

## **SCOTUSblog Briefing Paper**

### **Elena Kagan – Diversity on the Court**

**June 21, 2010**

#### **I. Summary and Our Take**

If she is confirmed this summer, Elena Kagan will become only the fourth woman to serve on the Supreme Court, and, for the first time ever, the Court will have three female Justices on the bench. Breaking gender barriers is nothing new to Kagan: in 2003, she became Harvard Law School's first woman dean, and last year, she was confirmed as the first female U.S. Solicitor General. Her nomination has been lauded by commentators as an indication of a positive shift towards equal gender representation on the Supreme Court.

Kagan has spoken on women in the legal profession. In 2005, she delivered a lecture in New York entitled "Women and the Legal Profession – A Status Report" in which she urged law schools and practitioners to expand opportunities for women in the legal profession, a sentiment echoed by numerous commentators and, just a few months ago, by a distinguished panel of female attorneys and judges at Georgetown (see below).

Following Kagan's nomination, supporters and commentators – from Democratic Senator Patrick Leahy to former First Lady Laura Bush – have praised President Obama's choice, suggesting that the nomination of another woman to the Supreme Court reflects an important shift towards a Court that is representative of the legal profession and of the population as a whole, and heralds a symbolic and practical expansion of opportunities available to women pursuing careers in legal practice and jurisprudence.

We believe, as a number of commentators do, that the nomination of a fourth female Justice is a very positive development as it gives rise to a more diverse and representative Court. Although diversity would not be a justification for appointing an unqualified nominee, it is a positive virtue. Furthermore, we believe that the appointment of Kagan, who has broken gender barriers on a number of occasions, will inspire women in their professional careers.

We note that unlike her female predecessors – Justices O'Connor, Ginsburg, and Sotomayor – Elena Kagan is the first woman arguably appointed entirely on the basis of her professional qualifications, as opposed to special characteristics relating to her gender. Though Justice O'Connor would go on to great prominence, when first named to the Court she was not widely known; President Reagan had essentially promised to appoint the Court's first female justice, but the limited professional opportunities for women meant that there were few available candidates. Justice Ginsburg was a well-known and well-respected judge on the D.C. Circuit, but also was famous as an advocate for women's equality as a lawyer, including in seminal cases before the Court. Justice Sotomayor is the first Hispanic woman (and indeed first Hispanic at all) on the Court. We thus for the first time foresee the prospect of women now being considered as

candidates for the Court on equal terms with men – *i.e.*, with far less consideration to the gender of nominees.

Ultimately, in Kagan’s confirmation hearings, we predict that her supporters will continue to laud the appointment of another woman on the Court, and that her opponents will spend little time on the issue.

## II. The Relevant Source Materials

### A. Kagan on women in the legal profession:

- [Leslie H. Arps Memorial Lecture: Women and the Legal Profession -- A Status Report](#) (Nov. 7, 2005)
  - “What I hope to do is start a conversation between law schools and the legal profession about where we go from here – about how we might work together to expand women’s choices and, by doing that, improve our profession and society.”
  - “[D]espite the enormous progress made – and we don’t want to lose sight of the advances – it’s also true that women lawyers still lag far behind men on most measures of success ... this is an issue for all of us.”
  - “*Women lawyers are not assuming leadership roles in proportion to their numbers.* And that is troubling not only for the women whose aspirations are being frustrated, but also for the society that is losing their talents. What we have here is a kind of brain drain, and we are all the poorer for it.”

### B. Other relevant voices on women and the Supreme Court:

- Dahlia Lithwick, [The Fairer Sex: What Do We Mean When We Say We Need More Female Justices?](#) Slate.com (Apr. 11, 2009)
  - “Debate has raged for decades now about whether there is something unique about women’s jurisprudence. A 1986 study of O’Connor’s opinions published by professor Suzanna Sherry, now at Vanderbilt University, saw evidence there of a ‘feminine jurisprudence . . . quite unlike any other contemporary jurisprudence.’ Defenders of the notion of a woman’s legal reasoning often build their case on the groundbreaking work of psychologist Carol Gilligan, whose 1982 book, *In a Different Voice*, claimed that female moral reasoning is fundamentally different. Men, the theory goes, prefer their law with rigid rules, clear lines, and neutral principles; women, meanwhile, want to look at the totality of the circumstances and apply broad discretion, preferring what Gilligan calls an ‘ethic of care’ to an ‘ethic of rights.’”
  - In a 2008 study, “the male judges were 10 percent more likely to rule against alleged sex-discrimination victims. And male judges were ‘significantly more likely’ to rule in their favor if a woman judge served on their panel. Because Epstein, Boyd, and Martin were studying only sex-discrimination cases—situations in which gender is front and center—it’s unclear whether their data would hold true in cases in which gender were beside the point. Still, an intriguing

implication of this study is that male judges rule differently when they're sharing the bench with a woman. It may suggest female moral reasoning—if such a thing exists—might be contagious.”

- Robin Lakoff, [Some Thoughts About Kagan](#), Huffington Post (May 11, 2010)
  - “[D]espite the differences between Kagan and Sonia Sotomayor, the whining on the right is set to the same old tune: her record is thin . . . she's not too smart . . . oh, and what about her, you know, sexual preference? And she isn't, hmm, Christian enough for some. . . . Critiques of this kind show up especially when a candidate for a high position is female, because women are still marked (i.e., abnormal) in such roles. So there has to be something wrong with a woman who is seeking one. And a woman cannot, in this system of reasoning, possibly be as smart as a man, because a woman has to be ten times as smart as a man to be as smart as a man. It's a mathematical paradox, no doubt one reason that women have traditionally been put off by math.”
  - “Of course, the problem here could be that some people can't tolerate the idea of a woman speaking publicly at all. So pretty nearly anything a woman in such a position says will become controversial. But, paradoxically, if a woman doesn't say anything, that isn't OK either: it means there is less of a basis on which to make interpretations of what she must have meant, or ought to have meant. And a woman who will not let herself be interpreted is a dangerous woman, a scary woman. Interpretation is power and control.”

### **III. Commentary**

- Pamela Harris, GULC Supreme Court Institute executive director, with regard to the Court (via the [New York Times](#)): “Any practitioner of diversity will tell you that you can't bring in a few token people and get a real diversity of viewpoint. . . . If clients are visualizing the court as a predominantly male entity, they are going to want a lawyer who looks like the people on the bench. . . . I think this could also be a critical moment in terms of women arguing before the Supreme Court.”
- Senator Arlen Specter ([full statement](#)): Kagan “has been a pioneer for women, serving as the country's first female Solicitor General and as the first woman to be Dean of Harvard Law School. I applaud the President for nominating someone who has a varied and diverse background outside the circuit court of appeals.”
- Mary Kate Cary of [U.S. News](#): “I'd rather not see this turn into a woman vs. woman thing. Why do we need to go there? Let's just keep it to the fact that we need more women at the table. (One fight at a time, please, as we say in my house.)”
- The Washington Post's Ann Gerhart (in [The Supreme Court Needs More Mothers](#)): “In saying he wants justices who have ‘heart’ and ‘empathy,’ and who understand ‘how our laws affect the daily realities of people's lives,’ Obama has invited us to ask who has a life outside work and who doesn't. That's hard to determine in a confirmation process that

will require Kagan, like Sotomayor before her, to crimp her personality and bite her tongue. . . . Motherhood offers a one-word verifier. It signals a woman with an intensity of life experiences, jammed with joys and fears, unpredictability and intimacy, all outside the workplace. Much of the time, it's the opposite of being strategic and assiduously prepared. . . . It's a story we understand without needing all the details.”

- Lisa Belkin (via the [New York Times](#)): “[I]t is still harder for mothers to reach the top. For men, having a family is an asset when pursuing a demanding career. For women, it is still a complication. So maybe the Kagan nomination sends the ‘wrong’ message, but at the moment, it is also a realistic — and cautionary — one.”
- President Obama, in his remarks on the nomination (via [MSNBC](#)): “I think [Kagan’s late mother] would relish, as I do, the prospect of three women taking their seat on the nation's highest court for the first time in history . . . a court that would be more inclusive, more representative, more reflective of us as a people than ever before.”
- Marcia Greenberger, co-president of the National Women’s Law Center (full statement of the NWLC is available [here](#)):
  - Via the [New York Times](#): “Even when you had two women [on the Court], there was still a sense that they were exceptions to the rule. [That notion was reinforced when legal advocates frequently confused Justices O’Connor and Ginsburg] even though they did not look anything alike.”
  - Via [Bloomberg BusinessWeek](#): “What we have seen repeatedly with two women on the Supreme Court is that they are seen as exceptions to the rule . . . [Kagan’s nomination moves us] toward the day when it’s accepted that women are just as likely as men to be on the Supreme Court.”
- Nancy Duff Campbell, co-president of the National Women’s Law Center: “We applaud the President for selecting a nominee of such accomplishment who would bring a wealth of experience that would help the Court better reflect both the composition of the legal profession and, most importantly, the people of this country.”
- National Association of Women Lawyers (full statement [here](#)): “The National Association of Women Lawyers . . . has called upon numerous Presidents to increase the representation of women in the federal judiciary, and has urged President Obama to nominate qualified women to serve on the Supreme Court. NAWL therefore commends President Obama for his nomination of Solicitor General Elena Kagan to fill the vacancy on the Court occasioned by the recent announcement of Associate Justice Stevens’ retirement.”
- National Organization for Women ([full statement](#)): “The National Organization for Women applauds President Barack Obama's decision to nominate a woman to follow Justice John Paul Stevens on the U.S. Supreme Court. Upon confirmation by the U.S. Senate, Solicitor General Elena Kagan would join Justices Ruth Bader Ginsburg and

Sonia Sotomayor to become the third woman currently sitting on the Supreme Court -- a historic achievement.”

- Senator Mary Landrieu (D-La.)
  - Via [Huffington Post](#): “I would think that would be an excellent idea [for President Obama to nominate a woman] ... We've had what, three women in the whole history of the country? We're more than 50 percent of the population.”
  - Via a [full statement](#) on her website: “Kagan has built an outstanding career as a legal scholar and trailblazer for other women in the field.”
- Alliance for Justice ([full statement](#)): “Her appointment ... represents an historic step forward as women continue to take their rightful place on the highest court in the land.”
- Constitutional Accountability Center ([full statement](#)): “Solicitor General Kagan, the former Dean of Harvard Law School, is a scholar and legal advocate who has served admirably as the lead lawyer for the Obama Administration before the United States Supreme Court. The first woman to hold each of those positions, Kagan is a leader and a pathbreaker.”
- Senator Patrick Leahy (D-Vt.) ([full statement](#)): “Ms. Kagan broke the glass ceiling when she was appointed as the first woman to serve as Solicitor General and also previously when she became the first woman to serve as dean of Harvard Law School. Her historic accomplishments and the way she has conducted herself in these positions has earned her a place at the top of the legal profession.”
- Senator Amy Klobuchar (via [Politico](#)): “There was a lengthy, long article this weekend in one of our major newspapers about Elena Kagan's clothing describing it in, I would say, rather critical terms, talking about at length her leg-crossing style . . . . I took note of this since it was compared to my leg crossing style. I never thought I'd be discussing this in this chamber but in fact this was a major article and stirred much commentary all over the blogs. I don't think that such an article was ever written about Chief Justice Roberts... or was such an article written about Justice Alito or was such an article written about Justice Rehnquist when he was being considered by this great body?”
- Laura Bush:
  - Via [Huffington Post](#): Bush is “really glad” Kagan’s appointment would mean a total of three women on the Court; she told Fox News, with regard to the nomination, that women should be represented “in all parts of American political and civic life.”
  - Via [New York Daily News](#): “I'm really glad that there will be three [women] - if she's confirmed. I like to have women on the Supreme Court.”