



## Kagan Might Pass as a Bush Supreme Court Choice: Ann Woolner

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Commentary by Ann Woolner

May 11 (Bloomberg) -- If [Elena Kagan](#) replaces [John Paul Stevens](#) on the U.S. Supreme Court, [George W. Bush](#) might wish for another try at persuading the justices to rule his way on a couple of items.

Take his notion that suspected enemies locked up at Guantanamo Bay have no right to challenge their detentions in federal court. The high court nixed that policy as unconstitutional by a bare 5-4 majority, with Stevens writing for the majority. If Kagan had been there instead, there is a decent chance the court might have stamped its approval.

Then there was the Bush administration's attempt to relieve the Environmental Protection Agency of regulating green house gas emissions from cars. A 5-4 majority led by Stevens in 2007 said the agency couldn't ignore the duties Congress gave it under the Clean Air Act.

Given what Kagan has written about the president's power over administration agencies, it's clearly possible that she might have flipped the court in favor of the White House on that one, too.

When it comes to protecting and enhancing the power of the president, Kagan offers more hope for the chief executive than the other front-runners for the job.

With Kagan's nomination, you would think you would be hearing hallelujahs from conservatives who denounced court rulings that blocked Bush policies.

On the other side, liberal outcry is muted on the point. The Center for Constitutional Rights spent much of the Bush years taking the administration to court to slap down its reach for ever more authority.

### 'Troubling Support'

"I am sad to say that Solicitor General Elena Kagan's record indicates a troubling support for expanding presidential powers, something we must be vigilant about at this time," Vincent Warren, executive director of the Center for Constitutional Rights, [said](#) on the group's website.

Sad? Troubled? Why not irate? Scared witless?

Warren chuckled when I asked him over the telephone about the tepid language.

"I am always hopeful that once the facts and positions are known to her," Warren said, that Kagan's viewpoint will shift.

Besides, there is a range of issues the Supreme Court considers. And given the partisan polarization in Washington, you aren't going to hear a lot of trashing of her by Democrats or unrestrained joy by Republicans.

On both sides, there is worry that her lack of judicial experience or academic writing gives little to reflect her philosophy or ideology, which is presumably liberal.

As dean of Harvard Law School, she tried, alongside faculty, to bar military recruiters from campus because of the don't-ask-don't-tell policy on gays. Who else but a liberal would do that?

Using Agencies

Nonetheless, we do know from her writing that she likes the idea of the president using federal agencies to carry out his policies, even though originally they were seen as a way for Congress to delegate its authority. On that point, she and Bush would make for a happy couple.

We also know that, in an exchange last year with Republican Senator **Lindsey Graham** of South Carolina, she worried civil libertarians when he asked her about the legal status of enemy combatants.

Yes, she agreed, they can be detained, "for the rest of their lives," as Graham put it, as long as they have received transparent due process with the involvement of an independent judiciary.

Plus, as solicitor general, Kagan has tried to block lawsuits that challenge warrantless wiretaps. The Bush and Obama administrations have both cited the state secrets law to kick the cases out of court before anyone can decide whether the eavesdropping was legal.

#### Not Heartening

This isn't heartening.

Among viscera-inciting issues, abortion rights and gay rights are the alpha for much of America, compared with comparatively academic debates over limits on presidential powers and judicial review of executive actions.

My guess is that few people will attempt to read Kagan's 103-page (with footnotes) Harvard Law Review **article** from 2001, "Presidential Administration."

It's hardly a radical document, as it acknowledges the roles of the other two government branches. But it does applaud the aggressive approach to presidential power taken by **Bill Clinton**, for whom Kagan worked when he was in the White House.

For this nominee, President **Barack Obama** wasn't looking for an ideologue but a consensus builder. But can she do that without giving away the store that Stevens spent his career protecting?

#### Amiable Advocate

The attempt to replace Stevens -- a dependable, articulate and amiable protector of individual rights -- with a justice who has shown affection for expansive presidential authority and who never voiced outrage when Bush and **Dick Cheney** were attacking the rule of law with their policies, should raise alarms.

It can't be that liberals are OK with presidential overreach when they like the president and conservatives comfortable with it only when he is one of their own.

No one knows how Kagan will rule if confirmed. But when it comes to that essential issue of presidential power, Bush has got to be smiling right about now.

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