



Trump really is restoring the constitutional order with his court picks

Ilya Shapiro

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As the political world obsesses over the latest sexual-harassment scandals and policy wonks scrutinize the latest tax-reform proposal, the Trump administration is quietly restoring constitutional governance.

Although Congress has been unable to pass legislation and President Trump faces record-low approval rates, his hiring of “the best people” in certain key areas has enabled the transformation of the judiciary — as well as reworking the bureaucracy (often called the Fourth Branch). A president has few powers more important than picking judges. Tax deals can sunset and regulations can be rescinded — Congress has used the Congressional Review Act to eliminate 14 Obama-era rules. Just last week, Attorney General Jeff Sessions announced that the Justice Department would no longer issue guidance documents that create rights or obligations binding on anyone outside the executive branch.

But federal judgeships are for life.

The most notable success here is Supreme Court Justice Neil Gorsuch. Those who hoped for another smooth-writing originalist to replace Antonin Scalia got what they wanted.

“Wouldn’t it be a lot easier if we just followed the plain text of the statute?” Gorsuch asked at his first argument. “Originalism has regained its place at the table [and] textualism has triumphed,” he explained to more than 2,000 celebrants at the Federalist Society’s annual dinner last week, “and neither one is going anywhere on my watch.”

Moreover, the alignment we’ve gotten used to, with four liberals, four conservatives and a “swing” vote is on its last legs. Whenever Justice Anthony Kennedy (age 81) retires — discount any rumors you hear from anyone but him or his wife — and whenever Justice Ruth Bader Ginsburg (85) departs, the court will move right, with Chief Justice John Roberts at its center. But by forcing Senate Republicans to eliminate the filibuster for high-court nominees, the Democrats destroyed any leverage they may have had in future.

It's not clear that "moderate" senators would've gone along with a "nuclear option" to replace Kennedy or Ginsburg with a nominee more controversial than Gorsuch, but now they won't face that dilemma. And Trump's judicial-nominations team has put up an exceptional list of 25 people from among whom the next justice will emerge — showing a diversity beyond coastal Harvard and Yale grads.

That goes just as much or more for the lower courts, which decide 35,000 cases a year, dwarfing the Supreme Court's output. Here, Trump nominees have generally displayed serious commitment to enforcing the Constitution's original meaning and applying statutory text as written. Some senatorial and local-bar favorites naturally creep in, but this is a stronger (and Examples of stellar picks include: Third Circuit Judge Stephanos Bibas, formerly of the University of Pennsylvania; Fifth Circuit nominee Don Willett, a justice on the Texas Supreme Court; Sixth Circuit Judge Amul Thapar, elevated from a federal district court in Kentucky; Sixth Circuit Judge Joan Larsen, formerly of the Michigan Supreme Court; and Seventh Circuit Judge Amy Coney Barrett, formerly a law professor at Notre Dame.

There is little concern of anyone moving left or being a "squish." The vetting instead focuses on the larger debate in conservative legal circles: how to avoid the sort of extreme judicial restraint Roberts displayed in the ObamaCare cases, whereby judges simply defer to the political branches rather than holding elected officials' feet to the constitutional fire.

Every four years, a president appoints about 20 percent of the federal judiciary. When Obama took office, only one of the 13 federal circuit courts had majorities of Democratic appointees — the west-coast Ninth Circuit — but now nine do. Trump is doing his best to reverse that, with the help of Senate Majority Leader Mitch McConnell and Judiciary Committee Chairman Chuck Grassley.

Grassley recently announced that he was ending Sen. Al Franken's "blue slip" obstruction of Eighth Circuit nominee David Stras, the first Jewish justice on the Minnesota Supreme Court. As of Nov. 20, Trump had made 58 nominations — more than double Obama at this point — and confirmed 14 judges, including eight to the circuit level.

I still worry about the state of the rule of law, as well as damage being done to political norms. But that's mostly a function of President Trump's Twitter feed. When it comes to actual on-the-ground results, the administration's judicial and regulatory agenda is nothing but #winning.

Ilya Shapiro is a senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review.