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### Political Ripples Ahead for Supreme Court Confirmation

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# Political ripples ahead for Supreme Court confirmation

Michael S. Ariens, For the Express-News  
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Judge Neil Gorsuch shakes hands with President Donald Trump after he was nominated for the Supreme Court on Jan. 31. His nomination has sparked a political battle that largely ignores that a judge's duty is to simply interpret the law. Nicholas Kamm /AFP /Getty Images

In our fractured times, the idea of a judge acting as an umpire — and not as a partisan — is rejected by many on both sides of the political fence. And the nomination of [Neil Gorsuch](#) to the U.S. Supreme Court seat that was occupied by [Antonin Scalia](#) serves as proof.

The president's constitutional power to nominate “judges of the Supreme Court,” and the Senate's power to give its “advice and consent” to such nominations are intensely political acts.

President [Donald Trump](#) fulfilled a campaign promise by nominating to the court one of the judges on a list published before his election. The Senate now has its turn. Pending disclosure of some information, the Republican-majority Senate will likely confirm the nominee.

The political battle to confirm Gorsuch will have some long-term adverse effects on one — and possibly both — of the political parties; which party suffers most by its actions in the next several months is impossible to predict.

The Constitution requires all “judicial officers” to swear or affirm “to support this Constitution.” The duty to support the Constitution has come to mean upholding the rule of law. The rule of law is based on the idea that our government is one of laws, of reason rather than arbitrary action.

The responsibility to uphold the law, as [Chief Justice John Roberts](#) stated in his nomination hearing, means a judge’s duty is “to call balls and strikes,” to serve, in this metaphor, as an umpire, not as a player or partisan.

This is what makes judges different from politicians: Judges are duty-bound to follow the rule of law, even when that duty may be contrary to the judge’s political views.

No such duty exists for politicians, including senators. They are permitted to vote “yes” or “no” for any or even no reason. There is one catch: Senators look more senatorial if they can arguably claim their vote is not solely political but made in the greater interest of the country.

To limit the options of senators of the opposing party, presidents of both parties for at least 25 years have made nominations to the court using the same template: They have emphasized the nominee’s acceptance of this duty to the rule of law, largely by highlighting the nominee’s educational background and judicial experience.

This template was used in the selection of Gorsuch as Trump’s first nominee. Gorsuch has an impeccable educational background. He received his bachelor’s and law degrees from [Ivy League](#) schools (Columbia and Harvard), and earned a doctor of philosophy degree from [Oxford University](#). His experience includes service as a law clerk, including as a Supreme Court clerk; as a lawyer in private practice and in the [Department of Justice](#); and, for the past decade, as a federal appeals court judge.

Gorsuch’s last job had been a requirement for nomination, with [Justice Elena Kagan](#), a former U.S. solicitor general, breaking the pattern. Since 1975, every nominee had judicial experience when nominated to the high court. Before Kagan, the last justice to lack federal judicial experience when nominated was Sandra Day O’Connor, who was a state appellate court judge when she was nominated in 1981.

This was historically not the case. [Earl Warren](#) was nominated to the Supreme Court by President [Dwight Eisenhower](#) in 1953 after serving as a district attorney, California attorney general and governor of California. The last justices to move from the practice of law to the high court were [Lewis Powell](#) and [William Rehnquist](#), both of whom were confirmed in 1971.

The criterion of federal judicial experience has become an apparent necessity solely for political reasons. Though federal court of appeals judges often must interpret federal statutes, which state appeals court judges rarely do, this difference is legally irrelevant. How a judge interprets statutes will remain the same, no matter which lawmakers adopted the statute.

The political necessity of federal appeals court experience is that it allows the president to argue that the judge is in the judicial mainstream and not a threat to the freedoms enjoyed by ordinary Americans.

Most Americans know little about how judges make and justify legal decisions, and on most issues there's little reason why they should take the time to learn. Unfortunately, when hot-button political controversies become legal disputes, those on both sides who care about such issues want to know whether the judge will support their political view. This desire, of course, is one a judge committed to upholding the rule of law cannot fulfill.

No judge seeking to uphold the rule of law would commit himself in advance to a particular vote; that would be pre-judging a case — prejudice of the worst kind.

But convincing a politically divided nation that a judge will embrace his role as an umpire rather than a political actor seems an impossible task.

The template used to mainstream the nominee is thus designed to limit the options of the opposition party (in this case, the [Democratic Party](#)). The Republican argument is that Gorsuch may be politically conservative (he is), but as a judge he will simply interpret the law (and the Constitution) as an umpire. Therefore, if [Democrats](#) oppose this nominee, they are engaged in a political witch hunt.

For Democratic senators, the Republican decision to refuse to give a hearing in 2016 to [Merrick Garland](#), President [Barack Obama](#)'s nominee to the seat opened after Scalia's death, may lead to an effort to stall the Gorsuch nomination.

The Senate currently has a rule that bars a vote on any nominee to the Supreme Court unless 60 senators agree otherwise. Republicans have 52 seats. This rule may be abolished by a majority vote.

How both parties navigate the continuing existence of this filibuster rule will have cascading effects. Republicans could win the battle (confirm Gorsuch) but lose the war (attempting to confirm another nominee to the court who would alter its balance). Democrats could lose both the battle and the war.

Both parties are already assessing how their approach will affect their chances in the 2018 and 2020 elections. The fracturing of America is likely to continue — indeed, to accelerate.

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Written By  
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