

The logo for 'The Federalist' is displayed on a black rectangular background. The word 'the' is written in a small, lowercase, serif font at the top center. Below it, the word 'FEDERALIST' is written in a large, bold, uppercase, sans-serif font, centered horizontally.

the FEDERALIST

7 Things The Trump Win Means For The Supreme Court

Here are some of the lessons we must take into the political fight for the Supreme Court.

Ilya Shapiro

November 9, 2016

The election result caught legal pundits by surprise as much as anyone else. Although the vacancy left on the Supreme Court by Justice Antonin Scalia's passing—and judicial nominations more broadly—didn't play as big a role in the campaign as leaked videos and emails, this issue is now at the forefront of the new administration's transition plan. Here are some lessons we can take into that political fight:

1. The nomination of Judge Merrick Garland nomination is dead.

Does this mean that Trump will indeed pick someone from his list of 21 potential nominees? It's a terrific list, to be honest, and is perhaps most notable for including 9 state jurists. Will we get one of those on the Supreme Court for the first time since President Reagan picked Sandra Day O'Connor in 1981?

2. Senate Republicans' strategy of not even considering Garland, of letting the American people decide who gets to fill Scalia's seat, worked.

Not only that, but it didn't at all hurt vulnerable senators running for reelection. Majority Leader Mitch McConnell and Judiciary Committee Chairman Chuck Grassley are now emboldened to pursue a broader legal-policy agenda.

3. The Swing Justice

Anthony Kennedy will almost certainly continue to be the “swing justice” on most controversial issues—all of those on Trump’s list would be considered more conservative—so he may have been the biggest winner last night.

4. It’s Not About Garland

I feel sorry for Garland, a respected jurist and honorable man who’s been in limbo for nearly eight months. That said, this wasn’t about him and I would’ve advised voting against him. (But don’t feel too badly for him: he maintains his lifetime appointment on the D.C. Circuit.) Senate Democrats will now play similar hardball, which will likely cause McConnell to get rid of the filibuster for Supreme Court justices just as Harry Reid did for lower-court nominees when Democrats controlled the Senate.

5. Who’s in Trump’s Ear

An open question is what happens when Trump realizes that the sorts of judges he’s been advised to appoint would rule against him on various matters. We can only hope that he continues listening to the same legal advisers that put together his nominee list.

6. Obamacare

If you live by executive action, you die by executive action—which means that many looming high-profile cases involving President Obama’s rule-by-decree will simply go away. DAPA (executive action on immigration) and the Clean Power Plan (carbon-emission regulation despite congressional rejection) will be rescinded, religious nonprofits will be exempt from Obamacare, the Department of Health and Human Services won’t make the illegal payments that have led the House of Representatives to sue Secretary Sylvia Burwell, and more. That may also include the transgender-bathroom guidance, which if rescinded would moot the biggest case from the Court’s current term.

7. Case Closed

With the election of (my friend and University of Missouri law professor) Joshua Hawley as Missouri’s new attorney general, the not-yet-scheduled *Trinity Lutheran* case regarding church eligibility for state playground funds will likely be settled.

Finally, while I won’t hold my breath, the *New York Times* editorial board really ought to include “It turns out that Ilya Shapiro was right” in its editorial urging senators to reject Trump’s judicial nominees.

Ilya Shapiro is a senior contributor to the Federalist. He is a fellow in Constitutional Studies at the Cato Institute and Editor-in-Chief of the Cato Supreme Court Review. Follow him on Twitter, @ishapiro.