Nothing was lost with confirmation filibuster

Senate Democrats did not filibuster Judge Neil Gorsuch because they thought they could stop his confirmation - they did it to express a protest message that they think will please and energize their constituents. They realize that even though they triggered the nuclear option and the elimination of the filibuster for future Supreme Court nominations, they had little to lose. The filibuster never has mattered in Supreme Court confirmation fights, and it was unlikely to make any difference in the future.

The Democrats filibustered Gorsuch in large part to express strong opposition to the unprecedented way in which the Republicans treated the nomination of Chief Judge Merrick Garland. Prior to 2016, 24 times in American history there was a vacancy on the Supreme Court in the last year of a president's term. The nominee was confirmed in 21 instances and denied confirmation three times. Never before had the Senate refused to hold hearings or a vote. Democrats see this as a stolen seat.

On top of that, Democrats see Gorsuch as a conservative much like Justice Antonin Scalia and are angry at the thought of this seat remaining conservative for decades to come. Gorsuch is 49 years old. If he remains on the court until he is 90, the age at which Justice John Paul Stevens retired, he will be a justice for 41 years - until the year 2058. Everything that is known about Gorsuch - from his opinions over the course of a decade as a judge on the 10th U.S. Circuit Court of Appeals and from his nonjudicial writings - show that he is a staunch conservative. Democrats are frustrated, too, that Gorsuch simply refused to answer any questions about his views on several legal issues during his confirmation hearings. This has become the norm in judicial confirmation hearings, but Gorsuch took nonanswering to a new level. He did nothing to dispel the Democrats' sense that he is going to be an extremely conservative justice.

Most of all, Senate Democrats used the filibuster against Gorsuch was a way to convey to their constituents that they are not giving in to President Donald J. Trump and the Republicans. At the same time, the Democrats rightly saw nothing to lose by their filibuster. If there is another vacancy on the Supreme Court during the Trump presidency, a filibuster then would have been just as likely to trigger the "nuclear option" and the elimination of the filibuster for nominations to the high court. The filibuster thus is an empty threat - it always can be eliminated by the party controlling the Senate.
If Justice Ruth Bader Ginsburg or Justice Anthony Kennedy or Justice Stephen Breyer - all of whom are 78 or older - leave the bench between now and Jan. 20, 2021, Trump’s next nomination can dramatically change the Supreme Court’s ideological balance. Gorsuch’s confirmation basically restores the court’s ideological balance to what it was before Scalia’s death. Another vacancy will give Trump the chance the most conservative Supreme Court since the 1930s. But that would make Senate Republicans even more likely to eliminate the filibuster if it hadn’t happened now.

In reality, the filibuster has rarely mattered for Supreme Court nominations. Forty-eight senators voted against the confirmation of Clarence Thomas and 42 voted against Samuel Alito. In both instances, it was more than enough to sustain a filibuster, but the Democrats did not do so to block these very conservative nominees.

Some say that the Democrats are making a mistake by escalating a fight over Supreme Court nominations that is perceived as beginning with the blocking of Judge Robert Bork in 1987. This ignores the history of confirmation fights that long preceded the Bork nomination. During the 19th century, almost 20 percent of presidential appointments to the Supreme Court were denied confirmation. In the 20th century, President Herbert Hoover’s nomination of Judge John Parker was blocked, as were President Richard Nixon’s nominations of Judge Clement Haynsworth and Judge Harold Carswell.

History shows why the Democrats lost nothing by staging a filibuster against Gorsuch’s confirmation. Successful confirmation fights occur only when the Senate and the president are of different political parties. Only then does the Senate have the ability to block confirmation. When the Senate and the president are on the same side, the nominee is almost certain to be confirmed. Occasionally there is an instance – such as President George W. Bush’s nomination of Harriet Miers – where the president’s own party recoils and the nomination is withdrawn. Otherwise, though, the minority party just doesn’t have the power to stop a confirmation.

Trump could have avoided all of this by picking a more moderate individual to replace Scalia. But conciliation is not his style, and Trump encouraged Senate Republicans to use the nuclear option, change the Senate’s rules, and confirm Gorsuch. That is exactly what happened. Just to be clear: The Democrats will do the same when they are in control.

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