

Politicians as Supreme Court Justices? Not common in recent years

Scott Bomboy, The National Constitution Center
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Over the weekend, President Barack Obama said in an interview that he probably wouldn't be interested in becoming a Justice after his term ends. And in terms of recent trends, it's been a while since a major national political figure joined the Supreme Court. President Barack Obama sat down with Jeffrey Toobin for a New Yorker interview and the former president of the Harvard Law Review was asked the "Taft Question" by Toobin. As you'll recall, William Howard Taft was the one, and the only, President to later serve on the Supreme Court.

There's nothing in the Constitution to prevent a former President from serving in a different branch of the federal government. President Warren Harding nominated Taft in 1921 as Chief Justice nearly a decade after Taft left the White House. And John Quincy Adams went on to a distinguished career in the House of Representatives after leaving the presidency.

President Obama would face some major hurdles if he ever changed his mind about a career on the bench, and especially the high court, after 2016. First, any Supreme Court nominee needs to go through the grueling public testimony process, and she or he must be approved by a majority of the Senate. In the past, most Supreme Court Justices were approved by a near unanimous voice vote; in the modern era, the vote often goes along party lines in the Senate. The sight of a former President testifying before the Senate would be very interesting, on a number of levels.

Then there is the argument about President Obama's legal background. As President Obama noted in the New Yorker interview, he decided not to clerk coming out of Harvard. He worked as a lawyer on civil rights cases in Chicago and he lectured on the law at the University of Chicago; however, much of his professional career has been in politics. The argument can be made, however, that a former President with eight years of experience dealing with the Supreme Court and the Justice Department has a unique insight into broader legal issues.

Since the World War II era, the last major elected political figure to receive a Supreme Court nomination was Earl Warren, who was the governor of California and the GOP vice presidential candidate in 1948. Warren spent a brief time in private legal practice before switching to a very prominent public career as a district attorney and as California's attorney general. President Dwight Eisenhower nominated Warren to become Chief Justice in 1954 and he was approved by a voice vote by the Senate. Prior to Warren, there were several Supreme Court nominees who came directly from political careers to the court.

Today, a look at the current Justices shows that some experience in the court system at a federal level is almost a prerequisite for a nomination. Eight of the nine current Justices served in the U.S. federal appeals court system. The exception is Elena Kagan, who clerked for Thurgood Marshall and was dean of Harvard's Law School before becoming Solicitor General. Experience as an elected political figure doesn't seem to be on the Supreme Court resume.

Does Supreme Court lack educational diversity?

BILL SCHACKNER AND NOLAN ROSENKRANS, Pittsburgh Post-Gazette
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President Barack Obama's nomination Wednesday of Merrick Garland to the U.S. Supreme Court officially set in motion an election-year fight over the merits of filling the high court vacancy now versus after a new president is in office. But as the latest in a lengthening list of Supreme Court nominees educated at either Harvard or Yale law schools, the selection of Judge Garland, an appeals court judge, rekindles another debate long heard within the legal community: Is the nation's high court as educationally diverse as it should be?

There seems little doubt that those two Ivy League schools in particular hold a lock on membership. Of the eight sitting justices, all received law degrees from Harvard or Yale, except for Justice Ruth Bader Ginsburg, who graduated from Columbia Law School after earlier attending Harvard. The late Justice Antonin Scalia, whose death last month created the vacancy on the nine-seat court, was Harvard Law, Class of 1960. For decades, nominees to the court have come largely from those two schools. Judge Garland is a Harvard Law graduate.

"It's a very important question and I think it's something that should be of concern," said Gregory Bowman, dean of the West Virginia University College of Law. "The United States is a vast and diverse place geographically and culturally, and when you pull your justices from just a few select schools in the same region of the country, then you are not getting a court that has a diverse set of experiences and backgrounds and ways of doing things," he said.

The provision of legal services in America for the most part involves those outside the Ivy League, Mr. Bowman said. Yet the opposite is true of the justices who are America's final arbiters of cases in which "people's lives hang in the balance."

There's another reason those schools are a pipeline, say some. Their brand and the connections their graduates enjoy can make a decision sure to face unrelenting scrutiny an easier sell to the Senate and public at large.

Gary Gildin, interim dean of Penn State Dickinson School of Law, said it depends on how one views the job of Supreme Court justice. If it's simply as an objective interpreter, then what matters is getting "the best and brightest of interpreters of statutory language and other sources of interpretation of statutes, as well as reading case precedents."

But if the job is more, then it's not simply about education or school but "the totality of life experiences" and "value sets" as well as other influences that can subconsciously enter a judge's decision, he said.

It's possible to overrate the influence of a justice's educational background, said University of Pittsburgh law professor Arthur Hellman. "By the time somebody is appointed to the Supreme Court, he or she has had many other life experiences," he said.

Just the same, Mr. Hellman added: "They [the justices] are not all that different from one another, and they all participated and spent most of their lives in a very narrow segment of the legal profession."

Richard Friedman, professor of law at the University of Michigan, didn't think that the educational background of Supreme Court justices is "that big of a deal."

"The big difference is the individual," he said. "I think what [graduating from a non-Ivy League school] would have done to them dwarfs in comparison to the personal differences."

But Rebecca Zietlow, professor of law at the University of Toledo, argued that a court filled with Ivy League graduates creates a court without a certain breadth of knowledge.

In general, she said, a degree from an Ivy League school indicates "you were rich, you were always rich, and you don't have the sense of how an average person lives."

As an example of how narrow perspectives can affect the court, she pointed to the lack of involvement in politics by justices before they were named to the court. That insulation from politics or legislative positions has, in her perspective, created a court that is not particularly deferential to the political process.

"They are very willing to overturn things that the Congress has done," she said, "and seem very dismissive of the judgment of the political branches."

Experience needed? The long history of nonjudge justices.

By Warren Richey, Staff writer of The Christian Science Monitor OCTOBER 7, 2005

WASHINGTON — John Marshall is widely revered as "the great Chief Justice," but before joining the Supreme Court in 1801 he had never served a day in judicial robes and lost the only case he argued at the high court. Earl Warren had worked for 18 years as a prosecutor and was three times elected governor of California. But he had no prior judicial experience. Nor did William Rehnquist, Felix Frankfurter, and Louis Brandeis.

The nomination of White House counsel Harriet Miers to the Supreme Court has sparked debate over her qualifications. Does she have the intellectual heft and constitutional dexterity necessary for the job? And how does her experience compare to the résumés and stature of prior justices?

Who is qualified to sit on the Supreme Court is a determination made on a nominee by nominee basis by at least 51 US senators. There are no set rules for qualification. Although every past justice has been a lawyer, 41 justices had no prior judicial experience. But many of the justices who lacked hands-on experience as a jurist nonetheless had achieved a high level of accomplishment and stature as intellectual or political leaders prior to their nominations.

"Judicial experience is not a prerequisite, but what you look for in place of judicial experience is distinguished experience as a law professor or public official, and Miers really doesn't have either of those two," says Michael Comiskey, a political science professor at Penn State-Fayette.

One key consideration, scholars say, is the goal of the nominating president. "She clearly doesn't have the kind of symbolic significance that presidents are sometimes going for in choosing justices - those who you put on the bench because you expect them to be great justices," says Keith Whittington, a politics professor at Princeton University.

President Reagan tried it, unsuccessfully, with the nomination of Robert Bork and succeeded with Justice Antonin Scalia, he says. "Earlier in the century Oliver Wendell Holmes was in that mold. Louis Brandeis was in that mold," Professor Whittington says.

Scholars are drawing comparisons between Miers and various former justices. Lewis Powell, Abe Fortas, and Brandeis were all lawyers with no judicial experience at the time of their nominations. Powell was president of the American Bar Association, while Miers was head of the Texas Bar Association. Fortas was Lyndon Johnson's personal lawyer prior to being named to the court. Miers was President Bush's personal lawyer and White House counsel prior to her nomination. But the least apt comparison, many analysts say, is with Brandeis.

"The difference between Louis Brandeis and Harriet Miers is that Louis Brandeis was an academic lawyer," says Stefanie Lindquist, a professor of law and political science at Vanderbilt

University. "He wrote some very influential law review articles while he was in private practice. So he established intellectual credentials to serve on the court before he was elevated."

She adds, "That is something we are missing with Harriet Miers. We really don't have any paper trail that establishes any intellectual credentials."

The elitist argument

Snobbery is no small part of the debate over Miers, analysts say. The fact that she attended Southern Methodist University rather than a top-tier law school like Harvard or Yale is seen by some as a mark against her. Yalof says the debate over who is most qualified for the Supreme Court is a false debate. Just because Miers isn't on someone's list of 100 most qualified candidates for a high court post doesn't mean she isn't qualified to do the job, he says.

"No one could possibly have thought in 1956 that William Brennan was on the top 100 list of people to become a justice of the Supreme Court," Yalof says. "At the time of his appointment, William Brennan had been a little-known state supreme court judge in New Jersey for seven years. He was far and away not considered the most reputable justice on his own court," Yalof says. "Was he qualified?" Judge Brennan, appointed by President Eisenhower, went on to become one of the most influential justices of the 20th century.

In contrast, some nominees never measure up. Charles Whittaker was an experienced litigator and corporate lawyer. He served as both a federal judge and an appeals court judge. But was unable to adjust to life as a justice. Some justices learn and grow on the job.

"People now say that the [Miers nomination] is not a Scalia or Thomas nomination," says Whittington. "But at the time Clarence Thomas was nominated it wasn't clear that Thomas was that kind of nominee either."

He adds, "He has emerged subsequently as somebody who has this kind of strong distinctive voice on the court. It is possible that Miers would as well."

Fine - or great?

Professor Lindquist says the lack of an academic or judicial paper trail makes it difficult to assess Miers' potential ability to develop or clarify legal and constitutional doctrine.

"My guess is she would be a fine Supreme Court justice, but will she be a great Supreme Court justice - that seems less likely," she says. "John Roberts, on the other hand, is going to become a great Supreme Court justice. Whether or not I agree with all his politics, I think he is likely to be a brilliant Supreme Court justice."

Why elites do belong on the Supreme Court

Christopher Edley, Dean of the School of Law at the University of California at Berkeley.
Sunday, May 16, 2010

Judges should be able to understand and empathize with just about anyone, because the law is about everyone. With that in mind, is what's good for Harvard and Yale good for America?

If Elena Kagan is confirmed, we will have an entire Supreme Court educated at Harvard and Yale law schools, demonstrating again the grip that academic elites have on the levers of power. Some worry this homogeneity is too anti-democratic, even for our most anti-democratic of institutions. I don't hear a claim that even knuckleheads deserve a spot on the court, but surely some brilliant possibilities attended, say, Berkeley? Or Tulane?

In confirmation battles, populist cred is at war with elitist credentials. Our political culture values a common touch, but our legal culture values uncommon smarts. Supreme Court nominations are a shotgun marriage of the two, but it should not be a marriage of equals.

For a court nominee or a political candidate, there are communications strategies to finesse a blinding résumé. If you want to explain to the public why you support a nerdy nominee (embrace it, Elena), you may want to talk about her Average Jane swellness. A senator walks out with the newest pick and grins into the cameras saying: "This is a fine person. Very likable. Loves fishing." Translation: "Pretty darned smart, but she seems human (enough), so don't hate me if I decide to support her."

In 1988, I was helping prepare Michael Dukakis for a presidential debate against Vice President George H.W. Bush. The Bob Squier, a brilliant operative, coached: "Remember, in this debate, the voter is sitting at home watching the tube, trying to decide which one of these two characters they want in their living room every night for four years. They've got to like you." Everyone got the message: The brainiac doesn't win, niceness counts, eliteness alienates.

But legal culture is different. We're enforcing the Constitution and preserving fundamental rights, for goodness sake. Federal judges, unlike those in most states, are well insulated from politics because they are appointed for life and never face election. Though political concerns do intrude -- the people who nominate and confirm judges are politicians who worry about political consequences, after all -- we hope that's not the only thing the politicians think about.

At the Supreme Court level, it's all about finding oracles for Olympus. While it's frowned upon when judges fire spitballs at colleagues, what matters is intellectual horsepower, not office-chat charm. It is wisdom and analysis, not personal experiences. If a judge's life is elite in the sense of excellence, that's fine. In fact, that may be the point. At every turn the nominee has excelled in a meritocratic system, one that is selective yet far more open than in generations past. But if a judge is elite in an exclusive and exclusionary sense, then we have a problem that's both political and jurisprudential.

The tension between elitism and populism is embedded in our national DNA because America rejected the model of a monarch ruling by divine right in favor of an iffy experiment in democratic self-governance. So now you are responsible for choosing your leader. Do you want someone like you or someone better than you? Easy answer if you're picking a piano teacher or a brain surgeon. But what about picking a Supreme Court justice who will decide whether corporations should be able to buy elections, whether late-term abortions can be prohibited, whether Congress can take a sledgehammer to state regulation of health insurers or whether local police can demand that people produce identification papers?

For about 40 years now, all the top law schools have tried to pick students who are not just brilliant but who have the potential to be outstanding leaders from and for all of America's communities. Today, "elite" doesn't carry the old-boy, classist, midcentury sense.

In fact, law schools strive for an elitism that is quite democratic in comparison with many other fields. As at Yale and Harvard, we at Berkeley seek to build a campus community that is as exciting and diverse as our nation. That means a New Jersey physics major who models underwear. A single-parent firefighter medievalist from Denver. A former Navy Seal, a software designer, a late-blooming high school dropout, a dancer with published poetry. And when they are here, they teach each other, they learn to understand each other, and then they remember each other. We should prefer institutions that are elite in terms of excellence, while more democratic in terms of access. Even Harvard, Yale and their ilk are more open than they were a generation ago. This is for a lot of reasons, among them the rise of standardized testing, however imperfect, intended to reduce cronyism, the civil rights and women's rights movements, and the modern system of need-based financial aid.

In my experience, there aren't too many "false positives," i.e., not-so-good people mistakenly admitted to elite settings such as Harvard, Berkeley or Supreme Court clerkships. On the other hand, there are plenty of equally terrific people who don't get a privileged spot in these institutions, for reasons that have nothing to do with meaningful differences in talent. But those "false negatives" (good people denied entry) aren't nearly as troubling as the false-positive mistakes in admissions or hiring. Again, think of your neurosurgeon or airplane pilot.

When the president announced his Supreme Court pick last week, he noted that Kagan has an understanding of the law as it affects "the lives of ordinary people." Not everyone is convinced she's one of those ordinary people. This nagging question -- of how well this brilliant legal mind can represent the "heartland" -- is one that won't go away. We know that Kagan has excelled in the legal field. That ought to be enough. But just to be safe, she must explain what beer she drinks while slugging softballs.

The Homogeneous Federal Bench

The New York Times Editorial Board

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Justice Ruth Bader Ginsburg, in a dissent from a 2007 Supreme Court decision that made it harder for women to sue employers for pay discrimination, suggested that the court's majority was not in "tune with the realities of the workplace." Her background as general counsel to the American Civil Liberties Union, where she had co-founded the Women's Rights Project in 1972, surely informed her thinking. Unfortunately, that kind of experience is both less common and more controversial on the federal bench today. If she were being considered for a seat on the court these days, Justice Ginsburg told an audience in 2011, "my A.C.L.U. connection would probably disqualify me."

But even though some senators think it's politically incorrect to say so, a judge's experience and personal history are, at times, critical to how she or he approaches the job. Given this reality, the makeup of the judiciary should reflect as much as possible the public whose cases come before it. For a long time, most of the attention to increasing diversity has focused on race, ethnicity and gender, where progress has been slow but incremental.

Equally important is diversity of professional experience, which gets less attention. Regrettably, under the Obama administration, federal judges continue to be drawn overwhelmingly from the ranks of prosecutors and corporate lawyers. This deprives the courts of crucial perspectives and reduces public trust in the justice system. According to a report issued by Alliance for Justice, about 85 percent of Mr. Obama's nominees to the federal bench have been corporate attorneys or prosecutors, or both, in some cases. Fewer than 4 percent have worked as lawyers in public-interest organizations. And while 43 percent of his nominees to the federal trial courts were previously state or federal prosecutors, only 15 percent were public defenders. At the appellate level, only 4 out of 56 nominees were public defenders and 21 were prosecutors.

Professional diversity on the federal bench was once more valued. In a 1992 tribute to Justice Thurgood Marshall, Justice Byron White spoke of the benefit of working with a jurist who, in addition to being the first black justice, had also been a renowned civil-rights lawyer. "Thurgood brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match," Justice White said.

Recently, Mr. Obama has worked to strike a better balance. In January, he submitted four district court nominees with underrepresented backgrounds, including a former public defender and a solo practitioner in criminal defense. Republicans who are more business-friendly and like to appear tough on crime will continue to fight such nominees. But, for now at least, their resistance has been thwarted by the elimination of the Senate filibuster for lower-level federal judges. That is how Mr. Obama succeeded in getting Cornelia Pillard, a law professor and former lawyer for the N.A.A.C.P. confirmed to the federal appeals court in Washington, the second-most powerful court after the Supreme Court.