

# "A Roguish and Unpopular President is potentially an Occasion for the Judiciary to Shine"

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Mattias Kumm Di 4 Apr 2017

*Do you see any way for the Democrats to stop Trump's candidate for the Supreme Court, Neil Gorsuch, from being confirmed this week?*

It is very probable that he will be confirmed, but it is not certain. If there is an up-or-down vote he will of course be confirmed. That takes more than 50 votes. The Republicans alone have 52 and there appears to be unanimous support for Gorsuch among Republicans. But if the Democrats decide to filibuster – an obstruction technique often used by the opposition to prevent the Senate from taking a vote – Republicans would need 60 votes to break it. If Democrats remain united, the only thing Republicans can do then is to exercise the so-called „nuclear option“: it would effectively abolish the filibuster in the context of Supreme Court nominations altogether, not just for this nomination, but for all future nominees. Exercising that option would take just a simple majority vote, so the Republicans would then get their confirmation easily, albeit at the cost of effectively allowing a simple majority of Democrats to do the same in the future. But Democrats hope there may be some on the Republican side who do not want to do that because they fear long-term repercussions. That creates the possibility that Republican won't have the simple majority they need. Maybe that is just a pipe dream of Democrats. But if this were to happen – an unlikely event, in my view – it might unrail the Gorsuch nomination.

*If Gorsuch is confirmed, how will that change the court?*

To begin with, the Court would have nine judges again which has been the regular number of judges on the Supreme Court since 1869. Substantively it would generally mean a restoration of the general situation we had before Justice Antonin Scalia died: a 5:4 majority of Republican appointed judges with Justice Kennedy as a swing vote. Hardly a revolution.

*There is one thing Scalia and Gorsuch disagreed on and that is the so-called Chevron doctrine. What is that about, and why is it so important?*

There are a number of differences on specific points between Scalia and Gorsuch, and you are completely right to point out that one of them appears to be the Chevron doctrine. Simply put, this is an administrative law doctrine established in 1984 that limits judicial scrutiny and accords discretion to the administrative agencies in situations where there is no clear legislative intent discernible in the statute authorizing agency action. As long as the agency's action is reasonable, the court will defer to agency findings in such a situation. It appears that Gorsuch is not very happy with this doctrine and wants to increase judicial oversight over administrative agencies. At first sight this appears to fit well with a general agenda of the Trump administration to undermine and cut down the role of administrative agencies. If you have strong judicial oversight and the Court is dominated by judges skeptical of regulatory interventions then, of course, this appears to favor deregulatory policy agendas. But I don't think things are that simple. If circumstances change, if there will be a liberal court some time in the future, the outcome might be the opposite. Greater judicial oversight might also mean that the courts may find that administrative agencies are not doing much or not enough. The original Chevron case was about the Reagan administration reading the Clean Air act in a restrictive way, not applying its rules to certain pollution sources; an environmental NGO went to court and said that the Environmental Protection Agency was not doing its job, whereupon the Court upheld the discretion of the agency. In that context Chevron deference effectively supported a deregulatory agenda and closer scrutiny by the court might well have established that the EPA was not fulfilling its statutory duties. So there is no simple relationship between higher and lower levels of scrutiny and the pursuit of a deregulatory agenda.

*Is that really a symmetrical constellation where judicial deference cuts both ways equally depending on the kind of regulation at hand?*

Under the Obama administration there were a number of agencies that interpreted their authority expansively. That is why people think limiting agency discretion and tightening judicial oversight will have deregulatory consequences: Courts, they believe, might seek to reign in overactive agencies. But that is a highly contingent context. Right now, President Trump is staffing these administrative agencies with people who used to lobby against regulation, who were fighting regulation tooth and nail, but now have been put in charge of overseeing regulatory processes. In such a context talking about stricter oversight of agencies might very well have an effect that those in favor of a deregulatory agenda may not like. Judges may require these agencies to do more than they were willing to do. Of course that is less likely to happen with a republican majority bench, but moving away from Chevron deference in principle merely opens the door to more judicial intervention, whether that is in favor or against regulation.

*This is a court which has gone out its way to strengthen corporate rights, elevating corporations to the position of fundamental rights holders. Don't you think it likely that these corporate rights will be used to shoot down administrative regulations once the Chevron doctrine is out of the way?*

That is one of the topics that Gorsuch's confirmation hearing has focused on. But if the issue is enabling a deregulatory agenda, the Chevron doctrine is the wrong doctrine to focus on. Substantive constitutional rights issues relating to takings of property, freedom of religion and freedom of speech, are of more significance. Also potentially significant is that some appear to believe that Gorsuch may want to tighten up be the doctrinal standards governing how much and to what extent Congress can delegate authority to agencies under the "non-delegation" doctrine. If Gorsuch were to succeed in shifting the court from the current very permissive regime to one more in line, for example, with German constitutional law, which requires legislatures to provide more than abstract intelligible standards for agencies to apply and insists on more concrete, specific legislative guidance, at least in rights sensitive areas: that could well have a deregulatory effect, particularly in conjunction with an expansive understanding of the rights of corporations.

*The Supreme Court is perceived as a predominantly political actor which undermines its standing as an independent anti-majoritarian corrective to power. How do you think the Gorsuch confirmation process will affect this perception?*

The Supreme Court is already perceived as a highly political actor no matter how this confirmation will go. This has been the result of a development which began in the 1950s and accelerated in the 1980s. To focus just on one aspect: Until 1925 the Senate confirmed a Supreme Court candidate without any formal hearing involving the presence of the nominee. Only since 1955 these hearings involving the presence of the nominee have become routine procedure. And only since the 80s has it become customary for this procedure to become a serious exchange of arguments about judicial philosophy and political leanings. This trajectory reflects the public perception of the politicization of the court. There is a direct negative correlation between the number of hours Supreme Court nominees have spent in front of the Judiciary Committee of the Senate and the overall public trust in the institution of the Supreme Court. So, yes, this is a problem, and I think the current nomination hearing reflects that problem. But that is nothing new. That has been a problem for decades.

*The resistance of Democrats against Gorsuch seems to be motivated less by aversion of the candidate than by revenge for the denied confirmation of Obama's candidate Merrick Garland. Isn't this, in terms of politicization of the Court, even worse than rejecting a candidate for his views?*

Well, in some sense it is better. Or at least it would have been, if the Democrats had said to the Republicans: "You should not be in a position to nominate a replacement for Justice Scalia; we were in that position, and you refused to do what you normally should have done, which is to comply with your constitutional duties and have a fair hearing and then vote on our nominee, whose first rate qualification were not in dispute. We will simply not discuss any nominee you put forward without consulting us first and seeking bipartisan agreement. The President cannot just nominate his Supreme Court candidate as if this were business as usual." Democrats should have been very clear that this is not simply about the candidate before them now, who clearly is a highly qualified conservative judge. If that were the position of the Democrats it would not undermine the court and not politicize the judges. The problem with the procedure as it is going forward now is that the serious resentment Democrats hold against Republicans for perfectly plausible reasons is now articulated as a critique

of Gorsuch, which undermines that candidate and arguably does so unjustly and unfairly. This is the wrong kind of politicization, that undermines the standing of the Court.

*The Supreme Court will eventually have to decide on the constitutionality of the acts of the Trump administration, like the immigration order. Might that give the Court an opportunity to break free of the projection of mostly deciding politically and along party lines?*

Potentially, yes. If there were some high-profile conflicts with the administration and the Supreme Court intervened in a way that is clearly not along party lines, say 8:1 or 9:0, that would strengthen the authority of the court.

*Given the record of the court in recent years, do you think that is likely to happen?*

Yes, I think it is. Trump is the kind of President who may well have what it takes to unify the Supreme Court on some highly salient issues. A President who denigrates office holders who do not agree with him, who denigrates a judge simply because he rules against him, who appears to have little understanding or respect for the separation of powers and has exhibited explicit animus against Muslims and Hispanics may well succeed in uniting the judiciary against him on occasion.

*So, the Trump administration might actually be a chance for the Supreme Court to retrieve some of the lost respect?*

Yes, a roguish and relatively unpopular President is potentially an occasion for the judiciary to shine, by simply doing its job. Perhaps the country based immigration ban might be such an opportunity, although it is not an easy case legally. There are statutory provisions and doctrines in place which grant the President a great deal of discretion when it comes to immigration, particularly when he justifies his acts as measures seeking to further national security. Under usual circumstances these types of decisions would very probably have gone in favor of the President. But with a President having campaigned the way he did, having talked about a “Muslim ban” – it was still on his website when the first decisions were handed down – racial and religious animus is foregrounded to such an extent, that no judge can plausibly ignore it, particularly when the government can’t show that its decisions were informed by a serious effort to collect and assess the relevant security related facts.

*Questions by Maximilian Steinbeis*

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