

# Why blocking Gorsuch's Supreme Court nomination may be damaging for Democrats in the long term.

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*This week President Trump announced the nomination of Court of Appeals judge Neil Gorsuch to fill Antonin Scalia's vacant Supreme Court seat – a seat which has been vacant for nearly a year due to Senate Republicans' refusal to approve President Obama's nominee, Merrick Garland. [Lauren C. Bell](#) writes that while the Democrats' voter base may be calling for their party to do all that they can to block Gorsuch, this may push Senate Majority Leader, Mitch McConnell to “take the nuclear option” and remove the remaining filibuster for Supreme Court nominations. That move, she argues, could mean the Democrats face an even more conservative Supreme Court in the years to come.*



President Donald J. Trump has nominated 10<sup>th</sup> Circuit Court of Appeals judge [Neil Gorsuch](#) to fill the seat on the Supreme Court left vacant since the late Justice Antonin Scalia's death nearly one year ago. Gorsuch's nomination comes at a time of unusual upheaval in the American political system; the first two weeks of the new Trump Administration have been unlike any in memory. With support from Democrats in the US Senate, progressive activists have already launched [fundraising](#) appeals to aid their work to prevent Gorsuch from taking a seat on the Court, while his nomination quickly [garnered praise](#) from Republicans in Congress and from conservative judicial watchdog groups.

Gorsuch's nomination also comes at a time of heightened partisan tensions over the nation's highest Court, circumstances that set this appointment up to be the most contentious in a quarter century.

## The Context

When Justice Antonin Scalia died suddenly on February 13, 2016, leading Republican senators immediately announced their refusal to consider any nominee put forward by then-President Barack Obama. Sensitive to the political climate, but with more than 11 months remaining in his presidency, Obama nominated Merrick Garland, the Chief Judge of the District of Columbia Court of Appeals. Garland was perhaps the most centrist, and certainly among the oldest, of Obama's potential nominees. His selection was an olive branch of sorts from the Obama administration to Republicans in the Senate.

It didn't matter. The Republican-controlled Senate refused to act on Garland's nomination throughout 2016. Had Hillary Clinton won the November election, it is possible that Garland's nomination would have moved forward, in anticipation of a more liberal pick once she were inaugurated, but [Senate Republicans' risky calculus](#) during 2016 paid off. When the 115th Congress convened on January 3, 2017, Garland's nomination was dead.

Enter Judge Gorsuch. Gorsuch is a 49-year old Oxford and Harvard-educated judge, with previous experience as a law clerk to former U.S. Supreme Court Justice Byron White and sitting US Supreme Court Justice Anthony Kennedy. He has served for a decade on the federal appellate bench, where he has developed a judicial record that bears striking resemblance to Justice Scalia's on issues such as gun control, religious freedom, and criminal law. His selection was met with [immediate praise](#) by Republican senators, and some Democrats signaled a willingness to support hearings on the nomination.

Gorsuch's confirmation would, essentially, return the Supreme Court ideologically to where it was a year ago, when Justice Scalia was still on the bench, but Gorsuch's youth means that he could serve for three decades or more. This alone is potentially enough of a reason for Democrats to balk at advancing the nomination.

## The Nuclear Option

In Gorsuch, Trump has selected a nominee whose education and professional credentials make it more difficult for Democrats to mount their [promised opposition](#) to Trump's Supreme Court nominees. Indeed, much is being made already of Gorsuch's [unanimous voice-vote confirmation](#) in 2006; many of the Democratic senators who previously voted to confirm him to the appellate bench continue to serve in the Senate.

Nevertheless, Senate Democrats have already [announced that they will mount a filibuster](#) to prevent Gorsuch from being confirmed, both because they object to his conservative record and because [they continue to seethe at Republicans for refusing to even hold hearings on Merrick Garland](#). There is [pressure on Democrats](#) from outside to do whatever it takes to prevent Gorsuch from being confirmed.



It is unclear just how many Democrats will join their party's filibuster on the one hand, or how many might be willing to support Gorsuch on the other. The Democratic party base, as well as alienated progressives, are clearly spoiling for a fight. With Gorsuch's nomination, rank-and-file partisans have a clear outlet for venting their anger at Senate Republicans for holding up another equally well-qualified nominee in Merrick Garland, and at a White House that began testing political and institutional norms within days of taking control of the executive branch.

Still, a filibuster comes with risks and Democrats and their supporters will need to think through their strategy on Gorsuch very carefully. A refusal to confirm an obviously well-qualified, albeit very conservative, nominee will undoubtedly lead to mounting pressure on Majority Leader Mitch McConnell to invoke [the nuclear option](#) to overcome obstruction by Democrats.

The nuclear option refers to the use of carefully orchestrated parliamentary procedure to eliminate the filibuster. The procedure, although threatened by then [Majority Leader Bill Frist, a Republican, in 2005](#), was first used by Democrats in 2013, when former Majority Leader Harry Reid decided that he had had enough of Republican opposition to President Obama's nominations. Reid orchestrated an obviously incorrect ruling by the presiding officer of the Senate that a filibuster can be ended with a simple majority vote. That incorrect ruling was then appealed using normal parliamentary processes to correct such erroneous rulings. But on appeals of the decision of the presiding officer, only a simple majority vote is required in order to sustain the ruling that was made—and so in 2013, Democrats used their narrow majority to sustain the ruling that only 51 votes were needed to end a filibuster on nominees to the lower courts and to the President's cabinet.

Reid's nuclear actions excluded the Supreme Court specifically, but in effect changed the Senate's rules to mean that filibusters on nominees to the lower federal courts and to the President's cabinet can be ended with only a simple majority vote, rather than requiring the usual 60-votes to end a filibuster. [Some Democrats now regret](#) their party's decision to eliminate filibusters for lower court judges and cabinet nominees, as they have been unable to block Trump cabinet nominees that they find anathema. Although the Democrats were warned about the long-term consequences of their nuclear actions, they prioritized short-term gains over possible long-term harms.

And so Democrats now walk a tightrope with the Gorsuch nomination; their base clearly expects vociferous opposition to Trump's Supreme Court nominee, but too much obstruction may lead McConnell to use the same procedural tactics to extend the Democrats' nuclear actions to the Supreme Court. Indeed, there are indications that the elimination of the filibuster for Supreme Court nominees [is exactly what the White House is hoping will happen](#).

It's not entirely clear that McConnell would be able to go nuclear on Gorsuch's nomination even if that were his preferred path forward. Three of the seven Republican senators who were part of the 2005 "Gang of 14" (John McCain, Susan Collins, and Lindsey Graham) are still in the Senate and might be unwilling to support the elimination of filibusters for Supreme Court nominees. But McConnell has indicated that he's willing to consider such a move in the event that Democratic obstruction prevents forward motion on the Gorsuch nomination.

All of this argues for careful consideration of both short- and long(er)-term goals for the Democrats. If Republicans go nuclear to confirm Judge Gorsuch, the fallout would likely be very bad for Democratic Party and progressive interests in the not-so-faraway future. Although the [immediate protests](#) by progressive interests don't acknowledge it, there are far more conservative potential nominees for Trump to choose from should he have the opportunity to make a second or subsequent Supreme Court pick during his term. Rabid opposition from Democrats that culminates in the elimination of the 60-vote cloture threshold for Supreme Court nominees will play right into conservatives' strategy of moving the Court further rightward than it was even when Scalia was on the bench. To be sure, eliminating the 60-vote threshold could pay dividends in the longer term, if Democrats are able to take back and hold the Senate. But the party's 2018 [prospects for regaining control](#) are tough, and the timing of Supreme Court vacancies is difficult to predict.

Democrats must think long and hard about setting up a nuclear confrontation in the Senate over Judge Gorsuch; simple majority confirmation of Supreme Court nominees could turn out to be far more damaging than a return to *status quo ante* on the Supreme Court.

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*Note: This article gives the views of the author, and not the position of USAPP – American Politics and Policy, nor the London School of Economics.*

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Judiciary from November 1997 until August 1998.

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