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## Trump's Supreme Court Whisperer

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By Kyle Peterson

The barrage began virtually the moment Donald Trump spoke the words “Judge Neil Gorsuch.” Shortly after 8 p.m. Tuesday, in front of a TV audience of 33 million, the president announced he would nominate Mr. Gorsuch, a dapper 49-year-old Coloradan, to the Supreme Court.

By 8:17, a Democratic super PAC had dropped a 78-page dossier, full of misspellings, calling Judge Gorsuch an extremist who had “argued that the court should not be used to litigate a ‘social agenda.’” Meantime, protesters outside the high court yelled into the dark and waved fill-in-the-blank signs: “STOP,” under which they had hastily marked “Gorsuch.” On [Twitter](#), Oregon Sen. Ron Wyden hyperventilated that “Gorsuch represents a breathtaking retreat from the notion that Americans have fundamental Constitutional rights.”

But as Democratic opposition goes—a grand tradition in a party that made *bork* a verb—it all felt a little forced. By Wednesday afternoon, as Leonard Leo returns to his office from a post-announcement huddle at the White House, the mood is cautiously optimistic. “In the first 24 hours,” says Mr. Leo, a lawyer advising Mr. Trump on the court, “it appears as though the nominee has been defined very, very well, and that the left has not done a particularly good job of sowing seeds of confusion and doubt. So there is that. But the fact of the matter is that the process can still turn in the other direction.”

Mr. Leo is one to know. A decade ago, he helped usher George W. Bush’s two Supreme Court appointees, John Roberts and Samuel Alito, to confirmation. Now Mr. Leo is on leave from his day job, as executive vice president of the Federalist Society, to do the same for Judge Gorsuch. On a table near Mr. Leo’s desk sits a bottle of Trump Winery champagne, as yet unopened.

President Trump keeps close counsel, but he seems to be listening to Mr. Leo. Last spring, not long after Justice Antonin Scalia died unexpectedly amid a presidential campaign, Mr. Trump hit on an idea: posting a public slate of people he would consider for the vacancy if elected. The candidate’s counsel, Donald McGahn, introduced Mr. Trump to Mr. Leo, and together the two lawyers drew up the list. A few months later, Mr. Trump was proclaiming: “We’re going to have great judges, conservative, all picked by the Federalist Society.”

When the initial 11 names were floated in May, Judge Gorsuch wasn’t among them. “We were hastily putting a list together of the first bunch, and we knew certain judicial records really well,” Mr. Leo says. “We didn’t know Judge Gorsuch.” As the campaign wore on, the net was widened—eventually to 21 names—and the extra time for vetting revealed Judge Gorsuch’s stalwart record.

The week after the election, when Mr. Leo was summoned to Trump Tower for the winnowing, he says Mr. Trump showed “an extraordinary level of engagement.” The president-elect wanted a nominee with impeccable credentials who would be “respected by all,” someone “not weak.” And, importantly, Mr. Trump wanted a justice who would interpret the law as Scalia had done.

“He would say, ‘One of the things I really want is a justice who’s going to interpret the Constitution the way the Framers meant it to be,’” Mr. Leo says. “I think that’s a great way of phrasing it. Maybe not for your sophisticated lawyer crowd—but for the general public? They get that. And he gets it.”

The implication is that if Mr. Trump doesn’t share Scalia’s deeply considered originalism, his instincts at the least run in that direction. “He would never use the terms ‘originalism’ and ‘textualism,’ but we have talked about going wherever the law takes you,” Mr. Leo says. “It is an understanding that there is something important about being moored to the written law.”

He cites a conversation with Mr. Trump last spring. “I’ll always remember this,” Mr. Leo recounts. “He said, ‘So what do you think about the ObamaCare case?’” This was the 2012 ruling in which Chief Justice Roberts’s switch in time saved a fine, allowing ObamaCare’s penalty for failing to buy health insurance to be construed as a tax. Mr. Leo continues: “I said, ‘Well I’m curious, why do you ask?’ And he said, ‘Because I think they made it up.’”

That isn’t a bad formulation either. A commitment *not* to “make it up” is what the Federalist Society has been advocating since it was founded 35 years ago. In some sense, Judge Gorsuch’s elevation represents the success of that project, the passing of the torch from a first generation of originalists, such as Scalia, to the next.

Originalism was once such a minority taste that Scalia joked it was viewed as a “kind of weird affliction that seizes some

people—“When did you first start eating human flesh?” Today, Mr. Leo says, all of the high court’s justices engage in textualism and originalism to some degree. “There is a recognition that those are important and appropriate tools of interpretation—by everybody,” he says. “That is an amazing development as compared to the 1970s and the early 1980s.” To Mr. Leo, the single most important thing Judge Gorsuch will do on the Supreme Court is to “continue the trajectory.”

But first he must get past Senate confirmation—and a potential Democratic filibuster. Mr. Leo is hopeful it won’t come to that. Ten Senate Democrats up for re-election in 2018 come from states Mr. Trump carried, and the Judicial Crisis Network is planning \$10 million of pro-Gorsuch advertising.

Mr. Leo also says that President Trump “has taken unprecedented steps to try to be bipartisan and to try to be reasonable.” To start, four days after being inaugurated he brought Sens. Chuck Schumer and Dianne Feinstein—the minority leader and ranking Judiciary Committee Democrat, respectively—to the White House to talk about the court.

Then the president chose not only a jurist from the public list, but a highly regarded one. No doubt, Judge Gorsuch is in the Scalia mold: His opinions cite the “original public meaning” of constitutional provisions, and he confessed to having cried on the ski slopes when the news reached him that Scalia had died. But Judge Gorsuch is also an intellect, a droll writer and well within the legal mainstream. “Neil Gorsuch,” Mr. Leo says, “is a judge who sends law clerks to Justices Sotomayor and Kagan”—both Obama appointees. “He’s a man who is being supported by Obama’s solicitor general,” Neal Katyal.

Even so, Mr. Schumer is indicating that Judge Gorsuch will need 60 votes to be confirmed—a hint of filibuster. This has sent Republicans to Defcon 1, readying the launch codes for the “nuclear option”—using 51 votes to override the Senate rules and eliminate the filibuster on Supreme Court picks for good, as the Democrats did for all other nominations in 2013. Nostalgia aside, Mr. Leo says that “most conservatives would not shed a tear” for the filibuster. “It’s a practical device. It’s a rule of procedure, OK? It’s not some sacrosanct, holy writ.”

Moreover, the thinking seems to be that keeping the nuke siloed only gives Democrats the chance to launch it first. “The idea,” Mr. Leo says, “that somehow if we offer to give them 60 votes here as a matter of comity and courtesy, that when they control the White House they’ll do the same thing? That’s absurd. Their behavior has never evidenced that kind of give and take. They have a selfish, self-centered, one-sided view of the process.” A moment later he adds: “The only thing that history and experience shows is that they relent and they are accommodating in the face of brute force, and that’s about it.”

The rancor is equally high on the Democratic side, which accuses the GOP of “stealing” the Scalia seat by blocking President Obama’s nominee last year. Mr. Leo insists there’s no comparison. “There was an 11th-hour vacancy on the U.S. Supreme Court in the midst of a presidential election,” he says. “I think it was, under those circumstances, entirely appropriate to say: Let the people decide how they want this seat filled.” Besides, he points out: “No one knew who was going to win. In fact, a lot of money was on Hillary Clinton winning. So the idea that this was a partisan decision, I think, is not borne out by the facts.”

Still, what’s the endgame? If the nuke is dropped, if the bitterness rises past hazardous to truly irradiating, will Supreme Court seats simply be left vacant for years at a time, whenever the White House is controlled by one party and the Senate by the other? That’s a question Democrats should contemplate, Mr. Leo says. If a nominee as good as Judge Gorsuch can’t get an up-or-down vote, then “this process is forever doomed.”

Republicans’ message is that, one way or another, Judge Gorsuch is going to become Justice Gorsuch. What does that portend for the law?

To some degree that depends on how open he is to overturning precedent. “What I think you see in his body of work is a willingness to raise questions about old doctrines. But you also see in his writings a sense of some degree of cautiousness. He recognizes that law has to have some degree of stability,” Mr. Leo says. “What I sense in Judge Gorsuch’s work is an approach to precedent and *stare decisis* that is not all that far off from Justice Scalia’s.”

One point of chatter is so-called [Chevron](#) deference, named for a 1984 case, which holds that judges should give federal agencies—the Environmental Protection Agency, for instance—the benefit of the doubt when interpreting ambiguous laws. “The idea was, let’s vest this discretion with the political branches rather than with the courts,” Mr. Leo says. “What has happened since is that the doctrine has been twisted in ways that provide *super*deference to administrative agencies.” In an opinion last year, Judge Gorsuch suggested tightening the bureaucrats’ leash, and Mr. Leo wouldn’t be surprised to see the court slowly walking back *Chevron*.

Also looming, as always, is *Roe v. Wade*. “He hasn’t taken a position on the abortion issue,” Mr. Leo says. “He has a couple of cases where he feels politics affected other judges’ decision in that arena. So, for example, there was a Planned Parenthood defunding case where he felt that the liberal members of the panel were imposing standards of review that normally wouldn’t be applied.”

So why should pro-lifers back Judge Gorsuch? True, the judge wrote a book opposing assisted suicide, and it includes passages like: “To act intentionally against life is to suggest that its value rests only on its transient instrumental usefulness for other ends.” But beyond that, Mr. Leo asks pro-lifers to “put their confidence in a judge who believes in textualism and originalism. Because at the end of the day, *that* is how we make sure the courts reach right answers.”

He continues: “I can’t tell you whether that will always result in what, politically, people may or may not want. But I feel much safer having a judge who follows those principles than a judge who’s going to just put their finger in the wind.”

All that being said, replacing one conservative justice with another won’t swing the Supreme Court’s balance. For that, Republicans will have to look to President Trump’s second pick—a prospect perhaps not as remote as it sounds. Judge Gorsuch once clerked for Justice Anthony Kennedy, who turned 80 last year, and some have speculated that Mr. Trump’s choice is an attempt at signaling Justice Kennedy that it’s safe to retire.

Mr. Leo dismisses this, shaking his head even before the question gets out. “That’s just not the way these things work. It would be demeaning to any other justice on the court to try to make a pick as a way of trying to force their hand,” he says. “It’s a foolish enterprise to start guessing when people are going to retire.”

Which isn’t the same thing, exactly, as putting the prospect out of mind. “There’s always the chance,” Mr. Leo says, “that you could have one or two or even three vacancies on the court.” If so, will Mr. Trump stick to the list? No guarantees—at least from Mr. Leo. “It’s hard to know,” he says. “And I think the president, frankly, ought to keep his options open.”