



If Gorsuch pick leads to 'crisis,' Dems should look in mirror first

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February 16, 2017

Facing a Supreme Court nominee with impeccable qualifications, Democrats are now crafting an indirect assault on President Trump's nomination of Judge Neil Gorsuch to fill the court's empty seat.

Unfortunately, the president's recent judicial attacks aren't helping things. In fact, they play directly into the Democrats' emerging strategy — to charge that we're "careening toward a constitutional crisis" over judicial independence, as Sen. Richard Blumenthal (D-Conn.) argued.

We heard more of that sentiment when Yale Law's Bruce Ackerman, appearing Wednesday on "Here & Now," condemned the president for trying to intimidate judges while they're deciding cases. "Unprecedented," he said.

Not to be outdone, Blumenthal rushed to the microphone later that day to report that Gorsuch, in a private meeting, had called Trump's comments "disheartening" and "demoralizing."

And the next day on NPR's "Morning Edition," Blumenthal spoke again of a constitutional crisis, adding that private comments were not enough; Gorsuch has to go public, Blumenthal said. He "has to be very explicit and direct," because "never before has a president so jeopardized the independence of the judiciary."

How short our memories are. Perhaps Blumenthal can be forgiven because he wasn't yet in Congress when President Obama, in his 2010 State of the Union Address, ridiculed the justices seated before him for their Citizens United decision.

And if it's trying to intimidate judges when they have a case before them, have we forgotten Obama's efforts to intimidate the court as it was deciding the first big ObamaCare case — which may have worked?

Judicial independence is not a trivial matter, of course, but it cuts both ways, implicating not only the president but his Senate opponents as well, as the Blumenthal interview makes clear.

Charging Trump with having established a "litmus test" regarding abortion, guns and more, Blumenthal said senators have to assume that Gorsuch meets the test — unless he "very specifically makes his views clear."

Well, there goes judicial independence. Once nominees have to put their *specific* views on the record in confirmation hearings, that's effectively where cases will be decided, politically, not in a courtroom, legally.

But, Blumenthal avers, this is a crisis "of Donald Trump's making."

No, senator, the crisis goes far back, and it's virtually all of the Democrats' making. In modern times, it began in 1987 with Sen. Edward Kennedy's (D-Mass.) personal destruction of Judge Robert Bork, a President Reagan nominee.

It continued in 1991, with the brutal hearings for then-Judge, and now Supreme Court justice, Clarence Thomas.

And it reached a crescendo during George W. Bush's presidency when no less than Professor Ackerman himself, citing *Bush v. Gore* in April 2001, demanded "a moratorium on Supreme Court appointments until the American people return to the polls in 2004."

And in June 2001, now-Senate Minority Leader Charles Schumer (D-N.Y.) argued in the *New York Times* that the Senate should litmus-test nominees.

For nearly two years, Democrats refused to hold hearings for most of President George W. Bush's appellate court nominees. And the stall resumed in Bush's second term until the Gang of 14 broke it after Republicans threatened to end the judicial filibuster with the "nuclear option."

That threat is again before us, of course, for which Democrats have no one to blame but their own former Senate leader, Harry Reid (D-Nev.). Yet they seem to believe that the filibuster for Supreme Court nominees will survive if only they play the judicial independence card Trump has handed them.

Thus, in that NPR interview, Blumenthal was asked whether Gorsuch deserved an up-or-down vote. When pressed, he replied: "He should receive a vote by a 60-vote threshold, which means that if we find him out of the mainstream, he should be rejected."

So what's really behind this "constitutional crisis"? In truth, it really is ideology. In that Times op-ed, Schumer put it plainly: "The Supreme Court's recent 5-4 decisions that constrain Congressional power are probably the best evidence that the court is dominated by conservatives."

Imagine that: the court constraining congressional power! Isn't that one of the things independent judges are charged with doing when the law requires it?

The nation is deeply divided over just such questions. To settle those differences, we have rules, one of which is that elections matter. But another is that legal cases are decided under law, in the

courtroom, not politically in judicial confirmation hearings that would effectively strip nominees of their independence.

So if judicial independence is to be front and center in the hearings ahead, let's have the real thing.

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