WASHINGTON Examiner

Gorsuch survives hearing, is well on his way to joining the Supreme Court

Ilya Shapiro

March 22, 2017

It's all over but the voting. Judge Neil Gorsuch survived his second and final day of having to listen to senators pontificate and now is well on his way to becoming Supreme Court Justice Gorsuch.

To be fair, there were plenty of occasions where he was less forthcoming than even previous nominees, like when asked whether this or that ancient case was correctly decided or how to interpret particular constitutional clauses. By my count, he took all of four firm legal positions during his testimony: (1) banning Muslims from the U.S. Army would be unconstitutional; (2) Marbury v. Madison (1803), which established judicial review, was correct; (3) Brown v. Board of Education (1954) was a vindication of the Constitution's original meaning; and (4) Griswold v. Connecticut (1965), on the right to privacy, was a "seminal" precedent. Not exactly going out on a limb.

He also made the sound choice to endorse skiing over snowboarding, but declined to say whether he would prefer to fight a horse-sized duck or 100 duck-sized horses. (Sen. Jeff Flake, R-Ariz., asked questions posed by his relatives.)

So Gorsuch didn't thread the needle of revealing his judicial philosophy in a way that wouldn't create headlines, but that's mostly because he didn't have to. This is how the game is played when the party of the president who nominated you also controls the Senate.

At the end of it all, the Democrats were left grasping at straws. First, they spent considerable time questioning Gorsuch about a Supreme Court ruling that came out during the hearing, implying that the unanimous high court had reversed him personally. In actuality, this was a course correction overturning a Tenth Circuit precedent that Gorsuch had dutifully followed in other cases—in the area of education law, though Sen. Dick Durbin, D-Ill., made sure to caution that of course he wasn't insinuating animus against children.

Second, there were stern lines of inquiry about Gorsuch's participation in the development of the Bush-era enhanced-interrogation program, during his brief stint at the Department of Justice.

This essentially went nowhere; I didn't even see any blaring headlines on activist websites about how Gorsuch ghostwrote the "torture memos" or the like.

Finally, there was the return of the "little guy" trope, this time most consistently by Sen. Al Franken, D-Minn., who railed about the Roberts court's ruling to enforce arbitration agreements. Sen. Ben Sasse, R-Neb., later offered to co-sponsor legislation with Franken to fix some of the parade of horribles that the current state of the law apparently produces—which is the right response and has nothing to do with the judicial role.

And that was about it. At least we also got to witness Sen. Amy Klobuchar, D-Minn., have her exchange about antitrust; as someone who spent part of his brief stint in private practice litigating in that area, I appreciated that.

What we're left with is a clear difference between the parties about the proper way to interpret the law, which is where we started. As Franken said on Monday, "While no one can dispute Scalia's love of the Constitution, the document he revered looks very different from the one that I have sworn to support and defend."

Now the Democrats are apparently floating a "deal" of "allowing" Gorsuch to get through if Republicans (just three are needed) promise not to get rid of the filibuster for the next nominee. Good luck with that: Gorsuch is getting through anyway and, as we also knew going in, the next battle—with a Trump nominee potentially replacing Justice Kennedy or Ginsburg—is the one that counts.

Ilya Shapiro is a contributor to the Washington Examiner's Beltway Confidential blog. He is a senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review.