

The Washington Post

On Leadership



LEGAL SCHOLAR

Benjamin W. Heineman, Jr.

Benjamin Heineman is a business ethics expert and senior fellow at Harvard's schools of law and government. A former General Counsel for General Electric, Heineman is also a former assistant secretary for policy at the U.S. Department of Health, Education and Welfare (now Health and Human Services.)

In praise of legal diversity

Q: In appointing a new Supreme Court Justice to replace John Paul Stevens, President Obama was seeking someone who could provide intellectual and personal leadership of the liberal block. **His gamble in nominating Elena Kagan is bringing in someone from outside the 'priesthood' of appeals-court judges. What are the advantages and disadvantages of selecting a leader with non-traditional qualifications?**

There is a stock list of traits for evaluating a Supreme Court nominees --- by the presidents who appoint them, the Senators who confirm them and the public who learn of them during the confirmation process.

We will be beaten about the head in the coming days with the usual categories. Does the nominee have the traits of judicial temperament and stellar legal intellect? Does she bring gender or racial balance to the Court? Where does she stand on a liberal-conservative spectrum? Is there is some action or writing "out of the mainstream?" It boils down to: Can the nominee be confirmed?!

But, with the nomination of Elena Kagan, there will be a new and important area of discussion: the relevance and importance of "background diversity," or the positions she held in the legal profession, which did not include a last stop on a federal court of appeals, where all nine current justices served before ascending to the High Court.

In my view, this question of experience is very relevant and important. The general reason for choosing a person outside the "judicial monastery" of the appellate court is to find a person with a broad experience who will bring legal diversity, a different perspective on legal institutions and legal action than one sitting for years on a bench reading briefs, hearing arguments and writing opinions.

The reasons for choosing a non-judge, however, are more complex than that --- reasons that provide a different way to evaluate the "fitness" of the nominee. These reasons stem from two fundamental dimensions of the Supreme Court's unique role in applying the constitution to specific cases, at times overruling decisions made by democratically elected legislators or executives.

First, the court effectively functions as a balance wheel in our society. Its constitutional decisions seek to find the proper balance between executive, legislative and judicial power; between the

authority of the federal government and the residual authority of the states; and between majority rule and minority rights. Most of the great court decisions involve this three fundamental set of issues.

Second, the majestic phrases of the Constitution---the Commerce Clause, the necessary and proper clause, the protection of free speech, the requirement of equal protection, the imperative of due process, the ban on unjustified and uncompensated takings, the prohibition against cruel and unusual punishment---are not self-executing. The relatively few words in these grand constitutional provisions must be filled in by the Supreme Court. Although due regard must be paid to constitutional history and legal precedents, all sophisticated observers of the court know the justices often have significant latitude---a range of choices---in reaching a particular decision in a particular case.

Ideally, a nominee would have had deep experience, not on the bench, but in legal institutions which are the subject of major constitutional cases: serving as staff in the Senate or the Executive Branch (for separation of powers questions); serving in either in Washington or in the states (on federalism questions); serving in some capacity as a litigator or advocate on majority-minority rights issues. I deeply believe that there is no knowledge like that developed by being inside an institution or organization. Just clerking on the Supreme Court for a year at a very young age (as Ms. Kagan did) is an remarkable opportunity to learn how the Court works.

Such experience, if deep, rich and intense, provides a vital real-world understanding of the most fundamental issues that come before the Court---far beyond the "big guy/little guy" partisan rhetoric. Obviously, the role of the judge is different than staffing a Senator or president and is technically confined to the briefs and record before the Court. But an understanding of the Congress or the presidency as an institution can importantly inform the deliberative process of a Justice and is perhaps even more directly relevant than to other aspects of the nominee's personal history and character.

The idea that Justices "follow the law" and "don't make law" is, in the area of new constitutional questions that come before the Court, silly. Yet this is the catechism that recent nominees have been forced to recite before the judiciary committee. If the reality is that, once on the bench, the nominee-now-Justice will invariably and inevitably make "law" by deciding new cases presenting new issues, then the value of understanding, through in-depth personal experience, other legal institutions and processes in our society is high.

An important part of Supreme Court adjudication may be to avoid the broad sweeping legislative-like holding in a specific case but instead to engage in a dialogue with the other branches of government---to rule on the case before the Court and raise important issues for the other branches or for the states to address in the future. This "discussion" among the entities of a great republic can be of great importance in establishing the ultimate legitimacy of evolving judicial rules.

A Justice with non-judicial experience may be especially capable of fostering such a dialogue between the great federal and state, legislative, executive and private institutions and individuals of our democratic society.

BY BENJAMIN W. HEINEMAN, JR. | MAY 11, 2010; 12:12 PM ET
CATEGORY: [LEADERSHIP](#)

###