

Local law professors analyze Kagan's inexperience as judge

By **DOUG SHERWIN**, The Daily Transcript

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Elena Kagan's lack of judicial experience will be helpful as she navigates the confirmation process for the U.S. Supreme Court, according to local legal professors.

But the absence of time on the bench also makes observers in both parties nervous.

"It helps her in the confirmation process to not have all her views out there," said Luz Herrera, an assistant professor of law at Thomas Jefferson School of Law, referring to the lack of written opinions. "But it also creates discomfort on all sides -- the very left and the very right -- as to what kind of justice she'll be. I think the ones most happy about it are centrists."

Kagan, who became Solicitor General of the United States in March 2009, is the former dean of Harvard Law School. While in Boston, she was credited with uniting a faculty that had been deeply divided.

"In her leadership at Harvard, she was able to really bridge a lot of divides and bring together people," said University of San Diego School of Law professor Orly Lobel, a teaching fellow at Harvard during Kagan's tenure at the school.

"That consensus building can be a good thing for a divided court. With (Justice Anthony) Kennedy being the swing vote, she is the person who can make convincing arguments on moving him to reach the right decision."

Herrera, who also spent a year at Harvard as a fellow while Kagan was dean, said not all people think she was a unifying force.

"I think she got things done, but not always by consensus," Herrera said.

Both professors agree Kagan is not a hard-line liberal as other potential nominees.

Her views on executive power and the military's ability to detain terrorists even if not found in a war zone skew to the conservative side while she's very liberal on gay rights.

Kagan was part of a coalition of law school deans who supported a lawsuit that tried to overturn the Solomon Amendment, so military recruiters would have been banned from school grounds. She's also spoken out against the military's "don't ask, don't tell" policy.

"She's more complex in her world view," Lobel said.

Herrera has reservations about Kagan's views related to diversity and community issues.

"I think she's politically and psychologically astute," Herrera said, adding, "I share concerns with my colleague Marjorie Cohn about (Kagan's) understanding of executive power and not scaling back on it given her experience as a White House appointee. And I think that could be a concern for people who care about civil liberties in this age of terrorism.

"I wouldn't mind seeing someone more clearly left and with more of an understanding of community-based issues," Herrera continued. "I was excited by (Sonia) Sotomayor not only

as a Latina but because she grew up in the Bronx, in the projects, and has a different lens on the world."

Lobel said she thinks Kagan's intelligence and communication skills make for an excellent nominee.

"By all accounts she's a wonderfully smart, principled person who wants to get it right; who doesn't have preconceptions of how she's going to vote (on cases)," Lobel said. "I think she really thinks through the issues and will make the right choices."

