

Women in Black The New Normal

By Hannah Hayes

In August of 1981, the movie *First Monday in October* was rushed to production six months earlier than its planned release date. A comedy based on a Broadway play of the same title, the whimsical storyline centers on the havoc wreaked by the appointment of a woman to the Supreme Court. The release date was pushed up when President Ronald Reagan co-opted the farce with the real-life appointment of Sandra Day O'Connor, the first woman to sit on the Supreme Court.

"Part of the comedy of the day was the whole idea of a woman on the Supreme Court," says Linda Greenhouse, the Knight Distinguished Journalist in Residence and a law lecturer at Yale Law School, New Haven, Connecticut. A Pulitzer Prize-winning journalist, Greenhouse covered the Supreme Court for the *New York Times* from 1978–2008.

Today, the high court has three women justices, and "for the first time now it seems normal to have women on the Supreme Court," Greenhouse says.

Patricia Millett heads the Supreme Court practice for the Washington, D.C., firm of Akin Gump Strauss Hauer & Feld LLP. She agrees with Greenhouse, pointing out that "we're past that now. If anything were to stand out, it would be more unusual to have no women on the Supreme Court."

Nearly 30 years passed from the time O'Connor was appointed to the

day Elena Kagan took her seat to form the first critical mass of women on the bench. O'Connor was the lone woman for 12 years until President Bill Clinton appointed Ruth Bader Ginsburg in 1993. When O'Connor retired in 2006, Ginsburg sat with eight male justices until Sonia Sotomayor's appointment in 2009.

Now that a critical mass of women on an appellate bench—including that of the highest court in the land—may be the new normal, what is the impact of three women compared to two or one, and has it made a difference?

Subtle—and Not So Subtle— Influence of Gender

The question of whether the presence of more women affects outcomes usually arises when appointments are made. While the number of women on the bench is on the rise, only 22 percent of all seats in federal courts and 26 percent of all seats in state courts were held by women as of 2010, according to a study conducted by the Center for Women in Government and Civil Society at the Rockefeller College of Public Affairs and Policy in Albany, New York.

"Perhaps in areas where gender is highly salient, such as sex discrimination suits, we would expect to see women as more receptive to a woman's claims than men," says Tracey George, who teaches law and political science at Vanderbilt University in Nashville, Tennessee. But

another way that gender can impact is through the internal dynamics that take place in a collegiate setting. "There's very good evidence that internal dynamics play a role," George says.

Studies of corporate boardrooms suggest that when it comes to gender, the number three is the tipping point when women are viewed as equals and wield more influence. A 2006 study done by the Wellesley Centers for Women in Wellesley, Massachusetts, suggested that when three women sit on a panel, they are no longer seen as outsiders and exert more influence.

According to the study, a lone woman is often perceived as the woman's voice, and gender is sometimes noticed more than point of view. Although influence improves with two, when three women appear, the group as a whole begins to function differently. "The women express different views and often disagree with each other. Women start being treated as individuals with different personalities, styles, and interests," according to the report.

Another study conducted examined the role of gender in the federal court of appeals' outcomes and found a difference in the voting patterns of male and female judges in sex discrimination cases. Women judges are approximately 10 percent more likely to rule in favor of the party bringing the discrimination claim. See Christina L. Boyd, Lee Epstein, & Andrew D. Martin, *Untangling*

the Causal Effects of Sex on Judging, 54 AM. J. POL. SCI. 389 (April 2010), <http://epstein.usc.edu/research/genderjudging.pdf>.

Further, that study suggested that the presence of a female judge on a panel influenced male judges to vote differently. When male and female judges serve together to decide a sex discrimination case, male judges are nearly 15 percent more likely to rule in favor of the party alleging discrimination than when they sit with male judges only.

"This supported anecdotal data that gender can lead to different outcomes," according to Christina Boyd, a coauthor of the study and an assistant professor in the Department of Political Science at University at Buffalo, The State University of New York (SUNY). "Specifically when it comes to collegial decision making," Boyd says, "statistics show that women judges can alter outcomes by influencing their colleagues."

Wise Women vs. Wise Men?

Because Sotomayor, Kagan, and Ginsburg were all appointed by Democratic presidents, it is difficult to discern the role of gender; the three women are considered the liberal flank of the Court, along with Justice Stephen Breyer.

According to the *New York Times*, Kagan and Sotomayor concurred in their case rulings nearly 94 percent of the time; Kagan and Ginsburg 90 percent; and Sotomayor and Ginsburg 85 percent. During the 2010–11 term, the three women justices concurred with Breyer in more than 84 percent of the cases on which they both voted: Kagan—88 percent, Sotomayor—87 percent, and Ginsburg—85 percent. See Adam Liptak's analysis of the 2010–11 rulings at www.nytimes.com/interactive/2011/06/28/us/scotus-graphic.html.

Further, Kagan's impact is just starting to be felt because she recused herself from one-third of the cases in the 2010–11 session because of her previous role as solicitor general. The Court split along the familiar ideological lines

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All Eyes on SCOTUS **The Affordable Care Act**

All eyes turned to the Supreme Court during the final week of March as the Patient Protection and Affordable Care Act of 2010 (Pub. L. No. 111-148) became the focus of a historic three days of proceedings. In a nearly unprecedented move, the Court released tapes of oral arguments almost immediately. The court watchdog SCOTUSblog reported that its servers nearly crashed from all the traffic.

While the media's attention focused on the Court centrists, Justice Anthony Kennedy and Chief Justice John Roberts, the heavy-duty questioning by Justices Elena Kagan and Sonia Sotomayor dominated much of the proceedings.

"Many, many people listened, and what a great value [it is] to have the American public hear this very public activity by women judges," says Martha Davis, a professor at Northeastern University Law School in Boston who has argued several cases before the Supreme Court. "They didn't just see a picture of women [justices]; they heard three women asking questions and acting as equals [with their male colleagues]. That was exciting and important."

Davis also points out that Justice Ruth Bader Ginsburg brought up Title IX in the discussion on Medicaid. Ginsburg asked whether colleges and universities were being coerced into maintaining athletic programs for women. "That type of analogy is more likely to come from a woman judge, and it shows how important it is to have women on the Court," Davis says.

Vanderbilt Law Professor Tracey George commented on the number and type of questions during the proceedings that illustrate the skill sets the three women justices bring to the bench. "You can see Kagan's background as broadly administrative or policymaking," she says. "Many of her questions were very pragmatic and practical in contrast to Justice Ginsburg, the academic, a Supreme Court litigator focusing on specific, nuanced, and very narrow questions."

Sotomayor, on the other hand, has a background as a judge at the district court and appellate court levels. "Her questions showed a combination of a practitioner and her time as a district court judge," George observes. "[The questions] were pretty distinctive about the nature of litigation and the nature of the lower courts, and reflected that [viewpoint]."

These experiential perspectives are important, according to George, because whenever appointments are made, much discussion focuses on credibility, diversity, and the background each justice brings.

Further, the unprecedented six hours of oral arguments have given Court watchers and the public much to speculate about as they await the Court's decision. "Unlike Courts of the past, you have much more data about what the Court is thinking, with the number of hours and the long questions," George says. "We heard the justices really talking to each other."

Source: "A Report of the Center for Women in Government & Civil Society, Rockefeller College of Public Affairs & Policy, University at Albany, State University of New York" (Spring 2010), www.albany.edu/womeningov/judgeships_report_final_web.pdf.

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on the biggest sex discrimination case to date, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

While O'Connor insisted in a famous quote that a wise old woman and a wise old man would come to the same conclusion, Court watchers point out that she was often the deciding vote in cases where gender may have been "salient."

Greenhouse recalls that Ruth Ginsburg "was pretty visibly alone" when O'Connor retired. "O'Connor was fairly conservative in many ways, but almost never rejected a female plaintiff's claim in any Title IX case or an employment discrimination case," she says.

Two cases that may have seriously been impacted by gender imbalance occurred while Ginsburg was the lone woman on the bench. In *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. 618 (2007), Ginsburg took the unusual step of reading her dissent aloud, chastising the Court for "failing to comprehend or [being] indifferent to the insidious way in which women can be victims of pay discrimination."

The other case, *Safford Unified School District No. 1 v. Redding*, 557 U.S. 364 (2009) involved the strip search of a 13-year-old girl. "During the oral arguments it became evident that the men had a different vantage point—you really needed to have to have someone

who has been a teenage girl to understand that perspective," Millett says.

The Court voted 7–2 in favor of the girl's suit, and Ginsburg is widely believed to have influenced her colleagues. In an October 2009 interview with *USA Today*, she explained "they have never been a 13-year old girl" when asked about her colleagues' comments during oral arguments.

"If you have a case involved with something like abortion and there's not a single woman in the room, then the conversation is very different," George says. "Now that there are three women, the conversations may be different."

Dynamic Duo: Kagan and Sotomayor

Supreme Court watchers like Joan Biskupic, who has covered the Court since 1989, say that the dynamics of Kagan and Sotomayor have also made for "a livelier court." In a March 2011 article for *USA Today*, Biskupic commented on the "forcefulness of Kagan and Sotomayor during oral arguments," noting that Chief Justice John Roberts often has played the role of traffic cop as the new justices fired questions.

"What is really notable is they ask different kinds of questions," says Martha Davis, a professor at Northeastern University Law School in Boston who has

argued several cases before the Supreme Court. Davis focuses on women's rights and constitutional law. "Sotomayor is a different kind of jurist—one with a brilliant legal mind. Kagan, on the other hand, brings a sharp academic mind to her very persistent questioning."

When Kagan was appointed by President Barack Obama in 2010, *Washington Post* columnist David Broder predicted the presence of three women "will change the high court in ways that no one foresees."

The late columnist based his sweeping statement on his experience in the 1970s and 1980s when women reporters and editors arrived in the newsroom. According to Broder, they asked questions that had not been asked and shunned the unspoken privacy rules surrounding politicians and candidates. "It was a protective, chauvinistic culture, and it changed dramatically when more than the occasional female reporter boarded the bus or plane."

While the three women justices will no doubt be watched more closely in years to come, Greenhouse goes back to the importance of the role-model effect. "Those of us with young daughters can be happy that it's now the most normal thing."

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director and chief counsel to the Senate Committee on Indian Affairs.

Networking and Persistence

Securing a congressional staff position involves networking, persistence, timing, and a little luck, current and former Hill staff say. Many agree that women and men appear to have equal opportunity to secure lower-level positions.

"D.C. is a place built on networks and relationships," says Caroline Fredrickson, who was chief of staff to Sen. Maria Cantwell (D-WA) for three years and deputy chief of staff to then Sen. Democratic Leader Tom Daschle for five

years. Today, Fredrickson is president of the American Constitution Society for Law and Policy in Washington, D.C. "I shopped my résumé door to door," she says, encouraging applicants to use their contacts and networks. Just sending a résumé isn't enough. Fredrickson advocates going in person to offices and working relationships one by one.

"It is not necessarily that you need to know someone," Siddiqui says. "You need to reach out and be persistent; those are the people who find something. It just doesn't always happen overnight."

As with any intense and challenging position, some days include a little humor

and fun. For Bruckner, a memorable moment was the first time she went to the Senate floor with Sen. Landrieu to call up an amendment. The senator walked onto the floor to offer the amendment, but Bruckner—a newbie—had failed to notify Senate leadership. As the senator spoke, she realized her error. When Landrieu finished, Bruckner apologized and explained that she was unaware of appropriate floor procedure. The senator responded with a wink and said, "Sometimes you need to be a little bit sneaky."

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