



# From Solicitor General to Supreme Court Nominee: Responsibilities, History, and the Nomination of Elena Kagan

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June 23, 2010

Congressional Research Service

7-5700

[www.crs.gov](http://www.crs.gov)

R41299

## Summary

On May 10, 2010, President Obama nominated Solicitor General Elena Kagan to replace retiring Justice John Paul Stevens. If confirmed, Elena Kagan would be the first serving Solicitor General to be appointed to the Court since the elevation of Thurgood Marshall in 1967. She would also be only the fifth of 111 Justices to come to the bench with such experience.

Given that Solicitor General Kagan has made few public statements on important legal and policy issues, some have looked to her record as Solicitor General for some indication of her views. Others have looked to her time as Solicitor General as an important element of her professional experience, especially in light of the criticism of some that her lack of judicial and litigation experience make her unqualified to sit on the bench. Understanding the role and responsibilities of the Solicitor General can provide a useful backdrop against which to evaluate Elena Kagan's statements and official actions and assess her professional qualifications.

The role of the Solicitor General is unique in the American legal system. Not only does the Solicitor General represent the interests of the United States government before the Court, but the office is also charged with assisting the Supreme Court in the exercise of its judicial function. Through repeated opportunities to argue before the Court, some suggest that the office of the Solicitor General has built a "special relationship" with the Supreme Court based on trust and interdependence established over multiple and continuing interactions. The Court relies on the Solicitor General to perform a "gatekeeping" function by recommending for review only the most meritorious of the government's cases and providing the highest quality arguments for the Court's consideration. Through these actions, the Solicitor General seeks to convince the Supreme Court that the government's position is the correct one. Although scholars disagree on the exact nature of the office's influence, most of the time, the Solicitor General is successful in this task.

Despite this close relationship and the institutional knowledge that comes with it, few of the 45 Solicitors General have been appointed to the Supreme Court. Since the creation of the office in 1870, only four former or current Solicitors General have been elevated to the highest bench. The first, William Howard Taft, served in both the executive and judicial branches before his joining the Court, most notably as the 27<sup>th</sup> President of the United States. Stanley Reed, who was elevated directly from the position of Solicitor General to the Court, spent most of his professional career in private practice and had never been a judge before becoming an Associate Justice. Robert Jackson, like Reed, had no judicial experience before his appointment. He had, however, served in five different positions in the Department of Justice, including that of Attorney General, prior to his elevation. Unlike Reed and Jackson, Thurgood Marshall, a former federal appellate judge, had little experience in private practice and had only served as a government attorney for two years prior to his nomination to the Court. However, between working as the director and general counsel of the NAACP Legal Defense Fund for 21 years and serving as Solicitor General, Justice Marshall had extensive Supreme Court litigation experience before joining the bench.

If Elena Kagan is confirmed, she would be the fifth Solicitor General to serve on the Court. Although service as the Solicitor General has generally been viewed as an important and relevant qualification, her lack of judicial and litigation experience has raised questions by some as to whether she is qualified to sit on the Court. Although the ultimate judgment as to appropriate qualifications to be a Supreme Court Justice must be left to the Senate, it is clear that the experience of serving as Solicitor General provides the occupant of the office with unique insights into the Supreme Court.

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## **Introduction**

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Given that Solicitor General Kagan has made few public statements on important legal and policy issues, some have looked to her record as Solicitor General for some indication of her views. Others have looked to her time as Solicitor General as an important element of her professional experience, especially in light of the criticism of some that her lack of judicial and litigation experience make her unqualified to sit on the bench. Understanding the role and responsibilities of the Solicitor General can provide a useful backdrop against which to evaluate Elena Kagan's statements and official actions and assess her professional qualifications.

This report examines both the office of the Solicitor General and the Justices who held that position before their elevation to the Court. First, the duties and responsibilities of the Solicitor General are discussed. Next, scholarly studies of the relationship between the Solicitor General and Supreme Court are examined. This research, conducted by political science and legal scholars, posits theoretical foundations and presents empirical evidence to explain the nature of the relationship between the Court and the Solicitor General's office. In each of these sections, particular attention is paid to the claim that a "special relationship" exists between the Court and the office of the Solicitor General. For those trying to assess the meaning of statements made by Elena Kagan in her capacity as Solicitor General, the discussion in these two sections may help place her comments and actions in context.

After examining the office of the Solicitor General and its success before the Court, the report describes the professional careers of the four Justices who served as Solicitor General before joining the Court: William Howard Taft, Stanley Reed, Robert Jackson, and Thurgood Marshall. Information on each Justice's Senate confirmation process is provided, with a focus on any relevant questions or issues that emerged in response to that Justice's service as Solicitor General.

The final section of the report examines the career of Elena Kagan, noting in particular her service as Solicitor General. As the current holder of this office, Elena Kagan is ultimately responsible for the government's appellate litigation before the Supreme Court. If confirmed, it is possible that she would have to recuse herself from a number of cases in which the government took part during the Supreme Court term beginning in October 2010. Accordingly, the conditions under which Elena Kagan may have to recuse herself are discussed.

## **Duties and Responsibilities of the Solicitor General**

The position of Solicitor General was created in 1870 at the same time as the Department of Justice.<sup>1</sup> The Solicitor General is the only federal public official required by statute to be "learned

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<sup>1</sup> Act of June 22, 1870, ch. 150, 1-2, 16 Stat. 162.

in the law.”<sup>2</sup> The Solicitor General, who is nominated by the President and confirmed by the Senate, is responsible for assisting the Attorney General with the performance of the duties of his or her office,<sup>3</sup> principally focusing on appellate litigation. To date, 45 individuals have served as Solicitor General. The Office of the Solicitor General also employs four Deputy Solicitors General, four recent law school graduates serving as legal fellows, and a small support staff.

The Office of the Solicitor General is generally responsible for coordinating executive branch litigation at all levels of appeal<sup>4</sup> and representing the executive branch in litigation before the Supreme Court.<sup>5</sup> While the Solicitor General is appointed by the President, his or her client is seen to be the United States, and he or she is expected to represent the “interests” of that client during litigation.<sup>6</sup> In some cases, this may give rise to disagreements between attorneys in the White House and the Solicitor General’s office.<sup>7</sup>

What is even more unique about the Solicitor General, however, is that the office, by tradition, has been assigned the added responsibility of attending to the needs of the Supreme Court.<sup>8</sup> Because the Department of Justice has primary responsibility for litigation on behalf of the executive branch and the various agencies,<sup>9</sup> the Supreme Court relies on the Solicitor General to help it screen out unnecessary litigation and to serve as a “gatekeeper” for the Court.<sup>10</sup> Due to this additional responsibility, the Solicitor General has often been referred to as the “Tenth Justice.”<sup>11</sup>

Given this responsibility to the Supreme Court, the Solicitor General has been seen to have the discretion to pursue his or her own legal agenda, and that the Office should, although may not always, be insulated from presidential control or pressure.<sup>12</sup> There appears to be a general

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<sup>2</sup> 28 U.S.C. § 505.

<sup>3</sup> *Ibid.*

<sup>4</sup> Kristen A. Norman-Major, *The Solicitor General: Executive Policy Agendas and the Court*, 57 *Alb. L. Rev.* 1081, 1082 (1994).

<sup>5</sup> 28 U.S.C. § 518; 28 C.F.R. § 0.20.

<sup>6</sup> Wade H. McCree, Jr., *The Solicitor General and His Client*, 59 *Wash. U. L.Q.* 337, 337 (1981).

<sup>7</sup> See Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 *Calif. L. Rev.* 255 (1994). For example, in February 1982, the Solicitor General’s office and the White House clashed over the preparation and submission of the government’s brief in the case of *Bob Jones University v. United States* (461 U.S. 574). In this case, the Court was asked to determine whether the IRS could deny Bob Jones University, a private religious educational institution, tax-exempt status due to its racially discriminatory admissions policies. Reagan administration attorneys, with the approval of the President himself, crafted the government’s brief without the involvement of the Solicitor General’s office. When acting Solicitor General Lawrence Wallace was asked to sign the brief, he initially refused. Ultimately, he “dropped a footnote” indicating that the “brief [filed by the government] sets forth the position of the United States on both questions presented. The Acting Solicitor General fully subscribes to the position set forth on question number two, only.” Lincoln Caplan, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (New York, NY: Vintage Books, 1987), pp. 45-55.

<sup>8</sup> See generally Margaret H. Lemos, *The Solicitor General as Mediator between Court and Agency*, 2009 *Mich. St. L. Rev.* 185 (2009).

<sup>9</sup> 28 U.S.C. § 516.

<sup>10</sup> Kristen A. Norman-Major, *supra* note 4, at 1083. Former Solicitor General Wade McCree has noted that “it is the duty of the Solicitor General to serve as a first-line gatekeeper for the Supreme Court and to say ‘no’ to many government officials who present plausible claims of legal error in the lower courts.” Wade McCree, *supra* note 6, at 341.

<sup>11</sup> Lincoln Caplan, *supra* note 7.

<sup>12</sup> “Concerned as [the President and the Attorney General] are with matters of policy, they are well served by a subordinate officer who is permitted to exercise independent and expert legal judgment essentially free from extensive involvement in policy matters that might, on occasion, cloud a clear vision of what the law requires.” Office of Legal (continued...)

consensus that the independence of the Solicitor General's office would be seriously undermined if the policy goals of an administration were consistently permitted to influence the Solicitor General's decision making regarding the litigation posture of the United States.<sup>13</sup>

The office of the Solicitor General performs a number of different tasks which can influence the Supreme Court's agenda. The four main tasks include (1) screening federal cases in which the United States was the losing party to determine which cases to appeal to the federal courts of appeal or the Supreme Court;<sup>14</sup> (2) submitting briefs to and arguing before the Supreme Court in cases in which the United States is a direct party;<sup>15</sup> (3) filing briefs for and against granting certiorari in cases not directly involving the United States; and (4) filing amicus curiae briefs in cases in which the United States is not a direct party.<sup>16</sup>

The task of determining which federal cases to present to the Supreme Court is probably the most significant power exercised by the Solicitor General. The Office of the Solicitor General must authorize any certiorari petitions filed by the government, and the office will draft these petitions, file briefs on the merits, and perform oral argument.<sup>17</sup> Nearly 800 government cases are submitted annually to the Solicitor General as potential cases for appeal or certiorari, and the Solicitor General chooses between 60 and 80 to bring before the Court.<sup>18</sup> Traditionally, the Court has accorded significant deference to the decisions by the Solicitor General as to when to seek a writ of certiorari, so that between 70% and 80% of the cases presented by the federal government to the Supreme Court are accepted.<sup>19</sup> The Court, recognizing the importance of the office in its gatekeeping functions, has stated, "[W]e depend heavily on the Solicitor General in deciding whether to grant certiorari in cases in which the government is a party."<sup>20</sup>

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Counsel, *Memorandum Opinion for the Attorney General: Role of the Solicitor General*, reprinted in 21 Loy. La. L. Rev. 1089, 1092 (1988)

<sup>13</sup> "By tradition, and because of his responsibilities to the Court, an SG must be free to reach his own carefully reasoned conclusions about the proper answer to a question of law, without second-guessing or insistence that his legal advice regularly conform to the politics of the administration he represents. An SG must have the independence to exercise his craft as a lawyer on behalf of the institution of government, without being a mouthpiece for the President." Lincoln Caplan, *supra* note 7, at 18.

<sup>14</sup> Whenever, in a case handled by the Department of Justice, the government loses, the Solicitor General must approve further judicial review, whether it is an appeal to the federal courts of appeals, or an appeal or writ of certiorari to the Supreme Court. As administrative agencies generally handle their own cases in the lower courts, however, their litigation may come to the attention of the Solicitor General only when it approaches the Supreme Court. Robert L. Stern, *The Role and Function of the United States Solicitor General*, 21 Loy. L. A. L. Rev. 1073, 1075 (1988).

<sup>15</sup> Much of the time of the staff of the Solicitor General is spent either reviewing or preparing briefs. Many Supreme Court petitions for certiorari, jurisdictional statements in direct appeals, and briefs in opposition, are drafted originally by one of the other divisions of the Department of Justice or one of the independent agencies, and are then reviewed by the Office of the Solicitor General. *Ibid.*

<sup>16</sup> Kristen A. Norman-Major, *supra* note 4, at 1084.

<sup>17</sup> Margaret H. Lemos, *supra* note 8, at 188. Unlike circuit courts of appeals, which must hear all appeals of district court decisions, the Supreme Court has a discretionary docket, meaning that it chooses which cases will be argued before it. A litigant seeking review of a state supreme court or circuit court decision must submit a petition for a writ of certiorari to the Supreme Court explaining why the Court should grant review. According to Supreme Court Rule 10, such a petition "will be granted only for compelling reasons."

<sup>18</sup> Kristen A. Norman-Major, *supra* note 4, at 1090.

<sup>19</sup> See Margaret H. Lemos, *supra* note 8, at 189 n.13.

<sup>20</sup> *Alvarado v. United States*, 497 U.S. 543 (1990), at 543. H.W. Perry, Jr., found that "[w]ithout exception, all [Justices and clerks interviewed] said that they have a high regard for the SG when it comes to petitioning, and that any case he (continued...)

The Solicitor General also controls any *amicus curiae* filings by the United States.<sup>21</sup> Since the office is free to choose which side to support, these filings are more likely to be directed toward developing areas of law in a chosen direction rather than protecting the interests of the United States. Unlike others seeking to file an amicus brief, the Solicitor General is not required to obtain the permission of the Court or the parties before making such a filing,<sup>22</sup> thus enhancing the ability of the Solicitor General to choose which cases to join.

While the Solicitor General can become amicus to a case on his or her own initiative, she is reported to limit the filing of an amicus brief to those cases where she believes it is important that the view of the United States be represented. On occasion, the Supreme Court will invite the Solicitor General to submit an amicus brief. In both cases, the amicus brief is seen as an important way for the President and the executive branch to communicate their desires to the Court with respect to policy positions and willingness to support the Court's decision.<sup>23</sup> In general, the Solicitor General is very successful in amicus filing, supporting the prevailing side between 75%<sup>24</sup> to 90%<sup>25</sup> of the time.

## Explaining the Success of the Solicitor General

Among all executive officers, the Solicitor General has distinct advisory and cooperative responsibilities with respect to the Supreme Court. The “special relationship” resulting from these obligations contributes to much of the Solicitor General’s success. As stated by one former Supreme Court law clerk, “The Court looks at the [Solicitor General] as more than just a litigant.”<sup>26</sup>

As mentioned above, although the Solicitor General is accountable to the Attorney General and serves at the pleasure of the President, the Solicitor General needs to be attuned to the institutional interests both the executive and judicial branches. This commitment to the Court fosters a relationship founded on “mutual need and interdependence.” According to one scholar, “Solicitors [G]eneral make their decisions on the basis of what they believe the Court will accept and do not overburden the judicial branch with numerous petitions. The Court recognizes the needs of the executive branch and rules in its favor when the [S]olicitor [G]eneral claims a valid governmental interest.”<sup>27</sup> The Court also grants privileges to the Solicitor General that it does not

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sends will receive serious consideration.” H.W. Perry, Jr., *DECIDING TO DECIDE: AGENDA SETTING IN THE U.S. SUPREME COURT* (Cambridge, MA: Harvard University Press, 1991), at 128.

<sup>21</sup> Ryan Juliano, *Policy Coordination: The Solicitor General as Amicus Curiae in the First Two Years of the Roberts Court*, 18 Cornell J. L. & Pub. Pol’y 541 (2009). *Amicus curiae* briefs, literally interpreted as “friend of the court,” are briefs submitted by an individual or organization who are not parties to the case. According to Supreme Court Rule 37, an amicus brief is most favored when it “brings to the attention of the Court relevant matter not already brought to [the Court’s] attention by the parties.”

<sup>22</sup> Federal Rules of Appellate Procedure Rule 29.

<sup>23</sup> Kristen A. Norman-Major, *supra* note 4, at 1096.

<sup>24</sup> *Ibid.*

<sup>25</sup> Ryan Juliano, *supra* note 21, at 542.

<sup>26</sup> H.W. Perry, Jr., *supra* note 20, at 131.

<sup>27</sup> Rebecca Mae Salokar, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* (Philadelphia: Temple University Press, 1992), at 179-180.

extend to other attorneys, such as the ability to file an amicus brief without the consent of the parties.<sup>28</sup> In response, the Solicitor General engages in practices, such as confessing error, that signal the office's commitment to the Court. The Solicitor General may choose to confess error, meaning that she recommends that the Court overturn a "flawed" decision, in a case when she feels that a lower court decision in favor of the government is unjust or unfair. According to one scholar, "[m]ost confessions of error involve criminal convictions, and happen for a range of reasons: a jury was selected unfairly; a judge gave faulty instructions to the jury before asking its members to reach a verdict; [or] there was scant evidence supporting the verdict."<sup>29</sup> Former Solicitor General Archibald Cox, when discussing the practice of confessing error, noted,

It tests the strength of our belief that the office has a peculiar responsibility to the Court... It affects the way all our other cases are presented. If we are willing to take a somewhat disinterested and wholly candid position even when it means surrendering a victory, then all our other cases will be presented with a greater degree of candor, and with a longer view, perhaps, than otherwise.<sup>30</sup>

Given the loyalty of the Solicitor General's office to the Court, some scholars argue, the Court has placed a great deal of confidence and trust in the judgment of the Solicitor General's office.<sup>31</sup> This trust is more centrally reflected in the office's impressive success rate in securing review for and winning on the merits in the cases supported by the office. Individuals who have clerked in the office expressed the sentiment that the Solicitor General "did not waste his capital on bringing up a poor case" and "was very careful not to squander his reputation with the Court."<sup>32</sup>

Some observers of the Court argue, however, that the relationship between the Court and the office of the Solicitor General is not a function of a "special relationship," but the skill of the office's advocates. To be sure, Supreme Court Justices have been reported to praise the quality of the attorneys in the Solicitor General's office, noting, "[The] Solicitor General's office by tradition has had a very high calibre lawyer working on its staff ... [The] ablest advocates in the U.S. are the advocates in the Solicitor General's office."<sup>33</sup>

The key to the Solicitor General's notable aggregate success rate in persuading the Court to accept the cases it chooses and winning cases on the merits is argued to be the natural result of superior lawyering skills developed by the attorneys in the Solicitor General's office through repeated interaction with the Court. In other words, the Solicitor General and the attorneys in her office are *repeat players*, as compared with *one-shotters*, whose success is a result of arguing many more cases before the Court than other litigants.<sup>34</sup> The opportunity to argue multiple times

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<sup>28</sup> Supreme Court Rule 37 states, "No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, country, town, or similar entity when submitted by its authorized law officer."

<sup>29</sup> Lincoln Caplan, *supra* note 7, at 9.

<sup>30</sup> Archibald Cox, *The Government in the Supreme Court*, 44 Chic. B. Rec. 221 (1963), at 225.

<sup>31</sup> Salokar, *supra* note 27, at 2.

<sup>32</sup> H.W. Perry, Jr., *supra* note 20, at 131.

<sup>33</sup> Karen O'Connor and Lee Epstein, *States Rights or Criminal Rights: An Analysis of State Performance in U.S. Supreme Court Litigation*, Paper prepared for the 1983 Northeastern Political Science Association annual convention, Philadelphia, PA, November 17-19, 1983; as cited in Jeffrey A. Segal and Cheryl D. Reedy, *The Supreme Court and Sex Discrimination: The Role of the Solicitor General*, 41 Western Political Quarterly 553 (Sept. 1988), at 556.

<sup>34</sup> Kevin T. McGuire, *Explaining Executive Success in the Supreme Court*, 52 Political Research Quarterly 505 (June (continued...))



before the Court not only hones one's skills, but also generates familiarity with the preferences of the Justices and the operation of the Court. As one Justice noted, the attorneys in the Solicitor General's office were not only superb lawyers, but "the [S]olicitor [G]eneral knows all the catchwords, and they just know how to write them in a brief; they know how to put things [to be effective]."<sup>35</sup>

The status of the Solicitor General as a repeat player, however, does not account for variations in the success of the Solicitor General before the Court on a case-by-case basis. To understand the relationship between the Solicitor General and the Court, some argue, one also must understand that the Solicitor General is not just a trusted partner or a familiar litigant, but that in addition to those roles, she is also a political actor who is fundamentally an agent of the President and, as a result, whose views reflect those of the executive.<sup>36</sup>

In studying the relationship between the Solicitor General and the Supreme Court, some scholars frame both actors as political in nature, meaning that both the Solicitor General and the Court are perceived as actors motivated by policy goals and preferences regarding the interpretation of the law.<sup>37</sup> The implications of this framework in predicting the conditions under which the Solicitor General will be successful are clear. First, the Solicitor General will be successful when she and a majority of the members of the Court have similar policy goals.<sup>38</sup> For example, according to this theory, one would expect a Solicitor General serving in the administration of a conservative President to be more successful before a conservative Court than a more liberal Court. One study found a 50% increase in the probability that the Court would decide a case in a manner consistent with a Solicitor General's amicus brief when the Court and Solicitor General had similar preferences, as compared with when the Court and Solicitor General were measured to have highly divergent preferences.<sup>39</sup>

Second, if through repeated interactions, both the Court and the Solicitor General learn the preferences of the other, the Solicitor General will be able to signal "good" legal and policy outcomes to the Court through the positions it takes. In particular, when the Solicitor General espouses a legal or policy position that appears to contradict the Solicitor General's known preferences, the Court may be able to confidently conclude that this position will result in a "good" legal or policy outcome. Three scholars found that when a comparatively conservative

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1998); Doris M. Provine, *CASE SELECTION IN THE UNITED STATES SUPREME COURT*, Chicago: University of Chicago Press (1980). For a more general discussion of repeat players, see Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 *Law and Society Rev.* 95 (Autumn 1974).

<sup>35</sup> H.W. Perry, Jr., *supra* note 20, at 132.

<sup>36</sup> Stephen S. Meinhold and Steven A. Shull, *Policy Congruence Between the President and the Solicitor General*, 51 *Political Research Quarterly* 527 (Jun. 1998).

<sup>37</sup> Michael A. Bailey, Brian Kamoie, and Forrest Maltzman, *Signals from the Tenth Justice: The Role of the Solicitor General in Supreme Court Decision Making*, 49 *American Journal of Political Science* 72 (Jan. 2005); Patrick C. Wolfarth, *The Tenth Justice? Consequences of Politicization in the Solicitor General's Office*, 71 *Journal of Politics* 224 (Jan. 2009); see generally Gregory A. Caldeira, John R. Wright, and Christopher J.W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 *Journal of Law, Economics, and Organization* 549 (1999). For a perspective on the limitations of this view, see Ryan C. Black and Ryan J. Owens, *Solicitor General Seduction: Influencing Supreme Court Justices to Overcome Their Preferences*, Unpublished Manuscript, April 30, 2009.

<sup>38</sup> Patrick C. Wolfarth, *The Tenth Justice? Consequences of Politicization in the Solicitor General's Office*, 71 *Journal of Politics* 224 (Jan. 2009), at 232.

<sup>39</sup> Michael A. Bailey, Brian Kamoie, and Forrest Maltzman, *supra* note 37, at 81.

Solicitor General espouses a liberal position in an amicus brief or, alternatively, when a comparatively liberal Solicitor General espouses a conservative position, the Court is 22% more likely to vote in a manner consistent with the Solicitor General’s brief than otherwise.<sup>40</sup>

Some argue that an important limitation of political theories of Supreme Court-Solicitor General interaction is that one cannot necessarily infer from the Solicitor General’s success rate that she is actually persuading the Court to decide in a way it would not otherwise without her participation. Rather, it is possible that her success rate is, in part, an artifact of the presence of similar policy and legal preferences.<sup>41</sup> Additionally, some have hypothesized that frequent or extremely political behavior by the office may limit the Solicitor General’s effectiveness. One study has suggested that the greater the overt politicization of the Solicitor General’s office, the less effective the office will be before the Court on the merits when the office participates as *amicus curiae* and when the government is a party to the case.<sup>42</sup>

Some argue that scholarly focus on the similarity between the policy preferences of the Solicitor General and the Justices fails to recognize the important component of this interaction—the weight of the law. Although evidence supporting political theories of the Solicitor General’s influence are compelling, even when a Justice’s legal and policy preferences run contrary to the recommendation of the Solicitor General, the Justice adopts that recommendation 30% to 38% of the time. Moreover, when the weight of the law runs contrary to the Solicitor General’s arguments, Justices are 25% to 34% less likely to follow her recommendations.<sup>43</sup>

## **From Solicitor General to Supreme Court Nominee**

It is clear from the preceding discussion that not only does the Solicitor General have what some would describe as a “special relationship” with the Court, but also that the Solicitor General’s office is highly successful both in securing review for the cases it deems worthy and winning on the merits when arguing before the Court. Given the Solicitor General’s personal and institutional knowledge of the Court, such experience could be seen as beneficial in preparing an individual to serve as a Supreme Court Justice. Yet, only 4 of the 111 Justices—William Howard Taft, Stanley Reed, Robert Jackson, and Thurgood Marshall—have served as Solicitor General prior to their elevation to the Court.

Each of these Justices served as Solicitor General from one to three years. Two Justices (Reed and Marshall) were appointed to the Court while serving in this role. Beyond this shared experience, the professional histories of these Justices vary widely. All practiced law in a private firm at some point in their careers, although the length of time each spent in private practice ranged from 4 years (Taft and Marshall) to 21 years (Jackson). Alone among these four, Marshall spent 21 years litigating public interest cases for the NAACP Legal Defense Fund. Two of these Justices, Chief Justice Taft and Justice Marshall, served as federal appellate judges prior to their elevation; Justices Reed and Jackson did not. Like Solicitor General Kagan, Chief Justice Taft also served as

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<sup>40</sup> *Ibid.*

<sup>41</sup> Michael A. Bailey, Brian Kamoie, and Forrest Maltzman, *supra* note 37; Ryan C. Black and Ryan J. Owens, *supra* note 37, at 2.

<sup>42</sup> Patrick C. Wolfarth, *supra* note 38, at 231.

<sup>43</sup> Ryan C. Black and Ryan J. Owens, *supra* note 37, at 3, 18-22.

the dean of a law school.<sup>44</sup> Finally, Chief Justice Taft, Justice Reed, and Justice Jackson all served in multiple executive branch positions, the most notable being Chief Justice Taft's tenure as President of the United States from 1909-1913.

The following four sections present short biographies of these Justices. Particular attention is paid to their qualifications and professional experiences. Additionally, issues that arose during each Justice's Senate confirmation process are discussed. This information is presented chronologically, beginning with Chief Justice William Howard Taft and ending with Associate Justice Thurgood Marshall.

## **Chief Justice William Howard Taft**

The first former Solicitor General to be appointed to the Court was William Howard Taft. Taft, was appointed by President Warren G. Harding to succeed Chief Justice Edward D. White in 1921.<sup>45</sup> Chief Justice Taft was the first Justice to have served as both the Solicitor General of the United States and a Supreme Court Justice. He was also the only person to have served as both President and a Justice.

The 69<sup>th</sup> Justice to be appointed to the Court, Taft began his career in public service shortly after receiving an L.L.B. from the University of Cincinnati College of Law in 1880.<sup>46</sup> Taft's appointment to the position of Solicitor General came relatively early in his legal career—only 10 years after receiving his law degree. At the time of his appointment in 1890, Taft was serving as a judge in the Superior Court of Ohio in Cincinnati.<sup>47</sup> Two years later, Taft was nominated by President Benjamin Harrison to be a circuit court judge on the U.S. Court of Appeals for the Sixth Circuit, to which Taft was confirmed on March 17, 1892. Taft had, what one scholar described as, an “immensely satisfying [eight-year]career” in which he wrote 200 opinions, only one of which was a dissent.<sup>48</sup>

Following his tenure as a circuit court judge, Taft served as President of the U.S. Philippine Commission (1900-1901), the first Civil Governor of the Philippine Islands (1901-1904), Secretary of War (1904-1908), and the 27<sup>th</sup> President of the United States. President Taft lost his election for a second term in office in 1912 and, in 1913, joined the faculty at Yale Law School.

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<sup>44</sup> When a judge on the U.S. Court of Appeals for the Sixth Circuit, then-Judge Taft taught at the University of Cincinnati College of Law and served as its dean.

<sup>45</sup> In 1910, as the 27<sup>th</sup> President of the United States, William Howard Taft appointed then Associate Justice White to the Chief Justiceship. Commenting on the selection of White, one scholar noted, “Taft made no secret of his own aspirations to sit in the center chair and had often remarked that he would have preferred to be chief justice rather than be president. Undoubtedly, the ages of the two leading contenders played a role in Taft's decision—[Associate Justice Edward D.] White was sixty-five and [Associate Justice Charles Evans] Hughes was only forty-eight. If the president was indeed positioning himself for the chief justiceship, it was more strategic to elevate one of the Court's elderly justices rather than its youngest and newest member.” David T. Pride, “William Howard Taft,” in *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, ed. Clare Cushman (Washington, DC: Congressional Quarterly, 1993), at 342.

<sup>46</sup> “William Howard Taft,” *Biographical Directory of Federal Judges*, Website of the Federal Judicial Center, <http://www.fjc.gov/servlet/nGetInfo?jid=2331&cid=999&ctype=na&instate=na>.

<sup>47</sup> *Ibid.*

<sup>48</sup> David T. Pride, *supra* note 45, at 342.

While teaching at Yale, Taft also served as president of the American Bar Association and joint chairman of the National War Labor Board.<sup>49</sup>

President Taft openly admitted to President Harding that serving on the Supreme Court “was and always had been the ambition” of his life.<sup>50</sup> Taft further explained, “I was obliged to say that not under the circumstances of having been President, and having appointed three of the present Bench and three others, and having protested against Brandeis (a sitting member of the Court), I could not accept any place by the Chief Justiceship.”<sup>51</sup> Prior to Chief Justice White’s death, Taft and his supporters engaged in a campaign to elevate Taft to the post, which included calling ailing Chief Justice White to encourage him to resign.<sup>52</sup>

President Taft was nominated to replace Chief Justice White on June 20, 1921, and confirmed on the same day by a 60-4 vote.<sup>53</sup> Chief Justice Taft is not known for his jurisprudential accomplishments, but rather his administrative vision and capacity. In particular, Chief Justice Taft is principally responsible for the Judges’ Bill of 1925, which gave the Supreme Court discretion over its docket. Taft served as the Chief Justice of the Court until his resignation in 1930.

## **Associate Justice Stanley Reed**

Stanley Reed was the 77<sup>th</sup> Justice and the second Solicitor General to be appointed to the Court. Reed began his legal career after studying law at Yale and the Sorbonne. Reed also read law briefly before passing the bar and opening his own practice in 1910. Reed continued his practice while serving in the Kentucky General Assembly from 1912-1916. In 1917, Reed closed his practice to serve as a first lieutenant in the Army Intelligence Division during World War I.

Following the war, Reed resumed private practice, focusing on railroad and agricultural issues. In 1929, he was recruited to be general counsel of the Federal Farm Board, an agency created by President Herbert Hoover to deal with agricultural problems caused by the Great Depression. In 1932, Reed was promoted to the position of general counsel in the Reconstruction Finance Corporation (RFC), which was created to give loans to “banks, business, and agricultural enterprises” to mitigate the impact of the Great Depression.

Reed was appointed by President Franklin D. Roosevelt as the 23<sup>rd</sup> Solicitor General in 1935. During his first few years, Solicitor General Reed unsuccessfully defended the constitutionality of New Deal economic regulations, such as the National Industrial Recovery Act<sup>54</sup> and the Agricultural Adjustment Act,<sup>55</sup> before the Supreme Court. In 1937, much to President Roosevelt’s

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<sup>49</sup> *Ibid.*, at 344.

<sup>50</sup> Letter from William Howard Taft to Helen Taft (Dec. 26, 1920), *microformed on* William H. Taft Papers, Reel 252 (Library of Congress), as cited in Robert C. Post, *Mr. Taft Becomes Chief Justice*, 76 U. Cin. L. Rev. 761-792 (2007-8), at 772.

<sup>51</sup> *Ibid.*

<sup>52</sup> David T. Pride, *supra* note 45, at 344.

<sup>53</sup> For more information on actions taken by the Senate on Supreme Court nominations, see CRS Report RL33225, *Supreme Court Nominations, 1789 - 2009: Actions by the Senate, the Judiciary Committee, and the President*, by Denis Steven Rutkus and Maureen Bearden.

<sup>54</sup> *A.L.A. Schechter Poultry Corp. et al. v. United States*, 295 U.S. 495 (1935).

<sup>55</sup> *United States v. Butler*, 297 U.S. 1 (1936).

delight, the Court's jurisprudence on the constitutionality of federal economic regulation shifted, and the Court ruled to uphold important New Deal legislation.<sup>56</sup> Soon after this switch, two Justices retired in the space of seven months.<sup>57</sup> To fill the first vacancy, President Roosevelt nominated a sitting Senator from Alabama, Hugo Black, who had been a strong supporter of the New Deal legislation during Roosevelt's tenure in office. To fill the second vacancy, President Roosevelt looked to his Solicitor General, Stanley Reed.

Solicitor General Reed was nominated on January 15, 1938. Reed's nomination encountered very little opposition and was subject to a single hearing on January 10, 1938.<sup>58</sup> At this hearing, Attorney General Homer A. Cummings testified as to Solicitor General Reed's qualifications, noting in particular his extensive experience in private practice, his work on the Federal Farm Board and Reconstruction Finance Corporation, and his commitment to the office of the Solicitor General. Cummings noted,

He immediately took hold of the work of that branch of the Department of Justice with the utmost vigor and skill. Everyone liked him. He has a fine personality, is friendly, gracious, sincere, and able. He handled a good many cases before the Supreme Court of the United States.... He had quite a run of consequential victories, amounting to 15 cases, which I think is pretty close to an all-time record. His services with the Department were of the highest type, and it is a source of great gratification to me that he has been nominated for the Supreme Court of the United States ...<sup>59</sup>

During these hearings, the Judiciary Subcommittee also received testimony from an individual who raised questions about how Reed's professional experiences would bear on the decisions he would make as a Supreme Court Justice. This witness, Mr. Robert Gray Taylor, chairman of the Philadelphia Court Plan Committee, noted,

We are not unmindful of the fact that the nominee is both a successful trial and a successful corporation lawyer ... and has had little other experience. It is our contention that the group of the trial and corporation lawyers is the least likely from which to recruit successful

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<sup>56</sup> Some argue that this jurisprudential shift was a result of President Roosevelt's "court packing." This plan would have permitted the President to appoint one new Justice to the Court for every Justice who reached the age of 70 and failed to retire; this plan would also cap the total number of Justices at 15. For description and interpretation of the events surrounding President Roosevelt's proposal, see Joseph Alsop and Turner Catledge, *THE 168 DAYS* (Garden City, NJ: Doubleday, 1938); Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 *American Political Science Review* 1139-1153 (Dec. 1987); Michael Nelson, *The President and the Court: Reinterpreting the Court-packing Episode of 1937*, 103 *Political Science Quarterly* 267-293 (Summer 1988); Jamie L. Carson and Benjamin A. Kleinerman, *A switch in time saves nine: Institutions, strategic actors, and FDR's court-packing plan*, 113 *Public Choice* 301-324 (Dec. 2002).

<sup>57</sup> In addition to the shift in the Court's jurisprudence, some also argue that the retirement of these Justices, Willis Van Devanter and George Sutherland, was facilitated by the passage of H.R. 3518 in the first session of the 75<sup>th</sup> Congress, which allowed these Justices to retire on a full salary. See Jamie L. Carson and Benjamin A. Kleinerman, *supra* note 56, at 304.

<sup>58</sup> Senator Marvin Mills Logan, who chaired the single hearing held by a special Judiciary subcommittee on the confirmation of Reed's nomination, noted especially, "I might say to the members of the subcommittee that no protests have come to me from any source, except one. I have a letter addressed to Senator Ashurst[, chair of the Judiciary Committee,] by a gentleman from New York who identified himself as William W. Williams. I do not know him, and he says he does not know Mr. Reed, but he is just against the government generally." U.S. Congress, Senate Committee on the Judiciary, Subcommittee Appointed to Consider the Nomination of Stanley Reed, *Hearings on the Nomination of Stanley F. Reed to be Associate Justice, U.S. Supreme Court, 75<sup>th</sup> Cong., 3<sup>rd</sup> sess., January 20, 1938*, Unpublished, p. 2. (Hereafter *Reed Hearings*.)

<sup>59</sup> *Ibid.*, at 5-6.

members of the Judiciary, from the point of view of ability to see both sides of questions involving the general welfare.<sup>60</sup>

After Taylor asked the committee to pose questions as to where Reed stood on several legal issues currently confronting Congress or the Court, Senator William H. King indicated that such a course of questioning would be inappropriate, commenting, “You do not expect a man to [make a statement on] what construction he will place on a matter of law [which has not] been argued before him, do you?” Ultimately, the Senators at the subcommittee hearing asked Reed no questions, and Reed gave no statement. Stanley Reed’s nomination was unanimously confirmed five days later on January 25, 1938. Justice Reed served on the Court for 21 years before retiring in 1957.

## **Associate Justice Robert Jackson**

Robert H. Jackson, the 82<sup>nd</sup> individual to be appointed to the Court, began his legal career at the age of 21 in 1913. In 1934, he entered full-time service as a general counsel for the Bureau of Internal Revenue in the Treasury Department and served as the government’s principal tax attorney.<sup>61</sup> In March 1936, Jackson became assistant Attorney General of the Tax Division and, less than two months later, he assumed the position of Assistant Attorney General for the Antitrust Division. In this position, he argued 10 cases before the Supreme Court.<sup>62</sup> This arguably prepared Jackson well for his next position, that of Solicitor General of the United States.

Jackson was confirmed by the Senate as the 24<sup>th</sup> Solicitor General of the United States on March 4, 1938.<sup>63</sup> In this capacity, he concentrated his energies not on the routine preparation of briefs, but rather the argument of cases before the Court.<sup>64</sup> While possibly not the most compelling litigator, Jackson was perceived to be quite effective in this position.<sup>65</sup> In particular, Jackson was noted for his ability to cut to the heart of a case when arguing before the Court. According to one scholar, during his tenure as Solicitor General, Jackson argued 27 cases before the Court and lost 4. In other words, Solicitor General Jackson won 87.1% of the cases he argued before the Court.<sup>66</sup> Justice Louis Brandeis reportedly observed that Jackson was so good at the position he should serve as Solicitor General for life.<sup>67</sup>

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<sup>60</sup> *Ibid.*, at 20.

<sup>61</sup> Warner W. Gardner, *Government Attorney*, 55 Colum. L. Rev. 438 (1955), at 440.

<sup>62</sup> *Ibid.*

<sup>63</sup> “Solicitor General Robert H. Jackson,” Website of the Robert H. Jackson Center, <http://www.roberthjackson.org/the-man/timeline/government-service-1934-1954/solicitor-general-robert-h-jackson/>.

<sup>64</sup> Warner W. Gardner, *supra* note 61, at 442.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.* Gardner notes, however, that “[t]his is not a reliable index of advocacy, for, the issues and the times were such that most of the cases would probably have been won for the Government however they had been presented. But one cannot similarly discount the unanimous opinion of bench and bar that these cases were presented with great ability and persuasiveness. Nor can one escape the belief that the 1938-1941 revolution in the constitutional doctrine of the Supreme Court was made a great deal simpler, and much less noticeable, by Robert Jackson’s uncommonly skillful advocacy.”

<sup>67</sup> James M. Marsh, “Robert H. Jackson,” in *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1993*, ed. Clare Cushman (Washington, DC: Congressional Quarterly, 1993), at 408.

Jackson's perception of the office, in the words of one attorney, was that it was the "duty of the Solicitor General, so far as it lay within his power, to accomplish and to keep at a high level the issues put to the Court."<sup>68</sup> In particular, this same attorney noted, "I am confident that few, if any, solicitors general have been more ready to confess error when the criminal prosecutions of the Government overstepped the very wide boundaries allowed the United States Attorney."<sup>69</sup>

In January 1940, Robert Jackson was appointed to be the Attorney General. He remained in that position until July 1941, when he was elevated to the Supreme Court.<sup>70</sup> In total, Justice Jackson served as a government attorney in five different capacities within the Department of Justice and argued before the Supreme Court on 37 separate occasions prior to joining the Court.

During the four days of public hearings on Jackson's Supreme Court nomination, witnesses raised questions about certain actions taken by the Department of Justice under Jackson's leadership as Attorney General.<sup>71</sup> Notably, one witness testifying before the committee was sitting Senator Millard Tydings. Senator Tydings argued that Attorney General Jackson should have pursued the prosecution of radio show hosts who accused the Senator of using Work Projects Administration money to improve his private property—a statement that Senator Tydings described as a "palpably criminal libelous statement."<sup>72</sup> Despite this opposition, Attorney General Jackson was confirmed by voice vote on July 7, 1941—less than a month after his nomination.

In 1945, during his tenure on the Court, Justice Jackson served as the chief U.S. prosecutor at the Nuremberg Trials at the request of President Harry S. Truman. In this role, he worked with similar officials from France, England, and Soviet Russia to develop the international tribunal in which Nazi leaders were prosecuted for war crimes committed during the Second World War.<sup>73</sup> After serving over 13 years on the Court, Justice Jackson died suddenly of a heart attack on October 9, 1954.

## **Associate Justice Thurgood Marshall**

Thurgood Marshall was the 96<sup>th</sup> Justice and the first African-American to be appointed to the Court. After graduating first in his class from Howard University Law School in 1933, Marshall opened a private practice in Baltimore.<sup>74</sup> Marshall spent much of his time volunteering with the Baltimore chapter of the National Association for the Advancement of Colored People (NAACP). In 1936, Marshall was recruited to work as an Assistant Special Counsel for NAACP. Three years later, he was named the director-counselor of the newly created NAACP Legal Defense Fund (LDF).<sup>75</sup> In this role, Marshall was one of the architects of the NAACP's legal strategy that

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<sup>68</sup> Warner W. Gardner, *supra* note 60, at 443.

<sup>69</sup> *Ibid.*

<sup>70</sup> "Associate Justice of the Supreme Court," Website of the Robert H. Jackson Center, <http://www.roberthjackson.org/the-man/timeline/government-service-1934-1954/robert-h-jackson-as-associate-justice-of-the-supreme-court/>.

<sup>71</sup> See the testimonies of Lester P. Barlow, Robert C. McManus, and Maxwell M. Wallach in U.S. Congress, Senate Judiciary Committee, *Nomination of Robert H. Jackson to be an Associate Justice of the Supreme Court*, Hearings before a Subcommittee, 77<sup>th</sup> Cong., 1<sup>st</sup> sess., June 21, 1941 (Washington, DC: GPO, 1941).

<sup>72</sup> *Ibid.*, at 53.

<sup>73</sup> James M. Marsh, *supra* note 67, at 408.

<sup>74</sup> Susan Low Bloch, "Thurgood Marshall," in *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1993*, ed. Claire Cushman (Washington, DC: Congressional Quarterly, 1993), pp. 476-480.

<sup>75</sup> Julius L. Chambers, "Thurgood Marshall's Legacy," 44 *Stan. L. Rev.* 1249-1258 (1991-1992), at 1252.

eventually led to the landmark 1954 Supreme Court decision *Brown v. Topeka Board of Education*. In this decision, the Court unanimously found that racial segregation in public schools based on the separate-but-equal doctrine violated of the Equal Protection Clause of the Fourteenth Amendment.<sup>76</sup> From 1940 through 1961, Marshall argued 32 cases before the Court and won 29.<sup>77</sup>

After 21 fruitful years with LDF, President John F. Kennedy appointed Marshall to be a circuit court judge on the U.S. Court of Appeals for the Second Circuit in 1962.<sup>78</sup> In the four years Thurgood Marshall served on the Second Circuit, he authored 98 majority opinions, not one of which was reversed by the Supreme Court.<sup>79</sup> This successful tenure as a circuit judge, according to former Chief Justice Warren Burger, “did not go unrecognized, and undoubtedly figured prominently in President Lyndon Johnson’s calculations” when he selected Marshall as the 33<sup>rd</sup> Solicitor General of United States.<sup>80</sup>

As Solicitor General, Thurgood Marshall argued 19 cases before the Court in which the government was a party; of these, he won 14.<sup>81</sup> In many ways, Marshall continued the civil rights litigation that comprised the bulk of his life’s work with the LDF. By the time of his appointment, Congress had passed the Civil Rights Act of 1964 and the Voting Rights Act of 1965. These pieces of legislation followed ratification of the Twenty-Fourth Amendment, which prohibited the payment of a poll tax in order to vote in federal elections. Given the legal climate, “[Marshall] saw the opportunity to serve as Solicitor General as a unique challenge which should not be refused.... As Solicitor General, Marshall would have an opportunity to give [these] new anti-discrimination laws their most effective interpretation.”<sup>82</sup>

After two full terms as Solicitor General (1965-1967), President Johnson nominated Thurgood Marshall to be Associate Justice of the Supreme Court. President Johnson disclosed to one scholar that he decided to appoint Marshall to be Solicitor General in order to prepare the way for his Supreme Court appointment. President Johnson revealed, “I did not tell Marshall of my intentions at the time. But I fully intended to eventually appoint him to that body.... I wanted him to serve as Solicitor General as an advocate to prove to everyone, including the President, what he could do.”<sup>83</sup> Similarly, an aide to President Johnson recalled,

[Johnson] thought Thurgood Marshall was a brilliant lawyer whose credentials as a courtroom lawyer were unsurpassed. And ... he determined that he had to outfit Thurgood Marshall and armor him with the kind of battleplates that no opposition could penetrate.... He said, ‘By God, I’m gonna take Thurgood and I’m going to make him Solicitor General, and then when somebody says—Well, he doesn’t have a lot of experience with the Supreme

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<sup>76</sup> Warren E. Burger, “Tribute to the Honorable Thurgood Marshall,” 44 *Stan. L. Rev.* 1227-1228 (1991-1992).

<sup>77</sup> Percy R. Luney, Jr., “Thurgood Marshall as Solicitor General: An Opportunity to Fulfill a Dream,” 6 *Harv. Blackletter J.* 18-26 (1989), at 26.

<sup>78</sup> “Thurgood Marshall,” *Biographical Directory of Federal Judges*, Website of the Federal Judicial Center, <http://www.fjc.gov/servlet/nGetInfo?jid=1489&cid=999&ctype=na&instate=na>.

<sup>79</sup> Susan Low Bloch, *supra* note 74, at 479.

<sup>80</sup> Warren E. Burger, *supra* note 76, at 1228.

<sup>81</sup> *Solicitor General Thurgood Marshall is Nominated for the Supreme Court*, 53 *A.B.A. J.* 825-826 (1967), at 825.

<sup>82</sup> Percy R. Luney, Jr., *supra* note 77, at 19.

<sup>83</sup> Randall W. Bland, *Private Pressure on Public Law: The Legal Career of Thurgood Marshall* (Port Washington, NY: Kennikat Press, 1973), at 127.



Court—... By God, [Marshall] will have prosecuted more cases before the Supreme Court than any lawyer in America. So, how is anybody gonna turn him down.’<sup>84</sup>

Solicitor General Marshall’s confirmation to the Court was contentious, with hearings spanning across five days.<sup>85</sup> During these hearings, Marshall received questions from Senators seeking to assess his views on legal issues that might appear before the Court, including questions on criminal rights, judicial restraint, and states’ rights. For the most part, Marshall declined to answer these questions. In some cases, he urged the questioning Senator to read a brief filed by the Solicitor General’s office in which the government’s view reflected his own.<sup>86</sup> Despite acrimony in the Senate, Thurgood Marshall’s nomination was confirmed by a 69-11 vote, possibly due to the fact that, as President Johnson planned, Marshall was so “perfectly prepared to become a Supreme Court Justice.”<sup>87</sup> Justice Marshall served in this position for 24 years until his retirement in 1991.

## Solicitor General Elena Kagan

After graduating *magna cum laude* from Harvard Law School in 1986, Elena Kagan served as a clerk for the Judge Abner Mikva on the U.S. Court of Appeals for the D.C. Circuit, and then for the Associate Justice Thurgood Marshall on the U.S. Supreme Court. After her clerkships, she was employed as an associate for the law firm of Williams & Connolly from 1989 through 1991, after which she became a law professor at the University of Chicago Law School. During her time at Chicago, she taught courses on constitutional law, civil procedure, labor law, and federal election law. In 1993, she also worked as a special counsel for the Senate Judiciary Committee during confirmation hearings for Justice Ruth Bader Ginsburg.<sup>88</sup>

Elena Kagan served in the Clinton White House from 1995 through 1999 as an Associate Counsel, then as a Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council. During her tenure at the White House, she worked on a wide variety of legal and policy issues, including crime, consumer safety, abortion, education, health, immigration, civil rights, tobacco, social security, and welfare.<sup>89</sup>

In 1999, Elena Kagan became Dean of the Harvard Law School. She was the first woman to hold that position, and she was credited with building consensus across ideological lines at Harvard, including hiring professors with diverse political outlooks.<sup>90</sup> During that time, she also became

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<sup>84</sup> Linda S. Greene, *The Confirmation of Thurgood Marshall to the United States Supreme Court*, 6 Harv. Blackletter J. 27-50 (1989), at 29.

<sup>85</sup> Prior to 1967, hearings on Supreme Court nominations lasted, on average, two days. The length of hearings on Thurgood Marshall’s nomination, at that time, was second only to the length of hearings on the nomination of Louis Brandeis in 1916, which spanned across 19 days. For more information, see Denis Steven Rutkus and Maureen Bearden, *supra* note 53.

<sup>86</sup> Linda S. Greene, *supra* note 84, at 30.

<sup>87</sup> Statement of Hon. Edward Kennedy during the hearings on the nomination of Thurgood Marshall, as quoted in Greene, *The Confirmation of Thurgood Marshall to the United States Supreme Court*, at 33.

<sup>88</sup> United States Senate, Committee on the Judiciary, Questionnaire for Nominee [Elena Kagan] for the Supreme Court, available at <http://judiciary.senate.gov/nominations/SupremeCourt/upload/ElenaKagan-PublicQuestionnaire.pdf>, at 1-2.

<sup>89</sup> William J. Clinton, Presidential Library and Museum, *Elena Kagan: Domestic Policy Counsel*, available at <http://www.clintonlibrary.gov/textual-KaganDPC.htm>.

<sup>90</sup> Laura Meckler, *Grading Kagan as Dean*, The Wall Street Journal, May 12, 2010, available at <http://online.wsj.com/> (continued...)

involved in a controversy surrounding Harvard's anti-discrimination policy and whether to allow military recruiters to recruit through the school's Office of Career Services despite the ban on gays serving in the military.<sup>91</sup>

## Tenure as Solicitor General

In 2009, President Obama appointed Elena Kagan to be the 45<sup>th</sup> Solicitor General of the United States. She is also the first woman to hold this position. Solicitor General Kagan has been counsel of record for over a hundred merits briefs and has argued six cases before the Court. These cases have included *Robertson v. United States* (criminal contempt); *Holder v. Humanitarian Law Project* (free speech); *United States v. Comstock* (civil commitment of sex offenders); *Free Enterprise Fund v. Public Company Accounting Oversight Board* (appointments clause and separation of powers); *Salazar v. Buono* (separation of church and state); and *Citizens United v. Federal Election Commission* (federal election law).<sup>92</sup>

## Potential for Recusal During Her First Term if Confirmed

The principal federal statute requiring disqualification and recusal of those on the federal bench, including the Supreme Court,<sup>93</sup> is 28 U.S.C. §455.<sup>94</sup> That law requires recusal in two general circumstances: (1) whenever a judge or justice's "impartiality might reasonably be questioned";<sup>95</sup> or (2) when there exists actual bias or prejudice, or when certain, specified relationships, connections, or interests are present, regardless of whether or not the judge's impartiality might reasonably be questioned.<sup>96</sup> As a general statement it may be fairly said that, with respect to disqualification and recusal, federal judges are held to the highest degree of impartiality and required objectivity of any officials in the federal government.

The question has arisen as to whether Elena Kagan, if confirmed as a Supreme Court Justice, would need to disqualify and recuse herself from cases with which she was involved during her tenure as Solicitor General. The portions of 28 U.S.C. §455 most likely to be relevant to this question are as follows:

- (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. (b) He shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; ... (3) Where he has served in governmental employment and in such

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(...continued)

[article/SB10001424052748703565804575238740862226702.html](http://www.congressionalresearchservice.com/article/SB10001424052748703565804575238740862226702.html).

<sup>91</sup> See CRS Report R41281, *Supreme Court Nominee Elena Kagan: Defamation and the First Amendment*, by Edward C. Liu.

<sup>92</sup> See Questionnaire, *supra* note 88, at 71.

<sup>93</sup> *Cheney v. United States Dist. Court*, 541 U.S. 913, 916 (2004)(Scalia, J, memorandum opinion); *Laird v. Tatum*, 409 U.S. 824, 825 (1972).

<sup>94</sup> See also 28 U.S.C. § 144 (applying only to district court judges); United States Judicial Conference, Code of Conduct for United States Judge, Canon 3(C) (applying to federal judges, but not to Supreme Court Justices).

<sup>95</sup> 28 U.S.C. § 455(a).

<sup>96</sup> 28 U.S.C. § 455(b)(1)-(5).

capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy....

The issue of recusal of government attorneys because of prior involvement with a case has most often arisen where a judge had formerly been a prosecutor, and had been involved with criminal proceedings regarding a particular client.<sup>97</sup> For instance, where a former prosecutor, now a judge, had been involved in a criminal investigation concerning a defendant in a case now before him, the courts have held the judge may be disqualified.<sup>98</sup> Similarly, where a judge was involved in his previous capacity in preparing or signing an information or a complaint against the defendant, assisting the grand jury, preparing or signing an indictment, participating in an arraignment, or other prosecutorial functions and actions, the courts have generally ruled that the judge was disqualified from acting in a later criminal proceeding involving the same defendant.<sup>99</sup>

In some state cases, the courts have recognized that numerous statutes require attorneys general, regional district attorneys, and other supervisory personnel to sign all motions, briefs, appeals, and similar papers, even if they have no knowledge of the facts of the case. Thus, in a number of state cases, the courts have held that supervisory prosecutors who had no knowledge of the facts of cases but had their signatures affixed to various prosecutorial documents prior to becoming judges were not thereby disqualified from subsequently trying the defendant in the same case.<sup>100</sup> It is not clear, however, that this exception would be available for federal judges under 28 U.S.C. §455.<sup>101</sup>

## Concluding Observations

The role of the Solicitor General is unique in the American legal system. Not only does the Solicitor General represent the interests of the U.S. government before the Court, but the office is also charged with assisting the Supreme Court in the exercise of its judicial function. Through repeated opportunities to argue before the Court, some suggest that the office of the Solicitor General has built a “special relationship” with the Supreme Court based on trust and interdependence established over multiple and continuing interactions. The Court relies on the Solicitor General to perform a “gatekeeping” function by recommending for review only the most meritorious of the government’s cases and providing the highest quality arguments for the Court’s consideration. Through these actions, the Solicitor General seeks to convince the Supreme Court

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<sup>97</sup> The same standards, however, would appear to apply to a government attorney previously involved with civil matters. W. R. Habeeb, *Prior Representation or Activity as Attorney or Counsel as Disqualifying Judge*, 72 A.L.R.2d 443, at 4(a).

<sup>98</sup> See, e.g., *United States of America v. Pepper & Potter, Inc.*, 677 F. Supp. 123 (1988) (judge who was former U.S. Attorney and who met with official of antitrust division about case before him suggests such meeting could serve as basis for disqualification).

<sup>99</sup> Jay M. Zitter, J.D., *Prior Representation or Activity as Prosecuting Attorney as Disqualifying Judge from Sitting or Acting in Criminal Case*, 85 A.L.R.5<sup>th</sup> 471, at 2(a).

<sup>100</sup> *Ibid.*, at 2(a) (collecting cases). Disqualifying the judge in these cases has been deemed inappropriate, since there is no real appearance of impropriety, and since the result would be a large number of cases in which such a judge would be disqualified.

<sup>101</sup> See *United States v. Amerine*, 411 F.2d 1130, 1133 (6<sup>th</sup> Cir. 1969) (holding that 28 U.S.C. § 455 was properly interpreted to make a United States Attorney “of counsel” in any criminal prosecution which occurred in his district and thus required his disqualification); *United States v. Arnpriester*, 37 F.3d 466, 467 (9<sup>th</sup> Cir. 1994) (where case was investigated in his district during his tenure, knowledge and acts of assistants are imputed to former United States Attorney).

that the government's position is the correct one. Although scholars disagree on the exact nature of the office's influence, most of the time, the Solicitor General is successful in this task.

Despite this close relationship and the institutional knowledge that comes with it, few Solicitors General have been appointed to the Supreme Court. Since the creation of the office in 1870, only four former or current Solicitors General have been elevated to the highest bench. The first, William Howard Taft, served in both the executive and judicial branches before his joining the Court, most notably as the 27<sup>th</sup> President of the United States. Stanley Reed, who was elevated directly from the position of Solicitor General to the Court, spent most of his professional career in private practice and had never been a judge before becoming an Associate Justice. Robert Jackson, like Reed, had no judicial experience before his appointment. He had, however, served in five different positions in the Department of Justice, including that of Attorney General, prior to his elevation. Unlike Reed and Jackson, Thurgood Marshall, who had served as a federal appellate judge, had little experience in private practice and had only served as a government attorney for two years prior to his nomination to the Court. However, between working as the director and general counsel of the NAACP Legal Defense Fund for 21 years and serving as Solicitor General, Justice Marshall had extensive Supreme Court litigation experience before joining the bench.

If Elena Kagan is confirmed, she would be the fifth Solicitor General to serve on the Court. Although service as the Solicitor General has generally been viewed as an important and relevant qualification, her lack of judicial and litigation experience has raised questions by some as to whether she is qualified to sit on the Court. Although the ultimate judgment as to appropriate qualifications to be a Supreme Court Justice must be left to the Senate, it is clear that the experience of serving as Solicitor General provides the occupant of the office with unique insights into the Supreme Court.

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