

## **Politics, judiciary must remain separate**

By Janet Albrechtsen, *The Australian*, 4 February 2017

The bonfire of the vanities lit daily by left-liberals since Donald Trump became the US President eclipses Tom Wolfe's novel about arrogance, sanctimony and ego in 1980s New York.

These 21st-century masters of the left-liberal universe are determined to raze Trump's presidency and put down, like a lame dog, a revolution of deplorables. As if it's for their own good.

There was more fuel for the fire this week with Trump's pick for the Supreme Court. However, rather than immediately condemn all attacks against Trump's nomination of Neil Gorsuch as misguided left-liberal bile, this battle is both inevitable and legitimate. When the nation's highest court enters politics, appointments become part of the political circus.

To understand the wild intersection of law and politics in the US, one needs only to recall that last July Supreme Court justice Ruth Bader Ginsburg called for Trump to resign from the presidential race. "He's a faker," she said. "I can't imagine what this place would be — I can't imagine what the country would be — with Donald Trump as our president," Ginsburg said in an interview with *The New York Times*.

Imagine if one of the judges on our High Court had intervened in the July federal election. It's inconceivable. And we should be grateful for that. Indeed, the Republican fanfare, followed by the left-liberal emoting, over Trump's nomination of Gorsuch is in stark contrast to the understated appointments this week to our High Court. Who, outside of the political, media and legal elites even noticed our newly sworn in Chief Justice Susan Kiefel and new justice James Edelman? That's no bad thing.

The President's pick is a 49-year-old whip-smart scholar, a deep thinker, well-educated, and a beautiful legal writer to boot. What's not to like? He's also a lawyer and judge who believes that judges distinguish themselves from politicians by taking an oath to uphold the law as it is, rather than reshaping it to be what they want the law to be.

Gorsuch is what American legal scholars call a "textualist" who interprets the law to provide a stable, predictable set of rules according to the words of a statute and, more importantly, the words of the US Constitution.

Following in the footsteps of former Supreme Court justice Antonin Scalia, who died last year, Gorsuch rejects the arrogance of judges who discern the meaning of laws from the apparent brilliance of their own minds, guided by their personal social policy preferences.

For good reason, Gorsuch is favoured by constitutionalists at America's leading think tanks such as the Federalist Society and the Heritage Foundation. In a lecture last year, Gorsuch recognised Scalia as a legal lion whose career was a reminder of the differences between judges and legislators.

Writing in the *National Review* in 2005, Gorsuch admonished American liberals for their "overweening addiction to the courtroom" as the arena to settle social policy when such matters ought to be determined by legislators. It leads, he said, to the politicisation of the judiciary.

While Republicans and Democrats can argue over legal method, they can't argue with the fact that the US Supreme Court is now a political institution.

That transformation makes Trump's presidency even more troubling to left-liberals. Gorsuch's nomination is just the beginning of Trump's legacy that promises to alter the direction of the Supreme Court long after he has vacated the White House.

A single new conservative justice to replace the conservative Scalia may not immediately tilt the court towards conservatism on every issue. After all, last June the Supreme Court, in a 5-3 judgment with swing justice Anthony Kennedy siding with progressives, struck down abortion restrictions in Texas. What worries left-liberals is: what happens next?

Two liberal justices, Ginsburg and Stephen Breyer, are aged 83 and 80 respectively, and Kennedy is 79. If Trump has the opportunity to replace Ginsburg, that will be her worst nightmare and his sweet revenge, delivering a majority of firm constitutionalists on the bench to determine everything from abortion to gun rights. Beyond the nation's highest court, Trump is also set to fill 128 vacancies on lower federal courts, which hear more than 50,000 cases a year and decide influential matters that stand unless overturned by the Supreme Court.

No wonder Democrats are girding their loins for a fight in the 100-member Senate. While confirmation of Gorsuch's nomination only requires a majority vote, Democrats can try to delay the vote with the American ploy of filibustering. A cloture motion to stop the filibuster requires 60 Senate votes, meaning some Democratic support will be needed.

Yet, for all the filibuster talk, after five days of debate during the controversial nomination of Clarence Thomas — accused of sexual harassment by law professor Anita Hill — the Senate confirmed Thomas 52-48.

To be sure, Democratic Senate leader Chuck Schumer wants to fight Trump's nomination "tooth and nail". That's easy for the senator from liberal New York to say. Those Democratic senators up for re-election in 2018 from states where Trump prevailed last year may be more cautious. Sniffing the new wind, Democratic senators didn't follow the sore-loser House Democrats who sat out Trump's inauguration. Already, conservative lobby group Judicial Crisis Network has said it will spend \$US10 million to pressure the five or so very red-state Democratic senators to support Gorsuch's appointment.

The choice of Supreme Court justice matters to millions of American voters in ways that don't compute in Australia. At the presidential election, exit polls revealed that one in five voters regarded the composition of the Supreme Court as the most important factor in their voting decision. Trump won over 56 per cent of these voters to Clinton's 41 per cent. Can you imagine an Australian voter telling an exit pollster that he or she voted a certain way to ensure the High Court was stacked with the right kind of judges?

The polarised debate over the Supreme Court appointments is both new and inevitable. As Scalia explained to me in an interview in his chambers some years ago, he was confirmed by the US Senate 98 to 0. "I couldn't get 60 votes today because of what has happened in the interim is that people have figured out what the name of the game is," he laughed. "Once upon a time, presidents and senators said, 'yeah we want to pick a good lawyer, someone who knows how to read a text, understands its history, is a fair person, you know, won't lean to one side or the other, has a modicum of judicial demeanour', blah, blah, blah," Scalia said.

“But they have come to realise that basically what this court is doing is rewriting the constitution from term to term, putting in new rights, pulling out old ones. And if that’s what they’re doing, by God, the most important thing is; ‘I want someone who’s going to write the Constitution that I like.’ And that’s what’s going on.”

Roe v Wade, the landmark 1973 abortion rights case, detonated the boundaries between law and politics. When a majority of the Supreme Court reworked the words of the due process clause in the 14th Amendment to the US constitution to discover a new abortion right for women, it wasn’t just anti-abortionists baulking at the blatant judicial activism.

Constitutionalists, be they lawyers or laypeople, believe that social policies should be legislated by democratically elected politicians, rather than meddling, unelected judges. More than 40 years later, abortion rights still rage as a political firestorm because a handful of judges supposed that they should legislate their preferred social policies from the bench.

What Scalia called the “big A” explains why the number of hours judicial nominees spend being grilled by the Senate’s judiciary committee shot up from single digits between 1925 and the 1970s to double digits since the 80s. Last year Republicans refused to even allow hearings to proceed to confirm Barack Obama’s Supreme Court pick Merrick Garland. “Delay, delay, delay,” Trump said, echoing Republican demands that the new president pick the new Supreme Court judge.

Hence, it’s reasonable for *The New York Times* columnist David Leonhardt to demand that Democrats block Trump’s nomination.

“Democrats simply cannot play by the old set of rules now that the Republicans are playing by a new one.” What is entirely illegitimate is the brazen attempt by the paper and Democrats to paint Gorsuch as a legal extremist. To put it in language that *The New York Times* sophisticates might understand, that’s faux news.

On Thursday, Trump told Senate Republicans to “go nuclear” if they have to. That means deploying an existing Senate rule that allows for a change to the numbers so that a simple majority suffices to bring on a vote to confirm Gorsuch.

Old rules, new rules, nuclear rules, broken rules. Who can keep up? The only certainty is that Trump’s nomination of an impeccable scholar will be another ghoulish political bunfight.

As the inevitable consequence of a politicised court, this latest furore serves as a reminder next time someone says Australia needs a bill of rights. We should reject that as an inevitable politicisation of our judiciary.