

January 26, 2017

I'm Justin Florence, counsel at Ropes & Gray, and today I am joined by Doug Hallward-Driemeier, who is chair of the firm's Appellate and Supreme Court practice. This is part of our Capital Insights series that examines issues and potential regulatory and enforcement changes emanating from Washington, D.C., as we transition to a new administration.

Attorneys
[Justin Florence](#)
[Doug Hallward-Driemeier](#)

In an earlier podcast Doug and I talked about how change can happen in Congress and the Executive branch, and today we are going to discuss the Federal Judiciary.

Doug: Thanks, Justin. This is such an important topic. The Justices and judges that are nominated by a president can outlast any president, often by decades, as do the decisions that those judges make from the bench. Now, Justin, you worked on the Senate Judiciary Committee, so perhaps a place to start is you walking us through the extent to which the president can, in fact, reshape the judiciary through the nomination process.

Justin: This president is going to have a tremendous opportunity to do that because of how many vacancies there are on the courts. The new president comes in, not just with the open Supreme Court seat, but in addition, there are 113 other judicial vacancies – 17 seats on the federal courts of appeals, 88 federal district court seats, and that is more than twice as many vacancies as existed when President Obama took office in 2009, so there will be a great opportunity here

Doug: Now the rules for judicial nominations have changed since President Obama took office, and maybe you could say a little bit more about that?

Justin: Sure, and let's start with court of appeals and district court judges. Senators have traditionally had a lot of influence over what judges are nominated from their states, and that's likely to continue to some extent. That results from a policy that Senator Leahy, the former Chairman of the Judiciary Committee, had in place called the "blue slip" policy, where he would not allow nominees to move forward at all unless they had the support of both home state senators. What has changed dramatically is that a couple of years ago, the Democrats exercised the "nuclear option" to make it that the filibuster no longer applied to court of appeals and district court judges, and the result of that is instead of needing 60 votes to get a nominee through for those seats, only 50 votes are needed. So that will, although there could still be delay, and although home state senators will still have great influence, will generally speed up the pace at which President Trump can put new nominees on those seats.

Doug: Now, I noticed you did not mention the Supreme Court.

Justin: Right, so when Senate Democrats exercised the "nuclear option" they did not do so for Supreme Court, so that means there is still a filibuster available for Supreme Court nominees. What makes the

situation interesting is that the parliamentary mechanism used for the “nuclear option” requires only 50 votes, and so even though there is a filibuster out there, whereby a Supreme Court nominee needs 60 votes to get through, at any moment, if Republicans have support of their caucus, they can use the “nuclear option” for Supreme Court nominees too, which takes only 50 votes, and so this creates an interesting game theory dynamic, especially for Democrats, where they will have to be very thoughtful about how aggressive to be in opposing an early Supreme Court nominee because if they do filibuster they have to consider the possibility of the “nuclear option” being used there and the filibuster being gone for the rest of the term, at least. Now, I’m curious, we’ve talked a bit about how new judges come on the courts. What changes do you think that will bring in cases and doctrines as we see a new judiciary seated?

Doug: Well, I think that it’s hazardous to make too specific a prediction, but I think overarching the biggest point is that we won’t see the change that we would have seen from a Justice Scalia to a Justice appointed by a Democratic president. For example, Judge Garland, who had been nominated by President Obama. There are several hot button issues that had we seen Justice Scalia replaced by a more liberal Justice might have shifted the balance of the Court. For example, the *Citizens United* decision, the ability of corporations to engage in unfettered political speech in influencing campaigns, might have well been an area of shift. Because Justice Scalia will now be replaced by President Trump, who has indicated he wants to appoint somebody in Justice Scalia’s mold, we won’t see that shift. But, that in some respects just maintains the *status quo*.

Justin: So even with a more conservative justice replacing Justice Scalia, are there areas where we may still see some changes?

Doug: I think there are. For example, one area where Justice Scalia voted with the more liberal justices sometimes was in the area of free speech under the First Amendment. Justice Scalia was a firm defender of the First Amendment; it’s possible that his replacement would be more conservative, perhaps in the mold of a Justice Alito, who is less so, and that could tip the balance in some First Amendment cases. Also Justice Scalia was, because of his conservative judicial philosophy, deferential, relatively, to agencies if they were construing an ambiguous statute. Whereas, we’ve seen, actually from the Republican House, a bill recently to curtail that level of discretion to agency interpretation, so a new Justice who is more in that mold might indicate a shift in that doctrine as well. There are some areas, for example, there was a case that had been granted by the Supreme Court before Justice Scalia’s death, considering whether unions could collect fees from non-members to support collective bargaining, and many thought that that policy might be ruled unconstitutional and then that case ended up in a 4-4 split. Well, with a new Justice, if that one Justice is in the mold of Justice Scalia, we might see finally that very major shift and change in the law happen. Of course, all of this is very speculative because Justices have lifetime appointments and very often they don’t end up on the bench acting exactly as their appointing president expected they would.

Justin: Now, we’ve talked about a potential replacement for Justice Scalia. If another member of the Court, a Justice Ginsberg, or Breyer, or Kennedy were to leave and open up an additional vacancy for President Trump, what types of doctrinal changes might we see then?

Doug: Well, again, it’s hazardous to speculate, but I do think there could be some significant shifts there. In some areas where Justice Kennedy has been the swing center Justice we could well see a change. For example, Justice Kennedy has avoided sort of very categorical rules on such areas as affirmative action, or even partisan gerrymandering, leaving open the possibility there might be a circumstance where he would

find that unconstitutional. But, a more conservative Justice might well be in favor of more categorical rules in those areas.

Justin: And this is, of course, something where the dynamics of the confirmation process and the use of the filibuster may have a strong effect on what type of nominees we see down the road and what type of nominees can clear through the Senate, so it does all tie together.

Doug: We will all be watching attentively, but unfortunately, that's all the time we have now. Thank you, Justin, for joining me in this conversation. Thank you all for listening. Please visit our newly launched Capital Insights page at www.ropesgray.com for additional news and analysis about noteworthy enforcement and regulatory issues.