



Democrats have zero leverage after Gorsuch

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This was an eventful week for two government institutions, the Supreme Court and Senate. More than a year after Justice Antonin Scalia's death, the high court will on Monday finally return to a full complement of nine justices. But the confirmation of the newest justice, Neil Gorsuch, happened only after the Senate decided, on a party-line vote, to exercise the "nuclear option" and remove filibusters for Supreme Court nominations.

These developments sound like a really big deal, but they were easily predictable given our toxic political climate and won't actually change the operation of either institution. But here are five takeaways for our post-nuclear-option world:

- 1. The Supreme Court.** The court effectively returns to the status quo before Scalia's death. No two justices are the same, but Gorsuch could have been expected to vote the same as Scalia on all the hot-button cases that broke down 5-4, and also on the cases (especially in criminal procedure) that joined the court's left and right against the middle. As it turns out, Scalia's absence only changed the result in a handful of cases and the court has largely succeeded in avoiding 4-4 splits. Adding a ninth justice will, however, make it marginally easier to get the four votes needed to "grant cert" (have a case accepted for review), especially on potentially controversial issues.
- 2. The Senate.** The exercise of the "nuclear option" returns Senate procedures to what they were 15 years ago. The filibuster was simply not employed for partisan purposes against a nominee who had majority support before Harry Reid started filibustering George W. Bush's lower-court nominees in 2003. (Infamously, the Senate denied Miguel Estrada an up-or-down vote seven times to prevent Bush from later having the opportunity to elevate the first Hispanic justice.) Reid used the "nuclear option" to eliminate that sort of filibuster a decade later, so perhaps this week's action should be called "thermonuclear." A Senate majority will still be able to stall a nomination made by a president of the opposing party—we could see more Merrick Garlands—but a Senate minority will lack that power.

3. The next nominee. By filibustering the milquetoast Gorsuch despite the high probability and repeatedly expressed intention of the Republicans to go nuclear, the Democrats have destroyed any leverage they had over the next nominee. Should there be another vacancy under President Trump while the GOP controls the Senate, there will be zero incentive for the President to moderate his choice. It's not at all clear that Republican senators such as Susan Collins of Maine, Lisa Murkowski of Alaska, Lindsey Graham of South Carolina and other "institutionalists" would've gone along with a "nuclear option" to replace Justice Ruth Bader Ginsburg with a nominee more controversial than Gorsuch. But now they won't face that dilemma.

4. Our political culture. Given the highly charged battle we've seen — only three Democrats, from states Trump won bigly (Indiana, North Dakota, West Virginia), voted for Gorsuch, and just one more, fellow Coloradan Michael Bennet, voted against a filibuster — too many people will now think of the justices in partisan terms. That's too bad, but not a surprise when contrasting methods of constitutional and statutory interpretation largely track party politics. Relatedly, confirmation hearings will continue to be Kabuki theater, educational to some about various legal doctrines but not illuminating anything of the nominee's judicial philosophy. On the other hand, perhaps nominees will occasionally feel free to express themselves, knowing that they don't need any of the minority party's votes.

5. Neil Gorsuch. You may not agree with him on every case, but his opinions will be well-reasoned and clearly written. Gorsuch's mentor, Justice Byron White, liked to say that each new justice makes for a new court, and I look forward to the breath of fresh air, intellectual rigor, collegiality, and constitutional seriousness that Justice Gorsuch will bring. Neil Gorsuch will serve with distinction.

Perhaps most of all, I'm glad that our nation's political debate can move beyond this toxic episode and that we won't ever have to discuss nuclear options with regard to judges ever again.

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