

Courts

Gorsuch Hearings Kick Off, But What's the Point?

BNA Snapshot

- Sen. Graham laments that focus on politics destroying the judiciary
- Quest for substantive answers from Gorsuch likely foiled by 'Ginsburg Rule'



By Kimberly Strawbridge Robinson

Members of Congress sparred during the confirmation hearings for Supreme Court nominee Neil Gorsuch over the purpose of the confirmation process.

The hearings are a forum to test the candidate's qualifications only, Sen. Lindsey Graham (R-S.C.) said during his opening statement March 20.

Gorsuch has an Ivy League pedigree and has been on the federal appellate bench for more than a decade.

But former President Barack Obama's nominee to fill the vacancy, Merrick Garland, had the same impressive credentials, Sen. Patrick Leahy (D-Vt.) said. Senate Republicans refused to act on Garland's nomination. So philosophy matters, Leahy said.

Still, the so-called Ginsburg rule may limit how much senators will be able to ascertain his philosophy. Under that "rule" coined in reference to Justice Ruth Bader Ginsburg's confirmation hearing, "a Supreme Court nominee declines to reveal his or her position on issues likely to come before the Court," Michael Scodro, of Mayer Brown LLP, Chicago, explained.

It's "incredibly unlikely that the nominee will depart from the rule in his responses," Scodro said.

Destroying the Judiciary

Graham's vision of the Senate's role in assessing a Supreme Court nominee is basically to ensure that the president isn't engaged in cronyism, Graham said.

He lamented the political shift in the confirmation process.

Noting that Justices Antonin Scalia and Ruth Bader Ginsburg were confirmed by a vote of 98-0 and 96-3, respectively, Graham asked, "What happened between now and then?"

"How did we go from being able to understand that Scalia was a well-qualified conservative and Ginsburg was a well-qualified liberal and recognizing that elections matter?" Graham asked.

"I don't know how we got here" but "what we are doing will destroy the judiciary over time," Graham said.

"There's no question that the Supreme Court confirmation process has been highly politicized since the failed confirmation of Robert Bork," John Malcolm of conservative political think tank The Heritage Foundation, Washington, told Bloomberg BNA.

"Since then, Senators have praised the independence of judiciary while at the same time trying to pin a nominee down in particular issues during the confirmation process," Malcolm said.

'Tough Job Interview.'

"A Supreme Court confirmation hearing should be an opportunity for an invaluable national public conversation about the work of the nation's highest court, and how its prospective stewards will understand and apply the Constitution," Elizabeth B. Wydra, of the Constitutional Accountability Center, Washington, told Bloomberg BNA March 20.

"It should also, despite nominees' best efforts to avoid answering substantive questions, be a genuinely tough job interview," Wydra said, noting that it's "the only time a prospective justice will be subject to the assent of the people's representatives."

Accordingly, senators should "probe the fitness of the nominee to serve for life at the top of our nation's judiciary," she said.

But the "irresponsible behavior of Senate Republicans last year, refusing to give Chief Judge Garland a hearing much less a vote, has caused major damage to the nominations process and seriously undermined the legitimacy of the Court as an institution that aims to be above politics," Wydra said.

So whether "the process actually reflects those ideals is up to the Senate itself."

Final Word

As the ranking member of the Judiciary Committee, Sen. Dianne Feinstein (D-Calif.) signaled that she shares Wydra's view of the confirmation process.

"We hold these hearings because the United States Supreme Court has the final word on hundreds of issues that impact our daily lives," Feinstein said during her opening statement March 20.

"The Supreme Court has the final say on whether a woman will continue to have control over her own body," "whether billionaires and large corporations will be able to spend unlimited sums of money to buy elections," "whether corporations will be able to pollute our air and water with impunity," "whether the NRA and other extreme organizations will be able to block commonsense gun regulations," and "whether employers will be held accountable for discrimination against workers," Feinstein said.

Feinstein and her Democratic colleagues will likely focus their questions, which will happen over March 21 and 22, on these divisive issues.

Past Looms Large

Nevertheless, they are unlikely to get an answer from Gorsuch himself.

"Gorsuch's confirmation hearings are likely to reignite debate over the so-called 'Ginsburg rule,'" Scodro said.

Every nominee, starting with Ginsburg, has refused to answer questions on issues that are likely to come before the court, Carrie Severino, of the Judicial Crisis Network, Washington, told Bloomberg BNA March 20. Gorsuch will likely do the same thing, she said.

The "rule has somewhat less bite where, as here, the nominee has a substantial judicial record," Scodro said.

"Gorsuch's opinions have yet to address some significant matters, but as the Senators' opening statements are already making clear, several of the Judge's past decisions and dissents are likely to loom large in the proceedings as windows into the nominee's approach on a range of issues," he said.

To contact the reporter on this story: Kimberly Strawbridge Robinson in Washington at krobinson@bna.com

To contact the editor responsible for this story: Jessie Kokrda Kamens at jkamens@bna.com