



Gorsuch Nomination: Bar Members Weigh Impact on Court

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U.S. Supreme Court nominee Neil Gorsuch has dominated headlines since President Trump's January 31 prime-time announcement, and reactions have come fast and furious about how Gorsuch, a judge on the U.S. Court of Appeals for the Tenth Circuit, could impact the Court.

"This was an inspired choice, and the fulfillment of a most important campaign promise," says Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute. "President Trump showed doubters that even if he doesn't know originalism from origami, he understands the importance of the Supreme Court and getting this nomination right. And he could hardly have picked someone more fitting to fill the large robe left by the legendary Justice Antonin Scalia."

Some have suggested that Gorsuch is cut from the same cloth as Scalia — he's both a textualist and an originalist who evaluates laws according to how the Constitution was understood when created.

"Neil Gorsuch . . . has a penchant for going to dictionaries and history books to find the right answer, just like Scalia. He takes constitutional structure seriously, not as an academic matter but as a means to secure ordered liberty," adds Shapiro.

Gorsuch's merits are not in dispute. He graduated from Harvard Law School and went on to clerk for Judge David Sentelle of the U.S. Court of Appeals for the D.C. Circuit, as well as for Supreme Court Justices Byron White and Anthony Kennedy. He was nominated by President George W. Bush in 2006 to serve on the Tenth Circuit. Gorsuch is known as a very persuasive and thoughtful writer in his opinions, among the most notable of which is the 2013 *Hobby Lobby Stores Inc. v. Sebelius*, ruling against Affordable Care Act's contraceptive mandate.

"He's an elegant writer, with clear and memorable turns of phrase to illustrate complex points. Just like Scalia, though not as punchy," Shapiro says.

Many in the legal community agree that Gorsuch is well qualified, but view his record as a "threat."

"Last night's announcement of Judge Gorsuch, who is impressive, stood in stark contrast to the chaos we've seen from this White House," says Joshua P. Galper, cofounder and partner at Trident DMG and the law firm Davis Goldberg & Galper PLLC. "But the trappings of the moment should not distract from the fact that his presence on the Court will pose a huge threat to

labor rights, the environment, and consumer protections, not to mention on LGBT and women's rights issues.”

Gregory Lipper, partner at Clinton, Brook & Peed, was more forceful in his reaction to Gorsuch's nomination. “His record and writings suggest that he's likely to uphold draconian restrictions on reproductive rights; sustain broad religious challenges to laws protecting LGBT rights and ensuring access to contraception; uphold efforts to suppress voting; and make it harder to bring cases on behalf of consumers, workers, students with disabilities, and victims of civil rights violations, among other vulnerable groups,” he says. “Given the tainted process that led to his nomination, the strongest argument against confirming Judge Gorsuch is that his name is not Merrick Garland.”

This Fight or the Next?

Lipper echoes a sentiment among many liberals who believe that Gorsuch is being nominated to a seat “stolen” from Garland, current chief judge of the D.C. Circuit and President Obama's pick for the Court, and that Democrats should block his confirmation.

But another strategy is looming: Don't obstruct Gorsuch; his confirmation is a return to the same Court when Justice Scalia was alive. The next empty seat is the one to fight for.

“I think that both as a matter of practicality — that Gorsuch would be tough to oppose on his own merits — and political wisdom, because so many Democratic senators are up for reelection in states Trump won, this should probably be a dry run for them rather than a full-scale assault,” says Shapiro.

Galper says he has seen “really smart observations about strategy for Democrats in dealing with this nomination and to recognize that the big fight is still to come for Justice Kennedy's replacement. At the same time, Democrats have very strong and understandable reactions to this nominee and his views, which are very conservative and threaten a whole number issues and people, no matter your party.” At the time of this article, at least seven Democrats oppose a filibuster.

Lipper isn't convinced, though. “There is nothing preventing Senate Democrats from fighting more than one Supreme Court nomination. If anything, rolling over now, even after the total Republican blockade of Garland, will make it harder for the Democrats to oppose the next nomination,” he says. Logistically it's also possible that the Democrats will have less senators in the upcoming years, making it harder to oppose the next nominee, Lipper argues.

“I think that the Senate Democrats have twisted themselves into knots trying to play 18-dimensional chess. It is far simpler and more principled, not to mention easier to explain, to fight this nomination because it resulted from an illegitimate process and will move the Court far to the right,” Lipper says. Despite Democratic opposition, the likelihood of Gorsuch getting confirmed is high, as will be his impact on the Court's direction. “All in all, a great choice,” says Shapiro, “and one the Democrats will be hard-pressed to gain traction in attacking.”

Gorsuch may be similar to Scalia, but he is not a carbon copy, Shapiro says, arguing that Trump's nominee has shown a willingness to question the scope of administrative agencies'

power unlike Scalia. “This is a looming issue on both legal and political circles, and I predict that he’ll make his name on it.”

Galper is looking at the longer-term significance of Gorsuch’s presence on the Court. “While he won’t shift the Court’s ideological direction in the short term because Justice Kennedy remains serving, Judge Gorsuch is a young man and this is a lifetime appointment.”