



The Queens in Obama's High Court

A look at the potential Supreme Court nominees. By Andrea Cooper

As early as this week, President Obama is expected to pick a replacement for retiring Justice David Souter—and the nominee will very likely be a woman. But change on the highest court in the land won't stop there. Obama could make at least two more appointments during the next few years. Justice John Paul Stevens is 89, and Justice Ruth Bader Ginsburg has been treated for pancreatic cancer. By the end of Obama's tenure, it's possible a third of the court's nine seats will be held by women.

What would a court with significantly more women mean for the nation? For one, women's-rights groups could see a more diverse court as an invitation to take cases there, says Tracey George, a professor at Vanderbilt University Law School, because the cases that come before the court are chosen by the justices. Controversial topics in the next few years could include civil

rights (such as terrorism-detainee rights or gay marriage), states' rights, and criminal justice.

For some people, it'll be a pleasant change to see even one more female in the boys' club. "It seems shocking that only one of nine Supreme Court justices is a woman," George says. "You want the body with the final word on the meaning of our constitutional rights to reflect the population whose rights they are protecting."

Still, according to a Gallup poll conducted in early May, 64 percent of Americans say it doesn't matter if Obama appoints a woman; 26 percent call it "a good idea, but not essential"; and just 6 percent say naming a woman is "essential."

Obama clearly sees this as an important nomination. He's said to have put in place the same heightened measures for secrecy that he used to select his vice president. Cynthia Hogan, counsel to Vice President Joe Biden and a longtime veteran of the Judiciary Committee, is active in the search and is reporting directly to the president on this project.

Even so, a few names have made it into the light, and each has the kind of résumé that could significantly alter the chemistry of the august body: Sonia Sotomayor, a divorcée, is Hispanic and was raised in the Bronx by a single mother; Elena Kagan, also a divorcée and a native of New York City, was the first woman to become dean of Harvard Law and once clerked for Justice Thurgood Marshall; and Diane Pamela Wood, a mother of six children, is a former colleague of the president's at the University of Chicago Law School.

Here's a glimpse of the woman—or women—who may mark the beginning of a new era at the Supreme Court.

The Fiery Latina

A few weeks ago, Judge Sonia Sotomayor, who is 54 years old and lives in Manhattan, was someone no one outside the legal community would have recognized—unless you were a baseball fan; in 1995, she was the judge who ended the contentious baseball strike with an injunction that took her just fifteen minutes to issue. Then, in early May, came the New Republic article by Jeffrey Rosen with anonymous sources questioning her intelligence and temperament; the heated Salon reply in her defense from a former litigator who argued in her court ("Sotomayor's decades of achievement in the face of overwhelming obstacles just gets dismissed with a few slothful, totally irresponsible smears from Rosen and his invisible friends"); and even a skit on David Letterman featuring a judge whose chaotic courtroom is full of Hispanic immigrants who all speak at the same time.

Whether the summa cum laude graduate of Princeton has the intellectual firepower and analytic ability to combat the conservatives on the court, the skirmish about Sotomayor also centers on personality—whether she's egotistical and unnecessarily aggressive from the bench. "When President Clinton nominated Sotomayor to the Court of Appeals, a substantial majority of the ABA judicial committee gave her the highest rating (abanet.org/scfedjud/ratings/ratings105.pdf) of 'well qualified,' while a minority gave her the intermediate 'qualified' rating," American University law professor Darren Hutchinson pointed out in his blog. Her detractors, he wrote, "describe her as a fiery Latina tempest waiting to knife and brutalize lawyers in the courtroom."

There's no doubt that Sotomayor's biography would make her nomination ground-breaking. She is self-made, having risen from the humble circumstances of a lower-income Puerto Rican family in public housing to the Ivy League. As a young child, she decided she would be a detective, just like Nancy Drew in the mystery books she loved to read. She was still in elementary school when she learned she had diabetes, which made her scratch the detective plan and look to another icon of the time for her career path—Perry Mason.

District Attorney Robert Morgenthau, who hired her out of Yale Law, has called her a “fearless and effective prosecutor” who as a judge “believes in the rule of law.” In the ABA Journal, she's described as a political centrist, which may explain why she's been nominated previously by both Republicans and Democrats. President George H.W. Bush picked her for the District Court, and President Clinton elevated her to the Second Circuit Court of Appeals, where she's been for more than a decade.

Once a clerk for Sotomayor, University of Illinois law professor Rob Kar describes his former boss as brilliant, warm, generous, and social—the person who threw the Christmas party everyone wanted to attend. Sotomayor, who has called the courts “the last refuge for the oppressed,”

befriends the powerful and the less so, Kar says, including janitors and cafeteria workers at the court, some of whom came to see her Second Circuit induction ceremony. She may be able to relate to their circumstances, at least financially: Though she earns nearly \$180,000 a year (in New York City, where the cost of living is higher), she reported no financial holdings in 2007 except a checking account and a savings account, whose combined total was \$50,000 to \$115,000.

Kar adds, “She is very intellectually engaged and exacting.” It's not a good idea to raise weak arguments in her court or show up unprepared. He has noticed that some lawyers—especially older ones who may be accustomed to “a less inclusive bench”—can feel resentful when challenged by a Hispanic woman who is often younger than they are.

As for Sotomayor's general disposition, says Jonathan Entin, a law professor at Case Western Reserve University who clerked for Justice Ginsburg, “I'm reluctant to make too much of what people say about strong women. Most judges are not shrinking violets. Most lawyers are not shrinking violets. Very few judges become judges because someone comes along and notices them. They do something to make themselves noticed.”

Sotomayor's noteworthy opinions include allowing the city of New Haven, Connecticut, to ditch the results of a test that would have promoted whites over minorities. The case went to the Supreme Court, which heard it last month but has not yet issued a ruling.

Sotomayor could have trouble in confirmation hearings for other reasons, as well. She has said the “Court of Appeals is where policy is made,” feeding perceptions she wants to make law rather than interpret it. Senator Orrin Hatch, a Republican on the Judiciary Committee, has somewhat ominously called that statement “a problem.”

Harvard's Den Mother

In March, then Harvard Law School Dean Elena Kagan was named the nation's first female solicitor general—the lawyer who argues on behalf of the government in front of the Supreme Court—though she had not argued a case before the court prior to her nomination and has never served as a judge. Whether that's a liability or an asset depends upon whom you ask. The eight justices who would be on the court with her served on the Appellate Court first, and over the last 50 years, two-thirds of Supreme Court justices held that job prior to nomination. By selecting Kagan, Obama would also be creating more work for himself because he'd have to find another solicitor general.

But if his priority is to pick someone with broader experience, Kagan could be the woman. All you have to do is take a quick look at her résumé: Clerked for Justice Thurgood Marshall. Taught at the University of Chicago, where the president taught, too. Joined the Clinton White House as associate counsel. (Clinton nominated her to the Court of Appeals, but Senator Hatch never scheduled a hearing on the nomination, which meant it died before it started.) Became dean at Harvard Law in her early 40s.

Kagan has received wide praise for her performance at Harvard. In part by adding more conservatives to the faculty, “she took the school in the direction of more openness and more rigorous intellectual debate,” says attorney Montgomery Kosma, who knew Kagan (when he was a law student) at Chicago.

Beyond that, she's credited with uniting “a fairly dysfunctional faculty” split on ideological grounds at Harvard, says Roger Goldman, a professor at Saint Louis University School of Law. It's possible her skill at bringing disparate personalities together might help the liberal wing get more wins at the court, which has sometimes been split four to four, with Justice Anthony Kennedy as the swing vote. Kagan had something of a motherly bent, too, giving students such niceties as free tampons in women's bathrooms, free coffee in classroom buildings, and a combination beach volleyball court/skating rink.

Born in 1960, in New York City, Kagan also has youth on her side. Supreme Court justices are an important legacy for a president. They serve until they choose to leave or die. Kagan, who is single with no children, could conceivably be a force at the court for 25 years.

Though she has no track record as a judge and therefore no written opinions to assess, the letters for and against her nomination as solicitor general suggest how her opponents think she might rule. The president of Concerned Women for America, a group that seeks to “bring Biblical principles into all levels of public policy,” is at odds with Kagan because she has said that the military's position against homosexuals is a “profound wrong—a moral injustice of the first order.”

Speaking to a Senate committee prior to becoming solicitor general, though, Kagan said that same-sex marriage is not an inherent right in the Constitution. She also revealed she is not “morally opposed” to the death penalty and believes that detainees in Afghanistan who are accused of terrorism should not have due-process rights.

There's reason to believe that Kagan has a sense of humor about the serious work of jurisprudence. Kosma remembers her in a University of Chicago Law School musical. “She

joined the students and appeared onstage wearing a motorcycle jacket and sunglasses and was absolutely hysterical.”

The Bench Balancer

Every other year or so, Judge Diane P. Wood holds a reunion for her former clerks, who travel from far-flung locations to attend the picnic in the backyard of her house in the Chicago suburbs. That informality may not be what you’d expect from a judge on the Seventh Circuit Court of Appeals, but Wood, 58, is not easily categorized. Proponents describe her as “very smart,” “a terrific thought leader,” “a careful and conscientious judge” who is “reasonable and responsible in her jurisprudence” yet “not easily pushed around.” She was appointed to be a tough counterbalance to two conservative male judges on her court, which suggests she could stand up to the likes of Justice Antonin Scalia.

Wood doesn’t reflexively take the liberal position, according to her admirers. “She has time and again been in cases where she sided with people who are perceived to be far more conservative than she is,” says attorney David Gossett, her former law clerk and friend.

A native of New Jersey, Wood earned her undergraduate and law degrees from the University of Texas, and then clerked early in her career for Justice Harry Blackmun and worked in private practice. When she joined the law school faculty at the University of Chicago in 1981, she was the only woman and was eight months pregnant. She went on to spend fourteen years on the faculty, overlapping with Obama and Kagan until Bill Clinton nominated her in 1995 for the Appellate Court.

A specialist in antitrust law, she is married to a neurologist and has three grown children and three stepchildren. She’s probably the only Court nominee who could ever include “accomplished twirler” on her résumé—a talent she picked up in high school—but she also plays the oboe for several local orchestras. “She’s a bright, engaging, genuine, friendly, warm person,” says Chicago–Kent College of Law Dean Harold Krent. Krent, who invited Wood to speak at his college’s 2004 commencement ceremony, says he sees her as a consensus builder who can reach out to opponents.

If that’s true, it may be because she’s had practice. Gossett describes her as popular even with judges on the other side of many cases, and attorney Montgomery Kosma found her a willing participant in events he planned for the Federalist Society, a conservative group. “She really engaged in the issues in a thoughtful way,” Kosma says. “She didn’t act like a haughty judge like some do.”

Of the three possible nominees, she would be the safest choice for Obama, Entin believes, because she’s highly regarded even by people who don’t agree with her. “They’re not going to say she’s superficial or a hard-core ideologue, or some sort of wild-eyed judicial activist. Those are simply not plausible charges.” Whether “hard-core ideologue” is a plausible charge or not, some conservatives are calling Wood too liberal. She’s written opinions upholding abortion rights, a topic that will surely come up if she is nominated.

She’s known to be an empathetic judge, something the president says he’s looking for. Last week, for example, Wood will hear a case brought by a Jewish family against their condo

association, which forbade condo owners to post religious symbols on their front doorways. It was on Wood's recommendation that the case will now be heard by the entire Seventh Circuit. In her opinion, Wood noted that the condo association waited to remove the family's mezuzah until everyone was out of the house, attending the funeral for the litigant's husband.

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