

# Hugh Hewitt and Ronald Klain: Have the Gorsuch hearings hurt Democrats?

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*Editor's note: This week, the Senate Judiciary Committee has been holding confirmation hearings for President Trump's Supreme Court nominee, Neil Gorsuch. After Monday's opening statements and Tuesday's questioning from senators, Hugh Hewitt and Ronald Klain discussed the hearings. The email discussion was moderated by Post Opinions digital editor James Downie and has been edited for style and clarity.*

**Ronald Klain:** Judge Gorsuch proved what everyone knew: that he is smart, charming and an adept lawyer. He did nothing to alienate his supporters, and that — combined with a self-acknowledged pedigree of being sourced to the Trump administration by Federalist Society kingmaker Leonard Leo — is surely enough to deliver every Republican vote in the Senate for his confirmation. The drama of his confirmation hearings, then, concerned the Democrats. And with regard to them, I had three observations.

First, I thought the Democrats largely acquitted themselves well in asking Gorsuch questions: respectful, well prepared, well organized. There were no senatorial filibusters, no long digressions. While it may have been exciting TV only for Supreme Court aficionados, since some previous hearings have not gone as well for the Democrats, this was a good reflection on them and their leaders. Sen. Patrick J. Leahy (D-Vt.), as always, was particularly forceful while also being genial. And while the Golden Gophers may have had an ignominious exit from March Madness, Minnesota's two U.S. senators, both on the Judiciary Committee, were especially effective — with Sen. Al Franken (D) scoring points on the “frozen trucker” decision by Judge Gorsuch, and Sen. Amy Klobuchar (D) making a strong case against his jurisprudence.

Second, one exception to that — one place where the previewed Democratic line of attack did not score — was on suggesting that Gorsuch would be especially deferential or compliant to President Trump as a Supreme Court justice. Sen. Charles E. Grassley (R-Iowa) was smart to put this question to Gorsuch to try to inoculate him from this attack (as then-Judiciary Committee Chairman Leahy did when asking Sonia Sotomayor about her controversial “wise Latina” comments back in 2009); Gorsuch rightly called the Grassley formulation of the question a “softball,” which he knocked out of the park. Ultimately, this argument against Gorsuch may be better made in floor debate than in a hearing; it definitely needs work.

But finally — and this is the most important point — I think the White House erred in sending in Gorsuch with a “say nothing, answer nothing” approach to the hearings. Of course, every nominee in the past two decades has been relatively circumspect, and all deflect the most results-oriented questions. But Gorsuch answered fewer questions about his philosophy, his basic legal views and his legal theories than any nominee I can think of — noticeably. Watching Gorsuch at the hearing was like watching a football team go into the prevent defense in the third quarter: safe, but perhaps not wise.

Why is that so important? The George W. Bush White House knew it wanted to beat a Democratic filibuster of Samuel A. Alito Jr., and so, it encouraged him to open up a bit in his answers, to try to get Democrats just comfortable enough that a sufficient number would vote to invoke cloture. (Nineteen of 44 Democrats did.) Likewise, the Barack Obama White House wanted to avoid any risk of a filibuster of Elena Kagan’s nomination and encouraged her to offer perspectives on her potential judicial philosophy to the committee’s Republicans — even when they disagreed, we believed they would be impressed by her careful thought and dedication to key principles. That too worked.

What we saw from Gorsuch on Tuesday was something very different. Other than the most watered-down nostrums, he gave the senators very little in the way of insights into how he would decide cases, how he regards precedent and what meaning he finds in the Constitution’s most important, but ambiguous, phrases. Maybe the White House has given up on winning Democratic votes; maybe it is just ready to “go nuclear” to break a filibuster, but either way, I think that was a miscalculation. “We don’t know” and “he wouldn’t say” will be the two most commonly heard phrases from Democrats during the upcoming floor debate on his nomination; that was a self-inflicted wound.

**Hugh Hewitt:** I concur in part and dissent in part, Ron.

The hearings aren’t over yet, but on the basis of the first nine or so hours of questioning, Judge Gorsuch has indeed displayed a very sharp intellect and a superb temperament as well as very careful preparation and a fierce attachment to judicial independence. But the Democrats on the Judiciary Committee have done themselves and their party significant harm.

Sen. Dianne Feinstein (Calif.), the committee’s ranking Democrat, began the day with a series of questions about documents that had not been shared with the nominee, and she retreated from them, following that stumble with a series of unrelated, indeed almost random questions. Sen. Leahy followed with an obviously partisan fusillade of charges about Republicans and Judge Merrick Garland that assumes everyone either forgot or does not care that he led the blockade of Bush nominees from 2001 through 2005, and that he supported then-Majority Leader Harry Reid (D-Nev.) in imposing the “Reid Rule” and shattering precedent with regard to judicial confirmations. Leahy and many others attempted to relitigate the decision of Senate Republicans not to hold hearings on any Supreme Court nominee, but Gorsuch, of course, has no answer to give for the (right) decision of Senate Republicans to refuse to hold hearings on nominees nominated in the eighth year of a presidency with primaries underway.

Repeated attempts by Leahy, Feinstein and many others to lure Gorsuch into commenting on decisions pending before the Supreme Court — especially with regard to President Trump’s executive order on immigration — were transparent, and their frequent interruptions simply rude. Sen. Klobuchar did not appear to understand that the Hobby Lobby decision turned on a federal statute and not the First Amendment, and her colleague Sen. Franken began with an apparently sincere attempt to

inquire into a specific case — *TransAm Trucking v. Administrative Review Board* — but quickly descended into an abrupt “Yes or no?” shout. Franken’s series of questions became a low point, until Sen. Richard Blumenthal (D-Conn.) attempted a sequence of questions beginning with *Brown v. Board of Education* that were intended to trap Gorsuch into commenting on *Roe v. Wade*, which dropped the bar lower. But *then* Sen. Mazie Hirono (D-Hawaii) dropped the bar to the basement with an accusatory opening statement and a jumbled explanation of a case that appeared to indicate she was clueless about the facts and the law involved, and that she was comfortable only with reading prepared statements.

Perhaps, Ron, you could watch much of this without rising unease, but I have to think ordinary voters — left, right and center — who saw more than a little of this proceeding are not going to be in a hurry to give the Senate majority back to Democrats. There are 25 Senate Democratic seats up for reelection in 2018. If voters in their states remember this day when they cast their votes in less than 20 months, it won’t go well for those Democrats. There was a basic civility in the confirmation hearings for Justices Sotomayor and Kagan that was simply absent Tuesday. Perhaps the anger among Senate Democrats at having the Reid Rule eviscerate their power in confirmation proceedings or their deep bitterness with the result in November has further poisoned a well that I didn’t think could get deadlier to people drinking from it, but Tuesday proved me wrong. Sen. Christopher A. Coons (Del.), by the way, hewed to the old standards of civility toward nominees, but he was the only Democrat who did.

Gorsuch is obviously very well qualified, as the American Bar Association has concluded, and he will be confirmed whether or not the Senate Republicans have to invoke the Reid Rule to do so. The Democrats have also given Trump a playbook on selecting his next Supreme Court nominee if another vacancy is his to fill, and significant guidance on whom to send forward as circuit and district court judges and how to prepare them for dealing with this Judiciary Committee.

The entire day of questioning seemed like end-stage “Borking” — the complete collapse of sincere questioning of nominees as opposed to pure political posturing — not only ineffective because of Reid’s and Leahy’s decisions in 2013, but also deeply harmful to the Democrats generally. I expect that Gorsuch will show the same sort of steady aplomb and intellectual rigor throughout his hearings, and that he will be a magnificent justice. But Democrats are lost in a tangle of past positions and present accusations. I have no idea how they get out of this very deep hole they have dug.

**Klain:** I think Hugh and I may have watched different hearings. I know we saw very different things.

Obviously, I thought the Democratic questions were sharp, smart and fair. Yes, they were pointed — but this isn’t patty-cake; at stake is a life-tenured appointment to the nation’s highest court. You will pardon my use of the phrase, Hugh, when I say that being a Supreme Court nominee isn’t a job for “snowflakes.” The questions should be hard — and they certainly were for Justices Sotomayor and Kagan. Nothing the Democrats said was as harsh as then-Sen. Jeff Sessions’s sneering dismissal of Judge Sotomayor’s writings as “troubling” and his accusation that she preferred to “choose to see some facts and not others” in cases of discrimination. Nor did any senator match Sessions’s outrageous claim that the then-solicitor general and former Harvard Law School dean — Kagan — lacked “real legal experience,” had “demeaned our soldiers as they were courageously fighting two wars overseas,” and had a career “consumed more by politics than law.” That was the low bar, one set ironically by the man who now holds the highest law job in the executive branch.

But more substantially, while there are any number of interesting arguments that conservatives like Hugh can make for Gorsuch's confirmation, the one that they cannot make in good conscience is any complaint about how the Democrats are treating Gorsuch in this process. By coming to the hearing, listening to his answers, giving him a chance to make his case, and voting on him in committee, they afford Gorsuch a level of respect and decency totally denied to Merrick Garland, a nominee more qualified, more accomplished and more moderate than Gorsuch. Any Republican who supported the denial of a hearing to Garland — and who backed the refusal to give that distinguished jurist any chance at all to answer questions — is in no place to suggest that the questions put to Gorsuch are hard-edged, or that the reaction to his answers too tough. If only Garland had been given that same chance to answer tough questions and rebut pointed reactions. If only he had been given the “treatment” given to Gorsuch. If only.

As for Hugh's point about the politics of the nomination, I agree that voters expect civility and decency from their elected officials toward judges — a norm that the man who nominated Gorsuch has flouted with impunity, with reckless and humiliating attacks on sitting judges. President Trump now has the lowest approval rating of any new president since polling began. And that fact is why voters will support Democrats in putting this president's nominee to the test. Americans reject Trump's Muslim ban, his health-care plan, his troubling alleged ties to Russia. All these issues are likely to end up before the Supreme Court; to pass before Gorsuch for decision if he is confirmed. What I saw Tuesday from Senate Democrats was a principled defense of our Constitution — but if there is political risk here, it would be in a failure to give hard, intense scrutiny to a nominee picked by a president with little regard for facts, law or the judiciary, when that nominee's decisions will shape our country for a generation or more.

Finally, I will concede to Hugh that Democrats were hoisted on their own petard by imposing a majority rule on nominations, as they were helpless these past few weeks to stop some of the most unqualified Cabinet nominees of my lifetime (including one who became the first Cabinet nominee who needed a vice president's vote to get over the top). But whether one agrees with what Hugh calls the Reid Rule or not, that rule did contain a powerful limitation that Hugh did not acknowledge: It did not repeal the filibuster rights of senators in either party who are facing Supreme Court nominees of a president of either party. If the Republicans now choose to strip away that protection of minority rights in the Senate, that pressure for moderation in Supreme Court nominations, it will be Majority Leader Mitch McConnell (R-Ky.), not Reid or new minority leader Charles E. Schumer (D-N.Y.), who is the author of that action and who will someday face a Democratic president unconstrained in his or her future choices for the court. The shovel is all yours, Sen. McConnell.

**James Downie:** Many have argued that, since Robert Bork's confirmation hearings, nominees of both parties have been advised to deliver less substantive answers, and as a result the hearings have lost at least some of their educational value for the public. Do you agree?

**Hewitt:** I do agree with part of this assessment. Since the hearings on Judge Bork and Justice Clarence Thomas, nominees have become increasingly guarded — and not just after their nominations, but throughout their lives, even once on the district or circuit court bench. Look at the amount of focus Tuesday on one dissent — *TransAm Trucking* — and imagine the impact such focus has on the mind of all judges who aspire to the Supreme Court. Gorsuch has participated in 2,700 decisions. But the message of “search and destroy” was clearly sent Tuesday.

The naked attempt to “convict” nominees of opinions justifying opposition (to whom, I can’t figure out, because the respective bases have already made up their minds) has made the hearings exercises in base mobilization and fundraising.

Pre-Bork, relatively little attention was paid outside of D.C., the bar and the academy to Supreme Court nominees. But as the court has assumed a greater and greater role in our lives, so too has the attention on the nominees soared. And with the attention, the limits on rhetoric have been abandoned. The hearings have thus gone from non-events to destructive ones. The embrace of the Reid Rule in 2013 means even less civility going forward, for as Sen. Lindsey O. Graham (R-S.C.) noted Tuesday, the reality of purely partisan confirmations is now arrived. It would take a grand bargain indeed to restore anything like the old order.

The public does learn a lot from the hearings, just not much about the nominees. They learn a lot about the Senate and its members. Those are inspiring lessons but they are hard to miss.

**Klain:** Let me start where I agree with Hugh: Supreme Court nominations are much more public and politicized than just a few years ago. The Bork nomination is part of that, but only a part. Public awareness of this process certainly went up after Bork, as Hugh suggests. But even so, we didn’t see super PACs spending millions to block subsequent Supreme Court nominations — as we did with Garland’s nomination last year. Nor did we see such groups spend millions to support nominations, as we are seeing with Gorsuch’s nomination today. These are very new developments. I think the public has a right to know who is behind such spending, and I wish Gorsuch would call on these financial backers of his confirmation to disclose their identities because we have a right to know if he is ruling on cases that affect their interests.

One repeated piece of commentary whenever there is a Supreme Court nomination is that everything that has happened to this process is an outgrowth of the Bork nomination fight. I don’t think the facts support that argument. Putting aside Thomas’s nomination (which had unique circumstances), the next four nominations to the Supreme Court after Bork — two from Republicans, two from Democrats — all got more than 85 votes for confirmation. If the Bork controversy “broke” the process, that certainly was hard to see that in the years that followed Bork’s defeat: a defeat, by the way, that came when six Republicans joined with a Democratic majority to vote down a nominee put forward by their own party’s president.

If the consideration of Gorsuch’s nomination seems to be taking place in a partisan frame, that probably has much less to do with how a nomination 30 years ago was handled, and more to do with last year’s partisan shutdown of the confirmation process for Obama’s nominee for this vacancy — and the explicit campaign statements in 2016 by Trump that he would appoint only nominees who would vote to overturn *Roe v. Wade* (it “will happen, automatically,” candidate Trump said).

More fundamentally, as Hugh and I discussed in a previous exchange on the night Gorsuch was selected, conservative voters overcame anxiety about only Trump because of his unvarnished commitment to do their bidding on Supreme Court nominations. That was Trump’s right as a candidate. But it’s no surprise that Democrats now look at the product of such a crass bargain with suspicion and unease.

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