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## **Will the Real Elena Kagan Please Stand Up? Conflicting Public Images in the Supreme Court Confirmation Process**

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**Will the Real Elena Kagan Please Stand Up?**  
**Conflicting Public Images in the Supreme Court Confirmation Process**

Keith J. Bybee<sup>†</sup>

Forthcoming in *Wake Forest Journal of Law & Policy*, Spring 2011

ABSTRACT

What images of judging did the Kagan confirmation process project?

My response to this question begins with a brief overview of existing public perceptions of the Supreme Court. I argue that a large portion of the public sees the justices as impartial arbiters who can be trusted to rule fairly. At the same time, a large portion of the public also sees the justices as political actors who are wrapped up in partisan disputes. Given these prevailing public views, we should expect the Kagan confirmation process to transmit contradictory images of judicial decisionmaking, with a portrait of judging as a matter of reason and principle vying for attention with a picture of judging as a political enterprise.

Second, I identify the different appearances of judicial action actually at play in the Kagan confirmation process by assessing all confirmation-related news articles, editorials, opinion pieces, and blog posts published in the *Washington Post*, the *New York Times*, and the *Los Angeles Times*. I find that the confirmation coverage in the three newspapers conveys a contradictory mix of images that closely corresponds to the contradictory views of the Court already held by large numbers of Americans.

Finally, I consider the significance of the Janus-faced public beliefs about the Supreme Court. I acknowledge the ways in which political perceptions can chip away at judicial legitimacy, but I also argue that the public's competing views may ultimately have a stable co-existence. If we believe that individuals generally place contradictory demands on the courts, calling for an objectively fair system and at the same time seeking a guarantee that their own side will prevail, then a judiciary that appears at once to be governed by impartial principle and by partisan preference may cohere.

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One of the lighter moments in the Supreme Court confirmation process last summer occurred during the second day of hearings before the Senate Judiciary Committee. Senator Arlen Specter asked the nominee Elena Kagan if she thought Supreme Court oral arguments should be broadcast on television. Kagan warmly supported the idea and she outlined the positive effects that televised arguments would have on the public as well as on the Court itself. Kagan then identified a final consequence of placing cameras before the high bench: "It means that I would have to get my hair done more often, Senator Specter."<sup>1</sup>

Kagan's comment provided comic relief and (perhaps inadvertently) pointed toward an important fact about the judicial process: appearances matter a great deal for courts.<sup>2</sup> Scholars have frequently argued that public confidence in the judiciary depends not only on the actual results of court rulings but also the ability of judges to convey the impression that their decisions are driven by the impersonal requirements of legal principle.<sup>3</sup> The public cares about how judges look. The avoidance of actual judicial improprieties is necessary to secure

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<sup>1</sup> Sheryl Gay Stolberg, *Why Kagan Supports Broadcasting Oral Arguments*, NEW YORK TIMES (June 29, 2010, 3:56 PM), <http://thecaucus.blogs.nytimes.com/2010/06/29/why-kagan-supports-broadcasting-court-arguments>.

<sup>2</sup> For an account of judicial appearances in the United States and an analysis of their significance, see KEITH J. BYBEE, *ALL JUDGES ARE POLITICAL—EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW* (2010). I draw on arguments from my book throughout this article.

<sup>3</sup> See generally James L. Gibson, Gregory A. Caldeira & Vanessa Baird, *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 343–58 (1998); Trevor L. Brown & Charles R. Wise, *Constitutional Courts and Legislative-Executive Relations: The Case of Ukraine*, 119 POL. SCI. Q. 143, 143-69 (2004).

judicial legitimacy but it is not sufficient; judges must also visibly appear to play the role of neutral arbiter in order to reduce the probability of actual bias and to maintain popular support.<sup>4</sup>

The importance of appearances has long been evident in the codes of judicial conduct. As Charles Geyh has observed, the first Canons of Judicial Ethics, created in 1924, paid significant attention to questions of appearance: one canon declared directly,

that a judge's official conduct should be 'free from... the appearance of impropriety,' [while] eleven other canons cautioned judges to avoid conduct that could create 'suspicion' of misbehavior or 'misconceptions' of the judicial role that might 'appear' or 'seem' to interfere with judicial duties, or that could 'create the impression' of bias.<sup>5</sup>

The original concern for judicial appearances remains central to the modern judicial conduct codes now established in all fifty states.<sup>6</sup> The same concern for maintaining the propriety of judicial appearances can also be found in the federal code.<sup>7</sup>

The widely recognized importance of judicial appearances suggests two questions: What images of the courts and judicial decisionmaking were

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<sup>4</sup> For evidence that the appearance of judicial bias reflects the presence of actual bias, see Chris W. Bonneau & Damon M. Cann, *The Effect of Campaign Contributions on Judicial Decisionmaking* (Feb. 4, 2009), <http://ssrn.com/abstract=1337668>.

<sup>5</sup> Charles Geyh, *Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism*, in *BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA* 21, 29 (Keith J. Bybee ed., 2007).

<sup>6</sup> *Id.* at 30-32.

<sup>7</sup> See CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2 (2009), *available at* <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf> (last visited Nov. 29, 2010).

conveyed by the Kagan confirmation process? What is the significance of these images? Whether one thinks that the confirmation process is a good way of identifying qualified nominees or is merely a “waste of everyone’s time,”<sup>8</sup> it is undeniably true that Supreme Court confirmations offer a highly public display of claims about how the Court works and what counts as a good justice. A day may come when the Court’s oral arguments (and Justice Kagan’s hair) are a staple of the television broadcast schedule. Until that day arrives, however, it is fair to say that one of the most prominent public discussions of the Court happens when a vacancy on the high bench is being filled.<sup>9</sup> If we are interested in identifying and evaluating how the Court appears to the American people, then the confirmation process – beginning with the hearings in the Senate Judiciary Committee and ending with the full Senate’s confirmation vote – merits careful study.

In this Article, I examine the images of judging generated by the Kagan confirmation process. I develop my argument in three sections. In the first section, I provide a brief overview of existing public perceptions of the Supreme Court. I argue that a large portion of the public sees the justices as impartial arbiters who can be trusted to rule fairly. At the same time, a large portion of

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<sup>8</sup> Ronald Dworkin, *The Temptation of Elena Kagan*, THE NEW YORK REVIEW OF BOOKS (July 22, 2010), <http://www.nybooks.com/articles/archives/2010/aug/19/temptation-elena-kagan>.

<sup>9</sup> Confirmation processes do not typically dominate the news, but they can draw significant public attention, at least for a limited period. Polls conducted during the Kagan confirmation, for example, showed about 40% of those surveyed were paying close attention to the process. See Jennifer Agiesta, *Majority to Back Kagan Confirmation as Interest Wanes*, WASHINGTON POST (July 20, 2010, 6:00 AM), [http://voices.washingtonpost.com/behind-the-numbers/2010/07/majority\\_back\\_kagan\\_confirmati.html](http://voices.washingtonpost.com/behind-the-numbers/2010/07/majority_back_kagan_confirmati.html).

the public also sees the justices as political actors who are wrapped up in partisan disputes. To the extent that the confirmation process is consistent with prevailing public views, we should expect the process to transmit contradictory images of judicial decisionmaking, with a portrait of judging as a matter of reason and principle vying for attention with a picture of judging as a political enterprise.

In the second section of the Article, I identify the different appearances of judicial action at play in the Kagan confirmation process by assessing all confirmation-related news articles, editorials, opinion pieces, and blog posts published in the *Washington Post*, the *New York Times*, and the *Los Angeles Times*. I find that the confirmation coverage in the three newspapers conveys a contradictory mix of images that closely corresponds to the contradictory views of the Supreme Court already held by large numbers of Americans. Thus the confirmation process seems to have reaffirmed and reinforced existing public perceptions.

In the final section of the Article, I consider the significance of the Janus-faced public beliefs about the Supreme Court. One can certainly argue that the political view of the Court will undermine the belief that the justices are impartial arbiters, inexorably leading to the conclusion that members of the Court are simply political agents hiding their partisan agenda under a cover of law. I acknowledge the ways in which political perceptions can chip away at judicial legitimacy, but I also argue that the public's competing views may ultimately

have a stable co-existence. If we believe that individuals generally place contradictory demands on the courts, calling for an objectively fair system and at the same time seeking a guarantee that their own side will prevail, then a judiciary that appears at once to be governed by impartial principle and by partisan preference begins to make sense. This is by no means to say that such a paradoxical system is equitable or just. But it may well be the system that best suits our conflicting desires.

## **I. Public Views of the Supreme Court**

The conventional understanding of judicial decisionmaking requires judges to be shielded from politics and allowed to render decisions based on an impartial reading of the law.<sup>10</sup> This does not mean, of course, that judges must approach controversies without any pre-existing beliefs about what the law requires. As a practical matter, judges inevitably come to the bench with some preconceived legal views. The conventional expectation of judicial impartiality does not ask judges to abandon their legal preconceptions, so much as it calls upon them to not let preconceptions “harden into prejudgments,” preventing them from giving fair weight to the facts, law, and arguments that will be presented in the disputes before them.<sup>11</sup> The American Bar Association

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<sup>10</sup> See generally ABA Comm. on the 21st Century Judiciary, Informal Report, *Justice in Jeopardy* (July 2003) [hereinafter *Justice in Jeopardy*], available at <http://www.abanet.org/judind/jeopardy/pdf/report.pdf> (last visited Nov. 29, 2010).

<sup>11</sup> Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 211 (2004).

considers this ideal of judicial impartiality to be so broadly shared that it is an “enduring principle.”

Judges occupy the role of umpires in an adversarial system of justice; their credibility turns on their neutrality. To preserve their neutrality, they must neither prejudge matters that come before them, nor harbor bias for or against parties in those matters. They must, in short, be impartial, if we are to be governed by the rule of law rather than by judicial whim.<sup>12</sup>

Public opinion surveys suggest that most of the American public sees the Supreme Court as living up to this conventional expectation of judicial impartiality. Numerous studies demonstrate that the Court receives a significant degree of public goodwill because it is generally thought to be an even-handed guarantor of basic democratic values for all.<sup>13</sup> Polls show that 66% of Americans trust the Court to operate in the best interests of the American people either “a great deal” or “a fair amount,” and that 75% of the public either “agree or strongly agree” that the Court can usually be trusted to make decisions that are right for the country as a whole.<sup>14</sup> Moreover, the Court is, according to most people, properly insulated from the machinations of the other branches of

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<sup>12</sup> *Justice in Jeopardy*, *supra* note 10, at 9.

<sup>13</sup> See generally Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. POL. SCI. REV. 635, 635-64 (1992); James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. OF POL. SCI. 354, 354-76 (2003) [hereinafter Gibson et al., *Measuring Attitudes*]; James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 JOURNAL OF EMPIRICAL LEGAL STUDIES 507, 507-38 (2007) [hereinafter Gibson, *Legitimacy of the U.S. Supreme Court*].

<sup>14</sup> Judicial Survey Results, Annenberg Public Policy Center, *Public Understanding of and Support for the Courts 2007* (Oct. 17, 2007), [http://www.annenbergpublicpolicycenter.org/Downloads/20071017\\_JudicialSurvey/Judicial\\_Findings\\_10-17-2007.pdf](http://www.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Judicial_Findings_10-17-2007.pdf).



government. When asked whether federal judges should be subject to greater political control by elected officials, over two-thirds of those surveyed said no.<sup>15</sup>

Yet, even though solid majorities believe that the Supreme Court makes fair decisions and impartially advances general welfare, a large number of Americans also believe that members of the Court are influenced by politics. Some of the very same opinion studies that show broad belief in the Court's good offices also indicate a widely shared view that the Court operates with too little regard for either legal principles or impartiality, with a near majority of respondents agreeing that the Court is "too mixed up in politics."<sup>16</sup> A majority (62%) of the public agrees that judicial decisionmaking should not be affected at all by whether a justice is a political liberal or a political conservative, but a significant number of Americans (43%) also believes that political ideology actually has a "large impact" on Court decisions.<sup>17</sup> Thus it is not surprising to find that the public often rates the Court in partisan terms, routinely evaluating Court performance from the perspective of individual party affiliation.<sup>18</sup> Positive

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<sup>15</sup> *Poll: Americans Don't Want Politicians Constraining Judges*, CNN.COM (Oct. 28, 2006, 9:01 PM), <http://www.cnn.com/2006/POLITICS/10/27/activist.judges>.

<sup>16</sup> See Gibson et al., *Measuring Attitudes*, *supra* note 13, at 358; see also Gibson, *Legitimacy of the U.S. Supreme Court*, *supra* note 13, at 519. See also generally James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RES. Q. 187, 187-201 (2005); James L. Gibson & Gregory A. Caldeira, *Supreme Court Nominations, Legitimacy Theory and the American Public: A Dynamic Test of the Theory of Positivity Bias* (July 4, 2007), <http://ssrn.com/abstract=998283>.

<sup>17</sup> John M. Scheb II & William Lyons, *Judicial Behavior and Public Opinion: Popular Expectations Regarding Factors That Influence Supreme Court Decisions*, 23 POL. BEHAV. 181, 185 (2001).

<sup>18</sup> Thirteen polls conducted by the Gallup Poll News Service from 2000 through 2007 show that Americans' overall ratings of the Court are clearly related to their party affiliation. See Gallup Poll

opinions of the Court have been shown to fall among Democrats and conservative Republicans when the former find leading decisions to be too conservative and the latter find decisions not to be conservative enough.<sup>19</sup> And when asked what sort of judge is most likely to let personal beliefs influence legal decisions, 40% of those polled said liberal judges, 39% said conservative ones, and 13% thought that both were equally likely to do so.<sup>20</sup> For many members of the public, the overwhelming prevalence of conventional talk about impartial and principled judicial decisionmaking does not prevent judging from looking like a matter of politics, pure and simple.

In the final section of this Article, I will consider how the public's conflicting views of the Supreme Court – views that take the Court to be at once an institution of impartial principle and an arena of political bias – can be said to relate to one another.<sup>21</sup> As an initial matter, however, a general understanding of public perceptions provides a useful basis for generating expectations about the appearances of judging broadcast by the Kagan confirmation process.

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News Service, *Slim Majority of Americans Approve of the Supreme Court* (Sept. 26, 2007), <http://www.gallup.com/poll/28798/Slim-Majority-Americans-Approve-Supreme-Court.aspx>. For polling data from 2005 through 2010 that also shows persistent partisan evaluation of the Supreme Court, see Pew Research Center for People and the Press, *Republicans Less Positive Toward Supreme Court* (July 9, 2010), <http://people-press.org/report/632>.

<sup>19</sup> Pew Research Center for the People and the Press, *Supreme Court's Image Declines as Nomination Battles Loom* (June 15, 2005), <http://people-press.org/report/247/supreme-courtimage-declines-as-nomination-battle-looms>.

<sup>20</sup> Susan Page, *What Americans Want in O'Connor Court Vacancy*, USA TODAY (July 13, 2005, 11:08 PM), [http://www.usatoday.com/news/nation/2005-07-13-court-cover\\_x.htm](http://www.usatoday.com/news/nation/2005-07-13-court-cover_x.htm).

<sup>21</sup> For the argument that public perceptions of both state judges and judges in general are similarly split into contradictory camps, see Bybee, *supra* note 2, at 6-10, 16-18.

Thus to the degree that the confirmation process is consistent with prevailing public beliefs, we should expect Senate hearings and debate to generate contradictory images of Supreme Court justices as neutral arbiters and as political actors.<sup>22</sup> On the one hand, we should anticipate that there will be efforts to present the activity of judging as a matter of impartial principle, reason, and restraint. The most extended articulation of this conventional ideal of judging is most likely to come from the nominee herself. On the other hand, we should also anticipate that confirmation process will appear to be a matter of politicians and pressure groups competing to install ideological fellow travelers on the bench. We should expect this second image of judging to be framed in terms of the conventional ideals of endorsed by the nominee. That is, we can expect that everyone involved in the process will decry the influence of politics on the high bench. Senators will deny that they are applying any kind of ideological litmus test and will insist that they are simply supporting judicial nominees who will adhere to the law. And, yet, even as participants in the confirmation process extol the standard judicial virtues, we should anticipate a clear message indicating that most participants actually want something quite different: rather than impartiality and open-mindedness, they seek a person who will reliably advance issues of interest to important political constituencies.

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<sup>22</sup> Reasoning along these lines, I wrote a short article outlining expectations for the confirmation process that was published as the Judiciary Committee hearings began. See Keith J. Bybee, *Kagan's Confirmation: Conflicting Imagery*, JURIST (June 28, 2010), <http://jurist.org/forum/2010/06/kagans-confirmation-conflicting-imagery.php>. I draw from this article in the above paragraph in the text.

## **II. Images of Judicial Action in the Confirmation Process**

What images of judging did the Kagan confirmation process in fact produce? In order to gain some leverage on this question, I examined all confirmation-related news articles, editorials, opinion pieces, and blog posts published in the *Washington Post*, the *New York Times*, and the *Los Angeles Times* from the start of the Senate Judiciary Committee hearings on June 28, 2010, until the final Senate vote on August 5, 2010. The material from the three newspapers was gathered using the built-in search functions at each paper's website. The name "Kagan" was selected as the basic search term because it not only established outer limits on the search (the name is somewhat specific to the confirmation process during the relevant time period), but also promised to deliver a comprehensive set of items. Table 1 displays the search results, with coverage categorized by type in order to give a sense of what the individual newspapers published as well as to indicate the overall distribution of material.

**Table 1:** Newspaper Coverage of Kagan Confirmation Process, 6/28/10-8/5/10<sup>23</sup>

Newspapers	News Articles	Blog Posts	Editorials & Opinion	<b>Total</b>
Los Angeles Times	19	15	5	39
New York Times	22	44	10	76
Washington Post	41	57	24	122
<b>Total</b>	82	116	39	237

As the table indicates, the *Washington Post* offered the greatest amount of coverage, a result of the fact that the confirmation process was a “hometown” event for the newspaper. The table also indicates that the greatest amount of coverage overall came in the form of blog posts. The high number of such posts reflects the ease of blogging and should not be considered a measure of comprehensive reporting. Many blog posts were quite short: a number were limited a single breaking development (such as a senator announcing how she planned to vote on the confirmation) or to conveying a humorous aside. Other blog posts were little more than a list of links to confirmation news articles to be found in the day’s newspaper or elsewhere on the web. On the whole, the news articles and opinion pieces tended to be substantially longer and more detailed than the blog posts.<sup>24</sup>

In analyzing the material, my goal was to identify the images of judging projected by the entire confirmation coverage in the three newspapers. I did not

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<sup>23</sup> Compiled by Author.

<sup>24</sup> The news articles and opinion pieces did, of course, significantly differ from one another in tone and style.

suppose that any single reader would read all of the coverage offered by any one outlet. Instead, I reasoned that the totality of material published by the newspapers would be a fair sample of the complete universe of confirmation coverage generated by all media. To learn how three large newspapers framed the confirmation process for their readers is, I would argue, to gain a good understanding how the media as a whole represented Kagan's journey from committee hearings to the final vote.

With the description of the newspaper material and of my research rationale in mind, we can address a re-formulated version of the question with which this section began: What images of judging were projected by the *Washington Post*, *New York Times*, and *Los Angeles Times* coverage of the Kagan confirmation process?<sup>25</sup>

All three newspapers clearly conveyed the impression that judicial decisionmaking is a matter of impartial principle, and did so primarily by reporting the words of Kagan herself. A number of Kagan's comments came from the exchanges the nominee had with the Senators on the Judiciary Committee, where she repeatedly insisted that judging is a modest activity restricted to the impartial gauging of arguments and evidence in each case.

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<sup>25</sup> Please note that in the following discussion of the newspapers' coverage I cite only some of the published items that verify each of the claims I make in the text. I have opted for illustrative article citation since exhaustive citation (for example, listing all the articles reproducing the same quotation from Kagan) would greatly lengthen each footnote without good reason.

- “As a judge, you are on nobody’s team. As a judge, you are an independent actor.”<sup>26</sup>
- “I’m sure that everybody [on the Supreme Court] is acting in good faith. You wouldn’t want the judicial process to become in any way a bargaining process or a logrolling process. You wouldn’t want people to trade with each other – you know, ‘You’ll vote this way and I’ll vote that way, and then we can... get some unanimous decisions.’”<sup>27</sup>
- “[Congress] ought to be the policymakers for the nation. The courts have an important role to play, but it’s a limited role. It’s essentially sort of policing the boundaries and making sure that Congress doesn’t overstep its role, doesn’t violate individual rights or interfere with other parts of the government system.”<sup>28</sup>

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<sup>26</sup> *Kagan Draws Mixed Reactions from Senate Judiciary Committee*, LOS ANGELES TIMES (June 30, 2010), <http://articles.latimes.com/2010/jun/30/nation/la-na-kagan-hearing-react-20100701>.

<sup>27</sup> Robert Barnes & Amy Goldstein, *Kagan Finished Supreme Court Confirmation Hearings*, WASHINGTON POST (July 1, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/30/AR2010063000369.html>.

<sup>28</sup> Adam Liptak, *Kagan Reminds Senators: Legislation Is Your Job*, NEW YORK TIMES (July 2, 2010), <http://www.nytimes.com/2010/07/02/us/politics/02assess.html>; *see also Confirm Elena Kagan*, NEW YORK TIMES (June 30, 2010), <http://www.nytimes.com/2010/07/01/opinion/01thu1.html>; *The Republicans and the Constitution*, NEW YORK TIMES (July 19, 2010), <http://www.nytimes.com/2010/07/20/opinion/20tue1.html>.

- “You shouldn’t want a judge who will tell you that she will reverse a decision without listening to arguments and without reading the briefs and without talking to colleagues.”<sup>29</sup>

The image of judge as impartial arbiter was also evident in Kagan’s opening statement to the Judiciary Committee, in which Kagan explained how her experience in various settings taught her a set of lessons about the neutrality, principle, reason, and restraint of the Court. On the basis of these lessons, Kagan pledged, “to listen hard to every party before the Court and to each of my colleagues . . . [to] work hard . . . [and to] do my best to consider every case impartially, modestly, with commitment to principle, and in accordance to law.”<sup>30</sup>

The newspaper coverage also managed to communicate an ideal of impartial judging when it was not directly reporting Kagan’s words. Some pieces offered defenses of Kagan’s claims to impartiality and restraint, presenting the nominee as charting a principled course throughout the Judiciary Committee hearings.<sup>31</sup> Various editorials and opinion columns appealed to Kagan as a

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<sup>29</sup> James Oliphant, *Kagan Slips on Fruits and Vegetables in Senate Panel Questioning*, LOS ANGELES TIMES (July 1, 2010), <http://articles.latimes.com/2010/jul/01/nation/la-na-kagan-hearings-20100701>.

<sup>30</sup> *Elena Kagan’s Opening Statement to the Senate Judiciary Committee*, LOS ANGELES TIMES (June 28, 2010, 3:38 PM), <http://latimesblogs.latimes.com/washington/2010/06/elna-kagan-judiciary-statement-supreme-court.html>; see also Michael Muskal, *Supreme Court Nominee Elena Kagan Vows to Work Impartially*, LOS ANGELES TIMES (June 28, 2010), <http://articles.latimes.com/2010/jun/28/nation/la-na-elena-kagan-supreme-court-20100628>.

<sup>31</sup> See Robert Barnes, *High Court Nominee’s Cautious Answers Frustrate Senators*, WASHINGTON POST (July 4, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/03/AR2010070302216.html>; *Confirm Elena Kagan*, WASHINGTON POST (July 4, 2010), <http://www.washingtonpost.com/wp->



person seriously committed to legal principle, and attempted to persuade her to adopt one jurisprudential philosophy or another.<sup>32</sup> And still other articles zeroed-in on Republican Senator Lindsey Graham, portraying his support of Kagan as an indication that the confirmation process turned on the question of whether the nominee had the knowledge, prudence, and temperament necessary for impartial judgment.<sup>33</sup>

The image of impartial judicial decisionmaking was not, however, the only image to be found in the newspapers. Indeed, the image of the impartial jurist was not even the most common vision of judging presented by the coverage. The far more frequent rendering of judicial action centered on politics. For many Republican senators, the clearest example of the political judge was Kagan herself. From the outset, Republicans tended to “cast Kagan as an inexperienced, progressive political operative who would work to preserve the

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[dyn/content/article/2010/07/03/AR2010070302694.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/07/03/AR2010070302694.html); E.J. Dionne, Jr., *A Judicial Change to Believe In*, WASHINGTON POST (July 5, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/04/AR2010070403846.html>.

<sup>32</sup> Jeffrey Rosen, *Brandeis's Seat, Kagan's Responsibility*, NEW YORK TIMES (July 2, 2010), <http://www.nytimes.com/2010/07/04/opinion/04rosen.html>; Jonathan Rauch, *A 'Kagan Doctrine' on Gay Marriage*, NEW YORK TIMES (July 2, 2010), <http://www.nytimes.com/2010/07/03/opinion/03rauch.html>; Katrina Vanden Heuvel, *Retiring Chief Justice Roberts's Umpire Analogy*, WASHINGTON POST (June 28, 2010, 5:16 PM), [http://voices.washingtonpost.com/postpartisan/2010/06/retiring\\_chief\\_justice\\_roberts.html](http://voices.washingtonpost.com/postpartisan/2010/06/retiring_chief_justice_roberts.html).

<sup>33</sup> Dana Milbank, *Lindsey Graham Stands Apart From Other Republican Senators on Kagan Vote*, WASHINGTON POST (July 21, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/20/AR2010072005445.html>; Sheryl Gay Stolberg, *Senate Panel Backs Kagan Nomination, With One Republican Vote*, NEW YORK TIMES (July 20, 2010), <http://www.nytimes.com/2010/07/21/us/21kagan.html>; David G. Savage, *Elena Kagan Approved by Senate Judiciary Committee in 13-6 Vote*, LOS ANGELES TIMES (July 21, 2010), <http://articles.latimes.com/2010/jul/21/nation/la-na-kagan-vote-20100721>. For a similar approach that focuses on participants other than Graham, see Aaron Blake, *Bush Administration Lawyers Praise Kagan*, WASHINGTON POST (July 1, 2010), <http://voices.washingtonpost.com/44/2010/07/bush-administration-lawyers-pr.html>.

president's policy agenda once on the high court rather than serve as an objective jurist."<sup>34</sup> For example, in announcing his decision to vote against Kagan, Senator Orrin Hatch called her "a skilled political lawyer" and criticized her for supporting jurists that Hatch considered to be activists. "The law must control the judge; the judge must not control the law," Hatch argued.<sup>35</sup> Senator Jeff Sessions reached the same conclusion:

I believe she does not have the gifts and the qualities of mind or temperament that one must have to be a justice.... [Kagan would be] an activist, liberal progressive, politically minded judge who will not be happy simply to decide cases but will seek to advance her causes under the guise of judging.<sup>36</sup>

Most Democratic senators countered Republican criticism of Kagan by characterizing her as an exemplar of conventional judicial ideals (as Senator Patrick Leahy put it, Kagan will "do her best to consider every case impartially, modestly, and with commitment to principle and in accordance with law."<sup>37</sup>). Democrats then re-focused the deflected criticism of political judging onto the conservative justices sitting on the Supreme Court. "The rightward shift of the Court under Chief Justice Roberts is palpable," Senator Chuck Schumer argued.

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<sup>34</sup> James Oliphant, *Senate Begins Debate Over Supreme Court Nominee Kagan*, LOS ANGELES TIMES (Aug. 3, 2010) [hereinafter Oliphant, *Senate Begins Debate*], <http://articles.latimes.com/2010/aug/03/nation/la-na-kagan-nomination-20100804>.

<sup>35</sup> Bernie Becker, *Hatch Opposes Kagan*, NEW YORK TIMES (July 2, 2010, 11:35 AM), <http://thecaucus.blogs.nytimes.com/2010/07/02/hatch-opposes-kagan>.

<sup>36</sup> David M. Herszenhorn, *In Senate, Vote Nears on Kagan Nomination*, NEW YORK TIMES (Aug. 4, 2010), <http://query.nytimes.com/gst/fullpage.html?res=9501EFD8173FF937A3575BC0A9669D8B63>.

<sup>37</sup> Oliphant, *Senate Begins Debate*, *supra* note 33.

“In decision after decision, special interests are winning out over ordinary citizens. In decision after decision, this Court bends the law to suit an ideology.”<sup>38</sup>

The dueling Republican and Democratic assertions about the identity of the real political judges might simply be read as evidence of bipartisan support for the conventional ideal of impartial judicial decisionmaking. After all, neither party invoked the idea of “political judging” as a form of praise and all senators describe their ideal member of the Court in conventional language of impartiality and principle. The newspaper coverage argues against such a reading, however, by repeatedly suggesting that few of the senators really placed much stock in the conventional ideals they espoused. Throughout the Judiciary Committee hearing “both sides prevailed upon Kagan to be the very thing that both sides say they decry: a nominee with preformed views about the law.”<sup>39</sup> The newspapers consistently presented the Senators as being locked in a political battle whose lines had been drawn by the looming midterm elections.<sup>40</sup> In this context,

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<sup>38</sup> Julie Hirschfeld Davis, *Kagan Pledges Impartiality, Restraint as Justice*, WASHINGTON POST (June, 28, 2010) (on file with author); see also Alec MacGillis & Amy Goldstein, *Kagan Says That She Would Take a ‘Modest’ Approach on Supreme Court*, WASHINGTON POST (June 29, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/28/AR2010062801859.html>; E.J. Dionne, *Whose Supreme Court is It?*, WASHINGTON POST (June, 28, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/27/AR2010062703527.html>.

<sup>39</sup> Oliphant, *Kagan Slips*, *supra* note 28.

<sup>40</sup> See, e.g., James Oliphant, *Elena Kagan’s Confirmation Hearing to Start Monday*, LOS ANGELES TIMES (June 28, 2010), <http://articles.latimes.com/2010/jun/28/nation/la-na-kagan-hearings-20100628>.

senatorial exchanges were not a part of joint deliberations so much as they were efforts to score political points and placate key partisan constituencies.<sup>41</sup>

The political competition that galvanized the Senators diminished Kagan, pushing to her to the margins of a confirmation process that was ostensibly designed to focus on her.<sup>42</sup> The intense political competition also cast doubt on Kagan's own professions of principle and impartiality. Just as the senators were understood to be manipulating the process in order to promote political objectives on the bench and at the polls, Kagan was understood to be using the process to advance her own interest in getting confirmed. She was repeatedly portrayed as carefully following a "script" that dictated her every gesture and comment.<sup>43</sup> Her participation was simply an act, a show designed to secure her elevation to the high bench without revealing anything about the person on stage. The senators seemed to recognize that Kagan's heavily coached remarks

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<sup>41</sup> Sheryl Gay Stolberg, *Confirmation is Likely, But Not G.O.P. Support*, NEW YORK TIMES (July 2, 2010), <http://query.nytimes.com/gst/fullpage.html?res=9501E3D6123FF931A35754C0A9669D8B63&sec=&spon=&pagewanted=all>.

<sup>42</sup> Ashley Southall, *The Early Word: Kagan's Confirmation Hearings*, NEW YORK TIMES (June 28, 2010, 7:25 AM), <http://thecaucus.blogs.nytimes.com/2010/06/28/the-early-word-kagans-confirmation-hearings>.

<sup>43</sup> Sheryl Gay Stolberg & Charlie Savage, *In 2nd Day of Quizzing, Kagan Sticks to Script*, NEW YORK TIMES (July 1, 2010), <http://query.nytimes.com/gst/fullpage.html?res=9401E2D6113CF932A35754C0A9669D8B63>; Jonah Goldberg, *Why the Kagan Hearings Will Be a Charade*, LOS ANGELES TIMES (June 29, 2010), <http://articles.latimes.com/2010/jun/29/opinion/la-oe-goldberg-kagan-20100629/2>; Dana Milbank, *The Dodgy Miss Kagan*, WASHINGTON POST (June 30, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/29/AR2010062904600.html>; Anne E. Kornblut & Paul Kane, *As Kagan Confirmation Hearings Begin, Republicans Struggle for Line of Attack*, WASHINGTON POST (June 28, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/27/AR2010062703516.html>; R. Jeffrey Smith, *With Votes Looming, Supreme Court Nominee Elena Kagan Plays it Cool*, WASHINGTON POST (July 11, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/10/AR2010071002816.html>.

resembled the artificial, highly orchestrated statements that elected officials themselves often make (“This is,” Senator Durbin observed, “an art form we have developed.”<sup>44</sup>). And yet senators of both parties also condemned the fact of Kagan’s performance as “a game of ‘hide the ball’.”<sup>45</sup> No one appeared to like evasion and pretense, including those whom acknowledged their dependence on these very devices.

### **III. The Significance of Contradictory Images**

How should the Kagan confirmation process’s contradictory images of judging – images that map onto the conflicting perceptions that Americans generally have of the Supreme Court – be understood?

Perhaps the most straightforward way to answer this question is to say that the public’s inconsistent views threaten judicial legitimacy. As a leading scholar writes, “[t]he more that the public and their representatives think that judges generally – not just a particular judge or panel of judges in isolated cases – follow their political leanings instead of the law, the more likely it becomes that long-established [judicial] independence norms will be challenged with increasing intensity and will ultimately yield to calls for greater judicial accountability from

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<sup>44</sup> Paul Kane, *Kagan Nomination Approved by Senate Judiciary Panel*, WASHINGTON POST (July 20, 2010, 1:12 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/20/AR2010072000559.html>.

<sup>45</sup> *Id.*

Congress.”<sup>46</sup> With a large segment of the public dubious about the impartiality of the courts’ decisions, it seems that the judiciary’s standing as an independent, authoritative arbiter of disputes is in danger, raising the specter of a coming age “where political officials tell judges how to decide cases.”<sup>47</sup> Indeed, some commentators believe that we are already at the threshold of “a war of all against all within and through the law.”<sup>48</sup> Without a rock-solid belief that the judiciary is limited by impartial principle, law will soon be “little more than the spoils that go to winners in contests among private interests who, by their victory, secure the prize of enlisting the coercive power of the legal apparatus to enforce their agenda.”<sup>49</sup> Those who end up on the losing side of this bleak system will comply only because of fear of punishment and “out of the hope that they might prevail in future contests to take their turn to wield the law.”<sup>50</sup>

The newspaper coverage of the Kagan confirmation process explicitly raised this prospect of a significantly delegitimized judiciary. After Kagan was confirmed by the Senate, Curt Levy of the Committee for Justice, a group that opposed confirmation, argued that political perceptions would continue to haunt Kagan on the bench: “The confirmation process inevitably resulted in Kagan

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<sup>46</sup> CHARLES GARDNER GEYH, *WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM* 263 (2006).

<sup>47</sup> Anthony Lewis, *Afterword: The State of Judicial Independence*, in *BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA*, *supra* note 5, at 201.

<sup>48</sup> BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 225 (2006).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

losing some legitimacy in the eyes of the public . . . [and that] will make Americans more skeptical of any controversial decisions she's a part of."<sup>51</sup> In a similar spirit, Senator Amy Klobuchar openly worried that the sharp partisanship that marked the confirmation would substantially undermine "the people's faith in the Court" as an independent and impartial body.<sup>52</sup>

Yet the newspaper coverage also contained some indications that the demise of judicial legitimacy was far from certain. Although the confirmation process appeared to be a highly partisan affair with a belief in the political nature judging at its core, it is still the case that Americans consider the Supreme Court to be an impartial arbiter. As Douglas Kendall observed, in the same news article where Levy and Klobuchar predicted the judiciary's demise, "[Democratic senators] tried the same general strategy with the Alito nomination with a stronger case, higher stakes, and more media focus, and I don't think very many Americans now view Alito to be an illegitimate justice."<sup>53</sup>

Opinion surveys similarly suggest that the politics of confirmation do not necessarily impugn the public's perception of Court's character. As I noted earlier, a substantial plurality of Americans believes that political ideology infects Supreme Court decisionmaking even as a large majority of the public insists that

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<sup>51</sup> James Oliphant, *Kagan Confirmed to Supreme Court Seat*, LOS ANGELES TIMES (Aug. 5, 2010) (on file with author).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

political commitments ought to have no impact on the justices at all.<sup>54</sup> The remarkable fact, however, is that the large gap between the expectation of political neutrality and the acknowledgement of political influence does not have a significant negative effect on overall evaluations of the Court.<sup>55</sup> The perception that justices may not actually operate according to the conventional dictates of impartiality does not seem to threaten public confidence in the Court after all.

How can this be?<sup>56</sup> By way of conclusion, let me suggest how we can begin to think about a stable co-existence between appearances of impartial judgment and politically influenced decisionmaking.

If we believe that people rely on the judicial process strictly as a source of principled and impartial adjudication, then the perception that judges may operate on the basis of partisan preference can only be corrosive. Yet if we think that individuals not only may seek principled and impartial judgment, but also may wish merely to drape themselves in the mantle of principled impartiality, then a process beset by conflicting public beliefs makes a degree of sense. The suspicion that judges might not conform to the conventional understanding of objective reasoning and fair judgment will still eat away public confidence. At the same time, the suspicion of political judgment will also attract all those whom wish to merely dress up their preferences in the formal language

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<sup>54</sup> See *supra* note 17 and accompanying text.

<sup>55</sup> Scheb & Lyons, *supra* note 17, at 186.

<sup>56</sup> I have developed an extensive answer to this question elsewhere. See Bybee, *supra* note 2.



of law in the hope that this will allow their cause to look better than it actually is.

Viewed from this perspective, law is a body of tests and procedures that asks individuals to seek impartial standards of judgment outside their own will while also creating an arena for the pursuit of personal interests and political attachments. Such an arrangement may rightly be criticized for appearing unfair, unreasonable, and inconsistent. But it is also an arrangement that may endure because it conforms to the contradictory desires of people who at once wish to have a neutral system of dispute resolution and want to ensure that their preferred side wins.

Given this jumble of principle, politics, and posturing, it is no wonder that the Supreme Court confirmation process fails to coalesce around a single image of what judicial decisionmaking really is.