Kagan’s Link to Marshall Cuts 2 Ways

By CHARLIE SAVAGE

WASHINGTON — In the spring of 1988, Justice Thurgood Marshall assigned a clerk, Elena Kagan, to write a first draft of his opinion in a case considering whether a school district could charge a poor family for busing a child to the nearest school, which was 16 miles away.

A majority on the Supreme Court ruled that the busing fee was constitutional. Justice Marshall, who was 80, was incensed and wanted a fiery dissent. But the 28-year-old Ms. Kagan, now a Supreme Court nominee, thought her boss’s legal analysis was wrong.

Ms. Kagan, recalling the incident in a 1993 tribute after his death, wrote that after she told him that “it would be difficult to find in favor of the child” under legal doctrine, he called her a “knucklehead.” He “returned to me successive drafts of the dissenting opinion for failing to express — or for failing to express in a properly pungent tone — his understanding of the case,” she wrote.

Because Ms. Kagan has never been a judge and has produced only a handful of scholarly writings, clues to her philosophy are rare. In that vacuum, liberals and conservatives alike are attributing special significance to her clerkship year with Justice Marshall, who led the civil rights movement’s legal efforts to dismantle segregation before becoming a particularly liberal Supreme Court justice.

But while Ms. Kagan, a former board member for the Thurgood Marshall Scholarship Fund, clearly relished the experience and admired the justice as a historic figure, she appears to have had a far more ambivalent attitude toward his jurisprudence, according to a review of his papers at the Library of Congress, her comments over the years about him and interviews with...
her fellow clerks and colleagues.

In analyzing why Justice Marshall was adamant about siding with the poor family in the busing fee case, for example, Ms. Kagan explained in her tribute that he “allowed his personal experiences, and the knowledge of suffering and deprivation gained from those experiences, to guide him.”

But Ms. Kagan did not share those experiences, notes Charles J. Ogletree, a Harvard law professor who heads an institute named after Justice Marshall’s mentor, Charles Hamilton Houston, and who has talked over the years with Ms. Kagan, a former Harvard Law School dean, about her clerkship.

“It’s absurd to compare Elena Kagan’s judicial philosophy to Thurgood Marshall’s philosophy,” Professor Ogletree said. “Their times and life experiences are different. They lived in different worlds. The reality is that Elena Kagan learned a lot from Justice Marshall, but she will not be overly influenced by Marshall or anyone else. She is her own person.”

Some differences in the views of Justice Marshall — who once described his legal philosophy as, “You do what you think is right and let the law catch up” — and of his former clerk are striking. For example, he believed that the death penalty was always unconstitutional. But during the confirmation process when she was named solicitor general last year, Ms. Kagan said she had no quarrel with the death penalty.

“I am not morally opposed to capital punishment,” Ms. Kagan wrote to a senator, adding that she “accepted” the Supreme Court’s precedents upholding “the death penalty as constitutional in a wide variety of cases and circumstances.”

Nevertheless, the political dynamics of Ms. Kagan’s nomination have led figures on the left and the right to gloss over such differences.

After some liberal commentators questioned whether Ms. Kagan could be trusted, President Obama declared that Justice Marshall’s “understanding of law, not as an intellectual exercise or words on a page, but as it affects the lives of ordinary people, has animated every step of Elena’s career.”

Conservative critics, too, have sought to link Ms. Kagan closely to Justice Marshall. Among
them, Curt Levey of the Committee for Justice has decried a supposed “Kagan/Marshall judicial philosophy,” noting that in her tribute she described as a “thing of glory” her former boss’s view that courts should show special solicitude for disadvantaged parties.

By 1987, as the Rehnquist court was moving to the right, Justice Marshall was “in his decline and alienated, marginalized” and, in hiring clerks like Ms. Kagan, “looking for really bright people to kind of put a new charge in him” and to help him write dissents, said Juan Williams, a Marshall biographer.

“She didn’t come to him because she was necessarily of like mind, although she was coming out of the same political milieu,” Mr. Williams said.

Justice Marshall nicknamed Ms. Kagan “Shorty” and sometimes referred to her as “Little Bits,” though they all got called “knucklehead” from time to time, recalled Harry Litman, another clerk that year. The musty chambers were crammed with books, African artifacts, red Naugahyde chairs and ungainly desks.

Justice Marshall did a lot of work in an anteroom to his main office. There, he sat in a comfortable chair across a large table from his clerks to discuss cases, sessions that inevitably digressed into stories the justice would tell about his life.

“You’re at the same time laughing because he’s such a great raconteur and also thinking it’s unbelievable that these things happened in the lifetime of this person in whose presence I’m sitting, and their life made such a difference in re-creating a South where he had to be out of town by sunset or his life was in danger,” recalled Carol Steiker, another clerk that year.

One task of the clerks was to write brief memorandums evaluating the thousands of cases appealed to the Supreme Court. Most written by Ms. Kagan are straightforward, but some caution against taking a case because of how the conservative justices might rule or elevate outcomes over the law.

For example, on Oct. 7, 1987, she analyzed a case in which a judge dismissed an immigrant’s guilty plea over a minor infraction because it could jeopardize his application for permanent residency. The Justice Department appealed, saying the district court had exceeded its authority.
Ms. Kagan wrote that the Justice Department’s view was “almost certainly correct.” Still, she recommended against taking the appeal because the judge had “ensured an equitable result” at “no great cost to the Republic.” Justice Marshall scrawled “D” for “deny” at the top of her memorandum.

In her hearing last year, Ms. Kagan distanced herself from those writings, saying her job was to “channel” Justice Marshall’s mind-set.

A clerk to a justice is “trying to facilitate his work, and to enable him to advance his goals and purposes as a justice,” she said, adding: “He knew what he thought about most issues. And for better or for worse, he was not really interested in engaging with his clerks on first principles.”

Indeed, while her 1993 tribute is couched in fond terms, the bulk of her remarks about cases that arose in her clerkship year concerned their disagreements.

In one case, he voted not to let a man pursue a discrimination claim because his lawyer, who was blind, accidentally left his name off an appeal, and a deadline expired. Ms. Kagan and fellow clerks sought to persuade Justice Marshall to change his vote until he grew annoyed and, pointing to his framed judicial commission on the wall, asked them whose name was on it.

But the case Justice Marshall cared about the most that year, she wrote, was the school bus dispute in which she had trouble justifying his dissent. The final draft seems to implicitly acknowledge that his vote rested less on legal doctrine than on his notion of social justice.

The case, it says, asked “whether a state may discriminate against the poor in providing access to education,” adding: “I regard this question as one of great urgency. As I have stated on prior occasions, proper analysis of equal protection claims depends less on choosing the formal label under which the claim should be reviewed than upon identifying and carefully analyzing the real interests at stake.”