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OPINION/VIEWPOINT

We will be three

Guest Commentary – Barrie L. Goldstein

Solicitor General Elena Kagan's nomination to the U. S. Supreme Court by President Barack Obama was hardly a surprise, but it nevertheless is welcome news for those who advocate that the Supreme Court should have more gender diversity. If Ms. Kagan is confirmed, women will constitute three of the nine seats on the court.

The absence of diversity on the Supreme Court is in stark contrast to many of the highest courts of the states, 22 of which have more than 40 percent women serving, including Connecticut, which has three women on a seven-person bench.

Women waited 61 years after they received the right to vote before they obtained a seat on the U. S. Supreme Court. While Justice Sandra Day O'Connor, appointed by President Ronald Reagan in 1981, broke the barrier, she was a minority of one until Ruth Bader Ginsburg joined her in 1993.

Yet, even two women on the Supreme Court did not significantly change the court's gestalt, as one commentator on the PBS News-Hour observed recently. While Justice O'Connor was and Justice Ginsburg continues to be very effective in their own ways during their tenures, a complement of two women justices first stands out because of their gender and, only second, for their jurisprudence.

President Obama's selection of Justice Sonia Sotomayor and now his nomination of Solicitor General Kagan overcome this tokenism. The Supreme Court will finally have sufficient diversity of gender to ensure that female justices are regarded as integral players in the development of the Supreme Court's culture and decision making. In diversity terminology, the Supreme Court has reached a tipping point.

The charge that Ms. Kagan lacks judicial experience because she has not served on the bench is unconvincing. Some of our greatest jurists, such as Justices Black, Douglas and Brandeis, never served on a court. (Justice Black did sit in "police court.")

The Supreme Court should reflect the thinking of legal minds who have developed their skills outside of the confines of the courtroom, where strictures of practice may undercut an understanding of the broader picture. We who litigate or who judge cases are products of the adversarial system, which limits legal argument to existing case law.

On the other hand, Elena Kagan's academic experience shows an inquiring approach to the law. For example, Ms. Kagan's 2001 Harvard Law Review article, "Presidential Administration," demonstrates a reflective scholarship concerning the president's role with administrative agencies. The Supreme Court often visits questions of administrative law, and Ms. Kagan's experience will bring considerable value to the court's consideration of such issues.

Judicial skills are not necessarily perfected in a courtroom setting. They are frequently honed around conference tables. For example, my first oral argument occurred in 1975 before "Nino" Scalia, as Justice Antonin Scalia was then known. It happened during a heated debate among government officials, including Justice Scalia, who then headed the Office of Legal Counsel.

While "Nino" wore no robes, he peppered me with questions about the Civil Division's position as if he were a judge. (His debate style hasn't changed.) Although Justice Scalia had not yet been elevated to the bench, there was no question that this session was a precursor for his later judging. Is there any question that Elena Kagan has had similar rigorous intellectual discussions that have prepared her to sit at the Supreme Court's conference table and hold her own? I think not.

The Supreme Court is divided. The next justice must be a consensus-builder who has the political savvy and considerable talent for consensus building. Here, Ms. Kagan does have a record, which will stand her in good stead. As the former dean of Harvard Law School, Elena Kagan revitalized a school whose reputation had suffered because of faculty discord. Dean Kagan hired conservative professors and even asked one to serve on the school's hiring committee. It is reported by many that she exhibited the very traits that a Supreme Court justice must have: an ability to listen and to be fair.

Kagan's paper credentials are impeccable, and there is no question that she is brilliant. Her confirmation will further correct the court's gender gap, and her talent for consensus-building will strengthen the Supreme Court as an institution. After due deliberation, the Senate should approve her nomination without a three-ring circus, so that we will have three highly qualified women on the court.

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