Rookie Justice

Kristin Linsley Myles, Michelle Friedland, Aimee Feinberg, Miriam Seifter, and Michael Mongan

From left: Kristin Linsley Myles, Michelle Friedland, Aimee Feinberg, Miriam Seifter, and Michael Mongan

The Supreme Court made much front page news this term, with its decisions on campaign finance laws, the death penalty, and prison overcrowding, among others. But the Court's 2010 Term was notable for not just *what* it decided but *who* did the deciding. This term marked Justice Elena Kagan's first on the Court and the first time in history that the Supreme Court had three female members on the bench. Justice Kagan's nomination to the Court was met with great curiosity about how this Harvard-dean-turned-solicitor-general-turned-Supreme-Court-justice would approach her role as one of the nation's nine most powerful jurists. In this column, we look at Justice Kagan's first year on the Court.

Unlike all of her colleagues, who were elevated to the Supreme Court from a federal appellate judgeship, Justice Kagan's previous job was as an advocate appearing before the Court, as the United States solicitor general. Although Justice Kagan is the 111th member of the Supreme Court, she is only the third person to be elevated to the highest Court directly from the position of solicitor general. Her brief tenure as the leading advocate for the executive branch gave her far greater familiarity with the Court than most freshman justices (whose prior experiences with the Court often involved waiting on the sidelines to see if their appellate court decisions would be upheld or reversed). Justice Kagan had argued before the Court six times during the October 2009 Term, on issues ranging from a First Amendment challenge to federal campaign finance laws to the constitutionality of an oversight board created by the Sarbanes-Oxley Act. As a result of those appearances, Justice Kagan had developed a working relationship of sorts with her new colleagues and an understanding of their approaches on the bench, even before her investiture.

Joining the Court directly from the office of the solicitor general also meant that Justice Kagan was familiar with many of the cases pending before the Court this term that had come through her office. The solicitor general not only handles Supreme Court cases where the United States is a petitioner or respondent, but also decides whether to authorize appeals by the government to the federal courts of appeals and submits briefs on behalf of the United States as amicus curiae or at the invitation of the Court. The Court's recusal practices are both voluntary and opaque, but it is clear that a justice's

prior involvement as an advocate in a case that is currently pending before the Court warrants his or her abstaining from any participation in the Court's decision. A former solicitor general like Justice Kagan, then, can expect to be sitting on the sidelines for a large number of merits cases during her rookie year.

By the end of the 2010 Term, Justice Kagan had recused herself from twenty-six merits cases, about 32 percent of the total number decided by the Court. This is roughly consistent with the track record of Justice Thurgood Marshall, who was elevated to the Court after serving as solicitor general in the Johnson administration. Justice Marshall recused himself from fifty-seven of the Court's merits cases during his initial term, about two-fifths of the total, the vast majority because of his prior service in the Department of Justice. The only other former solicitor general to move up to the Court, the more forgettable Stanley Forman Reed, recused himself from twenty-nine merits cases during his first term on the Court in 1938.

When Justice Kagan exchanged her advocate's attire for a black robe, she stepped into a world of rituals and traditions that often find the most recently confirmed justice at the bottom of the pecking order. For example, the junior justice takes notes during the Court's conferences and is tasked with the inglorious responsibility of answering the door during conferences if one of the marshal's aides knocks. (Justice Stephen Breyer frequently recounts a story of opening the door only to find that he was being asked to deliver a cup of coffee to Justice Antonin Scalia.) She is also the last to walk into the House chamber for the president's state of the union address and the last to walk in funeral processions. The junior justice also holds the high honor of serving on the committee with jurisdiction over the Court's cafeteria. Serving on this committee, Justice Kagan has already made her mark: thanks to her efforts, the cafeteria now offers frozen yogurt in addition to the usual chicken finger fare.

Nowhere are the consequences of juniority more apparent than in the Court's consideration and assignment of cases. After each week of oral argument, the justices hold a private conference to discuss the cases they have heard and to cast a preliminary vote on how those cases should be resolved. The discussion begins with the chief justice, followed by the most senior associate justice (Antonin Scalia), and so on. The junior justice is the last to speak. In most of the Court's cases, which are decided by 9–0 or 8–1 votes, the matter will already be decided by the time the junior justice has a chance to express her views. In a small but important fraction of cases, however, the vote stands at 4–4 after the first eight justices have chimed in, and the vote of the most junior justice is decisive. Justice Kagan found herself in this position a handful of times this term.

At the close of each monthly sitting, justices receive their opinion assignments. Majority opinions are assigned by the chief justice, unless he happens to be dissenting, in which case the opinion is assigned by the most senior justice in the majority. Court tradition provides that the chief justice assigns a yawn-inducing case to be the first opinion of his most junior colleague. Justice Breyer's inaugural effort, *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1994), involved the reach of section 2 of the Federal Arbitration Act, which makes enforceable a written arbitration provision in a contract evidencing a transaction involving commerce. Justice Ruth Bader Ginsburg's first opinion was a barn burner on whether the fiduciary standards set out in the Employee Retirement Income Security Act govern an insurance company's conduct in relation to annuity contracts. See *John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank*, 510 U.S. 86 (1993). Justice Sonia Sotomayor may have lucked out with her first assignment, deciding in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), that orders to disclose communications covered by the attorney-client privilege may not be immediately appealed under the collateral order doctrine.

The first majority opinions authored by Justice Kagan were no exception to the tradition. In *Ransom v. FIA Card Services*, the Court through Justice Kagan held that a debtor who does not make a loan or lease payment on his vehicle may not take the car-ownership deduction set out in Chapter 13 of the Bankruptcy Code, 11 U.S.C. § 707(b)(2)(A)(ii)(I). Justice Kagan concluded that the statutory text precluded the deduction, because debtors were only allowed to claim "applicable monthly expenses," which she and seven of her colleagues read as referring to expenses actually incurred by the debtor. Justice Scalia dissented, arguing that the statute entitled

all debtors who owned cars to an ownership deduction. Justice Kagan's second opinion, for a seven-justice majority in *CSX Transportation, Inc. v. Alabama Department of Revenue*, held that a railroad may invoke a provision of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501(b)(4), to challenge Alabama sales and use taxes that apply to the railroad but exempt other competitors in the transportation industry. True to tradition, the seven majority opinions that Justice Kagan authored this term were all in relatively noncontroversial cases: three were decided 9–0, two were 8–1, and two 7–2. Perhaps mindful of the mind-numbing quality of some of the issues her first opinions tackled, Justice Kagan showed some self-deprecating humor. When announcing her opinion in *Smith v. Bayer Corp.*, in which the Court held that a federal court exceeded its authority in enjoining state class certification proceedings, Justice Kagan quipped: "This decision involves a very complex procedural issue. And if you understand anything I say here, you will likely be a lawyer, and you will have had your morning cup of coffee."

Although Justice Kagan's early majority opinions may have been soporific, her first dissents were anything but, perhaps giving Court watchers and litigants a sense about her personal judicial style. Justice Kagan authored dissents in two of the most bitterly divided 5–4 cases of the term. Her very first dissent was in *Arizona Christian School Tuition Organization v. Winn*, the establishment clause case that was the subject of our column in the Spring issue of this magazine. Justice Anthony Kennedy's opinion for the Court in *Arizona Christian School Tuition* held that the plaintiffs lacked taxpayer standing to challenge Arizona's provision of tax credits for contributions to private school tuition organizations that provide scholarships to students attending religious schools. Justice Kagan's dissent, joined by Justices Ginsburg, Breyer, and Sotomayor, strongly disagreed with the majority's reasoning. Justice Kagan attacked what she called the "arbitrary distinction" between direct government spending favoring religion, which the Court said will support taxpayer standing, and what Justice Kagan called "tax expenditures"—meaning "the various deductions, credits, and loopholes that are just spending by another name" and that, under the Court's ruling, will not support standing. As we explained in our last column, the question of taxpayer standing for establishment clause challenges is one that has divided the Court for decades, and Justice Kagan jumped into that debate with both feet.

Justice Kagan also penned the dissent in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, on behalf of the same group of four justices. That case involved a First Amendment challenge to Arizona's public financing system for funding election campaigns for candidates for state office. The opinion for the Court, authored by Chief Justice John Roberts, struck down Arizona's matching funds provision, which allocated additional funds to a publicly financed candidate if a privately financed candidate's expenditures, combined with the expenditures of independent groups made in support of the privately financed candidate, exceeded the publicly financed candidate's initial state allotment. Justice Kagan argued that "[n]o precedent compel[led]" that result and that the "decision is in tension with broad swaths of . . . First Amendment doctrine." Justice Kagan apparently felt so strongly that the majority had unjustifiably interfered with Arizona's election reform efforts that she announced her dissent from the bench—something that typically occurs only a handful of times a term.

In both of these dissents, as well as in her only other dissent, which came in *Sykes v. United States*, a case addressing whether fleeing in a vehicle from a law enforcement officer counts as a violent felony for purposes of the federal Armed Career Criminal Act, 18 U.S.C. § 924(e), Justice's Kagan's law professor background was apparent. In each opinion, she used hypotheticals to support her reasoning. In *Arizona Christian School Tuition*, she managed to squeeze three hypotheticals in a single paragraph:

> Consider some further examples of the point, but this time concerning state funding of religion. Suppose a State desires to reward Jews—by, say, $500 per year—for their religious devotion. Should the nature of taxpayers' concern vary if the State allows Jews to claim the aid on their tax returns, in lieu of receiving an annual stipend? Or assume a State

> wishes to subsidize the ownership of crucifixes. It could purchase the religious symbols in bulk and distribute them to all takers. Or it could mail a reimbursement check to any individual who buys her own and submits a receipt for the purchase. Or it could authorize that person to claim a tax credit equal to the price she paid. Now, really—do taxpayers have less reason to complain if the State selects the last of these three options? The Court today says they do, but that is wrong.

Justice Kagan's dissent in *Arizona Free Enterprise* led with hypothetical examples, stating in the very first sentence: "Imagine two States, each plagued by a corrupt political system…" In *Sykes*, Justice Kagan likewise put readers in the role of law students asked to use their imaginations: "Imagine the converse of the statute described above—a statute making it a crime to 'willfully flee from a law enforcement officer *without* driving at high speed or otherwise demonstrating reckless disregard for the safety of others. . .'"

Justice Elena Kagan

Justice Kagan's personality peeked through in other ways as well. In her dissent in *Arizona Free Enterprise*, Justice Kagan adopted an informal, witty tone in several passages. For example, in arguing that Arizona's matching funds system made more sense than a lump-sum public financing system that the Court majority would have condoned, because too low a lump sum would disadvantage the publicly financed candidate while too high a lump sum would waste public resources, Justice Kagan stated: "The difficulty, then, is in finding the Goldilocks solution—not too large, not too small, but just right."

That Justice Kagan is already comfortable enough on the Court to make references to nursery rhymes while attacking her colleagues' reasoning may be a result of her close contact with the Court in her role as solicitor general. That her dissents were so passionate may give comfort to liberal Court watchers who were eager for the justice who replaced Justice John Paul Stevens—regarded by many as the guardian of individual rights and the fearless leader of the liberal bloc on the Court—to fill his large shoes. Looking at the term's cases overall, Justice Kagan voted reliably with her colleagues in the liberal wing of the Court. Many of the most controversial cases of the term—such as those addressing the constitutionality of Arizona's campaign finance law or a challenge to state support of religious schools—unsurprisingly were decided with a 5–4 split, with Justice Kagan siding with Justices Ginsburg, Breyer, and Sotomayor. But Justice Kagan also found herself taking the position traditionally viewed as "liberal" in the less closely divided cases as well. In each of the Court's rulings decided 6–3, Justice Kagan voted with the criminal defendant or civil plaintiff, or against the corporate entity seeking to relieve itself of the burden of particular government regulation.

Justices' approaches to judging and views on issues often change over the course of their careers on the Court. At age fifty-one, Justice Kagan will likely serve on the Court for many years. Her record on her first year on the bench may not be much of a barometer for how her career on the Court will evolve. But it is a strong indication that, however her jurisprudence evolves, her approach and writing—drawing from her experience as law professor, dean, and solicitor general—will be both insightful and entertaining.

Kristin Linsley Myles, Michelle Friedland, Aimee Feinberg, Miriam Seifter, and Michael Mongan are litigators at Munger, Tolles & Olson in San Francisco and all clerked at the Supreme Court—for Justices Scalia, O'Connor, Breyer, Ginsburg, and Souter, respectively.