

2/23/20

Neil Gorsuch Tries to Revive Congress

As they wait out the latest winter storm, Members of Congress ought to spend time reading Justice Neil Gorsuch's concurring opinion in the Supreme Court's rejection of President Trump's claim of emergency power to impose tariffs (*Learning Resources v. Trump*). The Justice has more confidence in Congress than the Members themselves do these days.

Justice Gorsuch rides shotgun to Chief Justice John Roberts's excellent majority opinion, and he mows down both the dissents and the concurring opinion by liberal Justice Elena Kagan. It's an intellectual tour de force. But his main theme isn't an assertion of judicial power. It's an effort to encourage Congress to reclaim its proper authority under the Constitution's separation of powers.

The Justice spends 46 pages explaining and defending the Court's major questions doctrine, which says the executive must point to clear Congressional language to justify a regulation with significant consequences. The liberal justices try to duck the doctrine while joining the majority opinion, while the three dissenting conservatives try to carve out exceptions on foreign policy and tariffs.

Justice Gorsuch thoroughly rebuts both, but his larger effort is to explain that the major questions standard is meant to protect legislative authority. "The major questions doctrine is not 'anti-administrative state,'" as Justice Kagan has asserted, Justice Gorsuch writes. "It is pro-Congress." By holding agencies to a clear-statement standard from Congress, the judiciary protects against the usurpation of legislative power by Presidents.

"Our founders understood that men are not angels, and we disregard that insight at our peril when we allow the few (or the one) to aggrandize their power based on loose or uncertain authority," he writes. "We delude ourselves, too, if we think that power will accumulate safely and only in the hands of dispassionate 'people . . . found in agencies.'"

The Justice explains why the legislative process is 'the bulwark of liberty.'

As the Court has ruled, this applies when liberal Presidents impose vaccine or energy mandates, or when a Republican President claims tariff power, based on no clear law. This protects against one-man or unaccountable bureaucratic rule, which is increasingly how the U.S. has been governed under Presidents of both political parties as they

seek to avoid the hard work of getting something passed in Congress.

In our view, the recent weakness of Congress vis-à-vis the President has many causes. Political polarization and narrow majorities make it harder for bipartisan coalitions to form. Media focus on the Presidency draws more readers than do stories on legislative process. The failure of civic education about the American system produces a public that is more susceptible to demagoguery and political idolatry.

But as Justice Gorsuch makes clear, the difficulty of passing legislation is a constitutional feature, not a fault. "Deliberation tempers impulse, and compromise hammers disagreements into workable solutions," he writes. "And because laws must earn such broad support to survive the legislative process, they tend to endure." He rightly calls the legislative process "the bulwark of liberty."

This ought to be a stirring message, especially to those in Congress and the press who fret about the end of democracy. The left in particular likes to write vague laws that hand power to bureaucratic "experts" who can dictate how Americans should live. Justice Kagan says forthrightly that this is a virtue.

No political system is perfect, and Congress can run off the rails. The Smoot-Hawley tariff of 1930 showed how legislative logrolling can end in disaster when a President (Hoover) lacks the courage to veto. But Congress has since ceded too much tariff power to a President who refuses to use it with restraint. Putting limits on discretionary tariff authority would be a good start on reviving the proper role of Congress.