



ABOVE THE LAW

Supreme Court Update: Trump Has Started Interviewing SCOTUS Candidates

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On Saturday afternoon, here in cold and snowy New York, President-elect Donald Trump interviewed Judge William Pryor of the Eleventh Circuit for the open seat on the U.S. Supreme Court. The opportunity to meet with PEOTUS to talk about SCOTUS must have lifted Judge Pryor's spirits, in the wake of the loss of his beloved Crimson Tide in Monday's football championship.

The news of a Trump/Pryor meeting, while notable, is not surprising. At last week's press conference, Trump said that SCOTUS meetings are underway and we should expect a nominee within two weeks of inauguration day. And Judge Pryor, beloved by conservatives, sits at the top of the Trump SCOTUS list.

Could Trump pick someone *not* on the list? There was one promising possibility:

After his [post-election] talk with Trump, Texas senator Ted Cruz and his chief of staff, David Polyansky, then sat down with Trump's chief strategist, Stephen Bannon, who sounded him out about his interest in filling the Supreme Court vacancy created by the late Antonin Scalia. Cruz — widely considered one of the best Supreme Court litigators of his generation — swatted down the idea, according to four people to whom he has relayed the conversation.

That meeting took place on November 15. A few days earlier, on November 11, my colleague Joe Patrice had written a column entitled Why Donald Trump Must Nominate Ted Cruz To The Supreme Court. Great minds think alike?

Alas, Cruz declined — mainly because, well, he still wants to be president. As one of his friends told Politico, “Who knows what’s gonna happen eight years from now? Ted would be a young man.... [T]hat’s another negative to being a Supreme Court justice, it’s a lifetime commitment.... Ted wasn’t ready to lay down his sword and pick up a pen for the rest of his life.”

With Cruz out of contention, Trump is presumably sticking to his list. Aware of other shortlisters who have met or are meeting with the president-elect? Drop me a line, by email (subject line:

“SCOTUS”) or by text message (646-820-8477). It would be great to know who else has made the final round (without having to camp out by Trump Tower in the cold).

What are Judge Pryor’s chances of getting nominated? Here’s a big plus for Pryor’s prospects: the ease with which Jeff Sessions sailed through his hearings, making his confirmation as attorney general a near certainty. It helps in at least two ways.

First, Sessions is a major Pryor proponent — and now that Sessions is definitely going to be AG, having killed it at his hearings, his Trumpworld stock is way up and his views enjoy greater sway within the administration.

Sessions and Pryor are close friends and have known each for more than 20 years. They met in 1994, when Sessions was running for Alabama attorney general and a mutual friend introduced them. After Sessions won, he hired Bill Pryor as his deputy attorney general. Sessions cited Pryor’s work for him, among many other factors, when he spoke glowingly about Pryor at his Eleventh Circuit confirmation hearings in 2003 and 2005.^[1]

Second, the success of Sessions shows that what gets liberals all hot and bothered isn’t necessarily enough to stop a nominee — and this might encourage the Trump Administration to “go bold,” swing for the fences, and put up Pryor.

Judge Pryor, more than any other potential Trump nominee, triggers strong opposition from liberal interest groups — civil rights groups, LGBT groups, and especially pro-abortion groups, who loathe his comments about *Roe v. Wade* (“worst abomination in the history of constitutional law”). But Jeff Sessions similarly entered his hearings as a hardline conservative with a Louis Vuitton steamer trunk of baggage, including accusations of racism that kept him off the federal bench in 1986.

One would have thought that if Sessions couldn’t get a federal judgeship — and not even one on the Eleventh Circuit, but on the lowly Southern District of Alabama (no offense, S.D. Ala.) — then he couldn’t get confirmed as attorney general of the United States. But Sessions came out swinging, calling the racism accusations “damnably false,” and proved that a strong performance in confirmation hearings can overcome a lot. (See also Clarence Thomas and his epic “high tech lynching” speech.)

Judge Pryor is very conservative and very outspoken — but he’s also very smart and a stickler for preparation, and he would likely perform well at confirmation hearings. He might not be able to bob and weave around the issues as well as some other nominees, given his paper trail and past pronouncements (and he might not even bother to; recall how he refused to disavow his “*Roe* is an abomination” comment in his 2005 hearings). But Bill Pryor is not going to self-immolate like Robert Bork in 1987; he’s too shrewd for that. And short of a self-immolation, he has a solid shot of winning confirmation, with 52 Republicans in the Senate (plus some Democrats who might cross over — Vice President-elect Mike Pence is already working on that).

Could the Democrats filibuster? Yes; the filibuster has not been eliminated for Supreme Court nominees. But as Ilya Shapiro points out, nothing prevents Republicans from exercising the “nuclear option” and eliminating the filibuster for SCOTUS nominees, just as the Democrats did

for lower-court nominees. And if that's what it takes to put Judge Pryor on SCOTUS, I could certainly see the Republicans doing it.

Would the Republicans pay a political price for “going nuclear”? Probably not; the Democrats didn't. And as we learned from what happened to Chief Judge Merrick Garland's SCOTUS nomination, the American public as a whole doesn't get that worked up about the Court, at least not if it sounds like “technicalities.” If the American people couldn't get excited over the Senate's “advice and consent” duty, they certainly won't get excited over judicial filibusters. Joe Sixpack will see a vote tally for the Pryor nomination in the newspaper the next day — even a straight party-line vote, 52-48 — and will think to himself, “Guy won a majority, sounds fair to me!”^[2]

Here's an interesting topic for legal nerds who like inside baseball (and if you've read this far, that's you): how will the solicitor-general selection process affect the picking of a SCOTUS nominee?

Jeff Sessions might have to make a tough choice about how he wants to spend his political capital within the administration. If he's fighting with other power centers — the White House counsel's office, for example, plus what's referred to in transition circles as “New York” (the coterie of top DJT advisers holed up in Trump Tower) — he could have to decide what he cares about more, having his friend and fellow Alabamian Chuck Cooper as solicitor general, or having his friend and fellow Alabamian Bill Pryor as associate justice. Depending on how strongly others in the administration feel about the rival SG and SCOTUS candidates, Sessions might not be able to get both of his wishes granted.

But given how high Sessions's stock is in Trumpworld right now, and given how Donald Trump, despite talking about the importance of SCOTUS as an issue, doesn't seem super-interested in its intricacies — I doubt he could name even half the people on his list of nominees — one could certainly see Sessions getting both Cooper and Pryor, thanks to deference from the president.

Another presidential administration might be troubled by the incestuousness and lack of diversity of installing three straight white males from Alabama — three “good ol' boys,” all close friends with each other — as attorney general, solicitor general, and associate justice. But if his personnel picks so far are any indication, Donald J. Trump doesn't stay up at night worrying about incestuousness and lack of diversity.

UPDATE (6:05 p.m.): Setting aside the possibility of Alabama overload (Roll Tide!), the qualifications of Bill Pryor and Chuck Cooper cannot be denied. See this new story, [The Case For Chuck Cooper As Solicitor General](#).

[1] Pryor had two confirmation hearings, in 2003 and in 2005, because his 2003 nomination didn't go through, as a result of opposition from Democrats influenced by civil rights and LGBT groups. But one shouldn't read too much into the difficulty Pryor had making it onto the Eleventh Circuit. It's much easier to quietly kill a lower-court nomination — by withholding a blue slip, never scheduling a floor vote, or other machinations — than to kill a Supreme Court nomination, which gets nationwide attention and massive media coverage.

[2] If you think American voters hold a more sophisticated understanding of government, just read these (very interesting) interviews of women who voted for Donald Trump. It's fascinating

to see what voters decide based on (and note that not one of these dozen women uttered the words "Supreme Court").