

OPINION: The US Supreme Court In 2017

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Who will be the ninth justice? No one knows. The Federalist Society has kindly supplied a list of 21 possible nominees. We remember the Federalist Society for their economic theories, which brought us one of the worst recessions in the history of the country. Being a member of that society allows you to never say you're sorry. Their list can supply great concern if you let it: repeal of the Miranda decision providing suspects a warning before interrogation; judges who would repeal *Roe v. Wade*, which allows abortion; judges who would allow torture and intense surveillance of Americans; and so on.



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Here are 10 thoughts on the upcoming confirmation hearings.

1. Wait until the nominee is actually named. Then, if he or she is a judge, do what I did with Judge Robert Bork and Justice John Roberts: read all of their decisions. I concluded that Judge Bork was an ideological jurisprudential games-player. He was generally antagonistic to the rights of Americans. I found that Justice Roberts is not an ideologue. In 31 decisions on the District of Columbia circuit, he found for government power in all but one. Hamilton would be proud. His skill as a lawyer was apparent. He has a strong moral sense, which he used in his dissent in the gay rights cases. But he upheld *ObamaCare* in the face of a conservative hate offensive.
2. If the nominee is not a judge, don't miss the confirmation hearings. It could be a gift to the Democratic senators. They are already in a bad mood. There is a reason presidents and senators have approved of appellate judges. It is safer.
3. How good will the new White House vetting staff be in ferreting out the histories of the possible nominees? What did they say to the Kiwanis in 1996? What is on that rumored video? Will there be some hidden fact that will turn the stomachs of many Republican senators and, most importantly, their constituents? If the first nominee is rejected, the White House criteria must change. The ideological voices will be diminished, as in the case of Justice David Souter. Judge Bork had recently been rejected in a nasty fight based on Bork's written decisions. George H. W. Bush nominated Souter, in part, because he had few controversial decisions. Democratic Senators Ted Kennedy and John Kerry from Massachusetts declared Souter to be a right-winger because he spent time with New Hampshire Republicans. The Senate Judiciary Committee voted 14 to 3 in favor of Souter. Point: the nomination process is not what ideologues in the Federalist Society might wish.

4. Look at the eight justices on the court. Only two are reliable conservative votes: Justices Samuel Alito and Clarence Thomas. Justice Anthony Kennedy still sits. He has developed his concept of liberty, which includes the development of personality. Doesn't sound like President-elect Trump's election speeches. Justice Kennedy got a renewed decisive fifth-vote reboot from the election. He now returns to the middle with his frequent deciding vote, no matter who the new justice is. Gay rights and the death penalty have been his specialties.

5. Do not fret about Justice Ruth Bader Ginsburg leaving. She will stay as long as she can, because the country needs her. She resides among a strong four-vote progressive minority. They repeatedly are a voice for Americans' rights.

6. We should watch Justice Roberts' votes this term. Is his thinking in play? Is the craft of his legal analysis bringing him to a new level? Does he ever think about his legacy? If he does, what does it look like to him? Are President-elect Trump's hopes for legal America the same as those of Justice Roberts? I doubt it. These questions are worth asking.

7. Never forget the ability of U.S. presidents to appoint justices who put their presidential knickers in knots — Justice Felix Frankfurter, whose record of progressive projects as a law professor turned into a preoccupation with saving the court's power for a later time; Justice Byron White, a most conservative appointment by President John F. Kennedy; Justice Souter, mentioned above, a stalwart on the four-vote side of many four-to-five progressive dissents; and the great civil libertarian Justice William Brennan, appointed by President Dwight Eisenhower. This lifetime appointment, to be bestowed by an almost evenly divided senate makes it doubtful the new justice will get all his or her ideas from President Trump.

8. One difficulty in nominating is the diversity of judicial instincts that will influence any potential Supreme Court case. "I want a successor to Justice Scalia," the president-elect has said. You mean someone who is very strong on Fourth Amendment rights as Justice Scalia was? Someone who would irritate some law enforcement leaders every time he or she defines the curtilage? Justice Joan Larsen of the Michigan Supreme Court, who is being mentioned, in *People v. Radandt* joined a dissent that stated the police were wrong because they went around to the back door of a house when a civilian person would not. Then there is Justice Don R. Willett of the Texas Supreme Court, who joined in *McIntyre v. El Paso Independent School District*, holding that there was a right to home schooling. Should a White House vetter suspect Judge Willett of harboring antigovernment tendencies? Here is the ideologue's main problem. He or she too often believes in conformity of thought. He or she will now search for true believers, but fortunately very few judges harbor the dark, conservative uniformity desired. If they do find one, the Senate will not confirm.

9. A word to the Democratic senators who almost have enough votes to block an unattractive candidate. The new justice, as you know, will vote on many issues dear to your Democratic constituents. You will be protecting the rights of all citizens if you decide the nominee is against those rights. No nominee is "qualified" if he or she will reduce the rights of all of us.

10. Finally, "treason light" it might be called. Some senators announced they would not confirm anyone whom a President Clinton would nominate. This unconstitutional declaration was uttered by Republican Senators Richard Burr and Ted Cruz, a kind of neo-FDR court-unpacking plan that showed a stone heart toward the third branch of government. These are dangerous people, but they are among the senators who will pass upon the new ninth justice.

As to future appointments, there is another question. Donald Trump has been elected. The question now is, "Can he govern?" Both President Lyndon Johnson and President Richard Nixon found out within a six-year period that they could not.

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