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## Both Trump And John Roberts Are Wrong About Politicized Judges

**In the feud between President Trump and Supreme Court Chief Justice John Roberts, both are wrong. Judges aren't partisan hacks, but they do have different approaches to jurisprudence.**

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President Trump's pre-Thanksgiving rant about an "Obama judge" who had ruled against the administration's new asylum rule set off an argument about the judiciary that has lasted into the post-prandial moment.

Chief Justice John Roberts, in an unusual public statement, felt the need to come to the defense of "an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them." Trump took to Twitter to correct Roberts and assail his old bugaboo, the U.S. Court of Appeals for the Ninth Circuit.

Never mind that the judge was technically correct, that the executive branch can't change plain statutory text to disallow asylum applications filed outside a port of entry. This president has faced plenty of adverse rulings—by judges appointed by both Republican and Democratic presidents, including his own nominee, who recently ruled against him regarding Jim Acosta's press pass. But that's no different than any president, including especially Barack Obama, who lost more (and more unanimously) at the Supreme Court than any of his predecessors.

Never mind too that the Ninth Circuit should indeed be split up, but not because it's liberal. The west-coast federal appellate court generally is the most-reversed court, although not by much and not every year. In the travel-ban litigation, it was the mid-Atlantic Fourth Circuit that was most vociferously against President Trump, while the Ninth Circuit engaged in methodical statutory interpretation that was measured even if ultimately ruling the same way.

No, the larger point is that, even as Roberts is right that (nearly all) judges approach their trade in good faith, there are stark jurisprudential differences that, in the most controversial cases, do map onto partisan divisions.

The chief justice should be commended for trying to reduce the politicization of the courts. The president too easily conflates judicial philosophy with political bias. But there's no escaping the fact that, if there's a case with ideological salience, the party of the president who appointed the judge deciding it matters.

That's why we've seen the ever-escalating battles over judicial confirmations. Otherwise, why would Republicans have held up Merrick Garland's nomination to the Supreme Court? Why would Democrats have pulled out all the stops against Brett Kavanaugh (who voted with Garland more than 90 percent of the time)?

The selection of judges has become one of the most hyper-partisan issues in American public life. That's why voters consistently say that judicial appointments are among their top issues in presidential elections and why Trump almost certainly would have lost in 2016 had it not been for the Supreme Court vacancy created by Antonin Scalia's death.

This is not a good thing. It shouldn't be the case that if you want judges who will interpret the Constitution according to its original public meaning—who will respect the structural limits on the federal government, not to mention the First and Second amendments—you can only have Republican presidents. That methodology should describe all judges, with narrower debates of the sort we now most often see in criminal-procedure cases, which tend to produce heterodox coalitions.

But that's not the world we live in. Led by the Supreme Court, the judiciary has allowed constitutional law to diverge evermore from the Constitution, in a process that began decades before the Robert Bork or Clarence Thomas confirmation hearings, or Harry Reid's use and elimination of the filibuster. So we're stuck with an overly large and overly centralized (and overly executive) government, with every social and political clash becoming a federal case, literally, instead of being resolved by the local, state, or even national legislature.

President Trump goes too far in deriding all judges opposed to him as partisan hacks. His use of the bully pulpit to casually sow distrust in our legal and political institutions also isn't healthy for the body politic. But he's not the first president to criticize court rulings—at the 2010 State of the Union, former law professor Obama made several basic errors just in describing *Citizens United* (which Roberts didn't like either)—or the first politician to malign judges.

Indeed, during the recent contretemps, Senate Minority Leader Chuck Schumer wasn't able to praise Roberts's response to Trump without himself assailing the Supreme Court's partisanship. That recalled Sen. Sheldon Whitehouse's characterization of the "Roberts Five" during the Kavanaugh hearings, perhaps not realizing that such a Manichean attack doesn't make the "Ginsburg Four" look particularly good either.

The latest Twitter war won't improve our legal discourse or change anybody's mind. Trump should focus on the most successful part of his administration: appointing solid judges who will have effects for decades to come. And Roberts should stick to applying the law, while letting the political chips fall where they may.

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