

Judge Gorsuch's Nomination Clears Key Hurdle

President Donald Trump's nominee to succeed the late Associate Justice Antonin Scalia on the U.S. Supreme Court, 10th Circuit Court of Appeals Judge Neil Gorsuch, cleared a key hurdle in the confirmation process Monday afternoon when the Senate Judiciary Committee approved the nomination on a 11-9 party-line vote.

Committee chairman Sen. Chuck Grassley (R-Iowa) opened the meeting with the following statement, which pretty much summed up the past several weeks of debate over the nomination:

Today, we have three nominees on the agenda who are all ripe for consideration:

- Neil Gorsuch to be an associate justice of the Supreme Court
- Rod Rosenstein to be the deputy attorney general
- Rachel Brand to be the associate attorney general

Before I turn to my remarks, let me explain how we're going to proceed.

As I said, in addition to the Supreme Court nominee, we need to report out the nominees for deputy attorney general and associate attorney general. I think all of us understand that it's important for the Department of Justice to get its senior leadership in place.

My intention is to have everyone speak on the judge and then vote on his nomination. Then we'll turn to Mr. Rosenstein and Ms. Brand. I'll have a statement on both of them that I'll put in the record so we can keep things moving.

Regarding the judge, for the most part, everyone has already indicated one way or another how they intend to vote. So,

there isn't a lot of mystery about how this is going to go. But regardless, I want everyone to have an opportunity to explain their vote.

So, I'm not going to put anyone on the clock. But my hope is that members can try to keep their remarks under 10 minutes, so everyone can have a chance to speak and we can proceed in an orderly way.

With that, I'll turn to my remarks, and then I'll turn to the ranking member.

Today we're considering the nomination of Judge Neil Gorsuch to serve as associate justice of the United States Supreme Court. Over the last couple months, the nominee's opponents have tried to find a fault with him that will stick. And it just hasn't worked.

Before the president made his announcement, the minority leader declared that any nominee must prove himself "mainstream" to get confirmed. Well, that test ran into trouble the minute the president selected this nominee.

He was confirmed to the 10th Circuit in 2006 by unanimous voice vote. In the 10 years since, his record on the bench has proved that the judge falls well within the mainstream. He's participated in 2,700 cases. He's voted with the majority 99 percent of the time. And roughly 97 percent of those 2,700 cases were decided unanimously.

Two of his former 10th -Circuit colleagues, one Reagan appointee and one Clinton appointee, remarked upon "his fair consideration of opposing views, his remarkable intelligence, his wonderful judicial temperament expressed to litigants, and his collegiality toward colleagues."

Legal commentators across the political spectrum have recognized he's a mainstream nominee. Even Rachel Maddow, who isn't exactly a conservative, said the judge is a

“fairly mainstream choice that you might expect from any Republican president.”

Once it became clear that Judge Gorsuch is “mainstream,” opponents moved the goal posts and set a different test. Any nominee of President Trump’s, the minority leader said, must prove that he is “independent.” Of course, there’s no debate on this question either.

The night Judge Gorsuch was nominated, President Obama’s Solicitor General Neal Katyal wrote a *New York Times* op-ed entitled: “Why Liberals Should Back Neil Gorsuch.” Mr. Katyal argued that one basic question should be paramount: “Is the nominee someone who will stand up for the rule of law and say no to a president or Congress who strays beyond the Constitution and the laws?”

Mr. Katyal answered his own question: “I have no doubt that if confirmed, Judge Gorsuch would help to restore confidence in the rule of law.” He went on to write that the judge’s record “should give the American people confidence that he will not compromise principle to favor the president who appointed him.”

It’s for these reasons and others that David Frederick, a board member of the liberal American Constitution Society, argued in an opinion piece that there is “no principled reason to oppose” Judge Gorsuch and that “we should applaud such independence of mind and spirit in Supreme Court nominees.”

So the “independence” charge didn’t stick, either.

Next, we heard that the judge is against the “little guy” and for the “big guy.” As an initial matter, this is a strange criticism, considering that my colleague the Minority Leader praised Justice Sotomayor as a judge who “puts the rule of law above everything else ... even when doing so results in rulings that go against so-called

sympathetic litigants.”

And the judge himself proved how absurd this argument is by citing a number of cases where he ruled for the “little guy.” But regardless, it’s of course a silly argument. No good judge considers the status of the litigants before them when deciding cases.

That’s why liberal Harvard Law professor Noah Feldman described the critique that Judge Gorsuch doesn’t side with the little guy as a “truly terrible idea ... The rule of law isn’t liberal or conservative—and it shouldn’t be.” In other words, a good judge listens to the arguments, regardless of who makes them, and applies the law, regardless of the results.

Next, we heard that the Judge hasn’t answered questions. That argument is basically a complaint that he won’t tell us how he’ll vote on a host of legal questions.

Well, the irony here, of course, is that seeking assurances from the nominee about how he’ll vote on particular legal questions undermines the very independence we demand from Supreme Court nominees. His approach is consistent with the canons of judicial ethics. And it’s consistent with the position nominees have taken since at least Justice Ginsburg.

In fact, that’s where the “Ginsburg Rule” comes from. She put it this way: “A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process.” Judge Gorsuch’s responses reflect this same principle.

And so at last, after all the charges leveled against the nominee and his record have fallen flat, we learn that the nominee should be opposed not because of his record or his qualifications, but because of clients he’s had, or the

groups who now support him. We've heard criticism of the judge's former client, the Department of Justice, and its litigating positions. Opposition on these grounds may be creative, but it's baseless.

Justice Kagan, for example, argued as solicitor general that the government could constitutionally ban pamphlet materials. When that issue was raised at her hearing, she said she was a government lawyer acting on behalf of her client, the United States government. But today, the other side is all of a sudden arguing that government lawyers should be held personally responsible for every policy or legal position the government takes. So that argument doesn't stand up under scrutiny, either.

And finally, of course, we've heard criticism of the advocacy groups who are speaking out in support of Gorsuch's nomination and spending "dark money" on issue advocacy. As an initial matter, I think it speaks volumes of the nominee that at the end of the day, after reviewing 2,700 cases, more than 180,000 pages of documents from the Department of Justice and the George W. Bush Library and thousands of pages of briefs he filed as a lawyer in private practice, all his detractors are left with is an attack on those who support his nomination.

But as a Senator who's participated in 14 Supreme Court hearings, I must say these comments strike me as odd. To hear my friends on the other side tell it, it's only conservative outside groups who are engaged in the nomination process. But we all know that isn't true.

It's no secret that there are dozens of advocacy groups on the left who get involved in the nomination process. And there's absolutely nothing wrong with that. A group called the "Coalition for Constitutional Values" ran ads in support of Justice Sotomayor and Justice Kagan before their confirmations. The American Constitution Society touted

Justice Kagan as “A Justice for Every American.”

Where did their money come from? I don’t know, and I don’t care.

And advocacy groups on the left are engaged on this nomination as well. Liberal billionaires like Tom Steyer and George Soros fund their own “dark money” organizations like NextGen Climate—a group that describes Judge Gorsuch as “an extreme candidate ... wrong for the Supreme Court under any circumstances.”

Everyone in this room knows that liberal and progressive groups have been pressuring the minority leader to find a reason—any reason—to filibuster this nominee. NARAL has run ads to pressure members to filibuster. We even had some group called the Progressive Change Campaign Committee target a senior and extremely well-respected Democrat over his “squishy” comments suggesting he might not filibuster. In short, they’ve threatened to primary any Democrat who supports the nomination. Now, that’s dark.

And of course all last year, the groups on the left coordinated to attack me. They followed me all over Iowa, ran commercials, put up billboards and even had a plane pulling a banner fly over special events. I never heard any Democrat complain about all the money these groups spent.

We had a debate. I believed then, and I believe now, that we took the right course for the Senate and the Court. And, I said regardless of who won the election, we’d process the nominee.

All of that’s fine. That’s democracy at work. By and large, I disagree with those advocacy groups on most issues. But I don’t take issue with them engaging in the process and making their voices heard. And I don’t try to intimidate or silence them.

The bottom line is this: If you don't like the fact that issue advocacy groups are engaged in the process, the remedy is not to attack, intimidate, and try to silence them. The remedy is to support nominees who apply the law as it's written. The remedy is to support nominees who leave the legislating to Congress.

If you want politics out of the process, the solution is judges who apply the law as it's written, and leave the policy-making to the other branches. Which brings me back to where I started. Judge Gorsuch is eminently qualified.

He's a mainstream judge who's earned the universal respect of his colleagues on the bench and in the bar. He applies the law as we in Congress write it—as the judicial oath says, without respect to persons. And he refuses to compromise his independence.

This nominee we're voting on today is a judge's judge. He's a picture of the kind of justice we should have on the Supreme Court. So I urge you to join me in supporting his nomination.

Democrats did, in fact, rail about the “dark money” contributions from “right-wing conservative special interest groups,” like the Heritage Foundation and The Federalist Society. And they accused Gorsuch of having a secret agenda on conservatives' behalf to overturn 40 years of liberal court decisions.

Sen. Mazie Hirono (D-Hawaii) said Republicans have a sense of urgency to get Gorsuch confirmed so that he can be in place by April 19, the date which the Supreme Court is scheduled to hear oral arguments in the case *Trinity Lutheran Church v. Comer*, a case about which Liberty Counsel wrote:

Like the carrier of a communicable disease, Trinity Lutheran Church has been excluded from fully participating in society for fear of passing on its “contagion.” In this case, the

“contagion” that threatens to “taint” the community is Trinity’s status as a church. Despite placing fifth among forty-four applicants, Trinity Lutheran was denied, solely because it is a church, a grant that would have made the playground used by neighborhood children safer and more accessible for disabled children ... The denial not only subjects neighborhood children to a sub-optimal, inaccessible playground, but also contradicts this Court’s precedents and decades of public-private partnerships that have improved the health and welfare of millions of children.

Prior to the actual vote, Politico reported that Democrats have the 41 votes necessary to maintain a filibuster of the Gorsuch nomination. If they proceed with that effort, it will be the first time a high court nomination has been filibustered for purely political reasons.

Sunday, Senate Majority Leader Mitch McConnell (R-Ky.) said he is ready to force a rules vote to invoke the final element of the so-called “nuclear option” to remove the 60-vote cloture requirement to take up Supreme Court nominations. Democrats had invoked the rule change for legislation and other presidential appointments early in President Barack Obama’s first term in office when they controlled the Senate.

Senate rules prohibit a floor vote on confirmation until one full business day has passed, meaning the earliest the Senate could take up Gorsuch’s nomination is Wednesday. In the meantime, there is likely to be a lot of back-room negotiating between Republicans and the so-called “Red State Senators”—Democrats who represent states in which a majority voted for President Trump.

So far, three have said they intend to not only vote for cloture, but to vote for Gorsuch’s confirmation. Others have hinted at voting to invoke cloture, but will still vote against the nomination.

Invoking the rule change is immune from cloture requirements and would only require a simple majority to prevail.

Following more than four and a half hours of discussion over the Gorsuch nomination, the committee quickly voted on the nominations of Rosenstein and Brand, moving both to the full Senate by votes of 19-1 and 11-9, respectively. {eo}