alliances across ideological lines and unite the Justices across those lines (Lane, 2006). One of those that Stevens has built alliances with is Justice Kennedy, the lone moderate on the Court and often times the swing vote (Rosen, 2007).

The similarities between Stevens and Kagan abound and highlight her potential in the Court. Like Stevens, Kagan has been known for her ability to bring people of unlike minds together and unite a school “hobbled by ideological clashes” (Bennett, 2008). This trait they share is one of extreme importance. Stevens assumed the role of Associate Justice at a young age as well and made an enormous impact over his tenure, something that most certainly could take place for Kagan (Rosen, 2007). The relationship Stevens has forged with Kennedy is one of the areas in which Kagan could have the most potential influence. As previously stated, Stevens has influenced Kennedy’s vote on numerous occasions and Kagan could easily assume that role.

While Justices Kagan and Stevens have many similarities, their distinct differences of opinion in First Amendment cases could produce a noticeable shift in the Court. Kagan’s conservative views in First Amendment cases, specifically *Texas v. Johnson* and *Federal Communications Commission v. Pacifica Foundation*, are liable to produce a conservative shift on the Court (438 U.S. 726 (1978) and 491 U.S. 397 (1989)). Stevens had a more liberal view in both of the aforementioned cases and his replacement,

with a more conservative outlook, would assuredly foster a more conservative look at First Amendment cases.

Yet another manner in which Kagan could produce a shift is with regards to executive power. Kagan holds a more conservative view of the strong executive, evidenced in her work *Presidential Administration* (Kagan, 2001). Stevens was a liberal in almost all aspects and his replacement with conservative executive views is another potential shift producing event.

Elena Kagan's relationship with Justice Stevens is not the only relationship that could have an impact on the Court. Justices Kagan and Ginsburg share some unique aspects of life history that could produce a formidable team. Both Kagan and Ginsburg have experienced many firsts in their lives for women in traditional male roles. Kagan served as the first female dean of Harvard Law School and the first female Solicitor General of the United States while Ginsburg was turned down for a Supreme Court clerkship on the sole basis that she was a woman (E.A.A, 2010). The discrimination that Ginsburg has faced, especially in an era in which women conformed to traditional females roles, has led her to become a fierce women's rights activist (E.A.A, 2010). Although Kagan has not explicitly stated any views about women's rights, the struggles that she has likely shared with Ginsburg could affect a bond between them.

CONCLUSION

Kagan's impact on the Supreme Court will be one of many facets. Her slightly conservative views on executive power and the First Amendment will bring the Court to a more centered state. This centering of the Court will be furthered by her uniting

abilities, shown during her tenure at Harvard. Her openness to ideas and all viewpoints and to being proven wrong will also help to unite the Court. Slow and steady compromise will be the enduring legacy that she leaves with the Court, functioning with her pragmatic approach. Kagan's impact will not be immediate but it will certainly be present and continue to grow over her tenure on the Court, much like her predecessor Justice Stevens. Kagan's relationships with her peers on the Court and her ability to build relationships will help her impact. For a woman about whom little is still known, the degree of her impact could be enormous.

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