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The United States Supreme court is our last firewall against the administrative state, writes Jay B Gaskill.

SCOTUS: BEYOND POLITICS



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Columnist

Justice Scalia's Supreme Court replacement may make or break what's left of the US Constitution. This is a watershed moment. The mountain and prairie states, small sized businesses, farmers and ranchers - all who cherish the US constitution as liberty's unique last and best firewall – have much at stake.

Presidents have insider information about the candidates they nominate, but the rest of us get resumes. So a Supreme Court appointment is a trust issue. But this president squandered bipartisan trust in his first term. No Senator should be pressured into voting on an Obama Supreme Court nominee, period. The country can easily afford an eight member court for another year.

This watershed may well be a last chance. Over the last 60 years we have experienced a staggering expansion of the federal administrative state. A growing alphabet stew of federal regulatory agencies – including the Environmental Protection Agency, Equal Employment Opportunity Commission, National Labor Relations Board and the Federal Communications Commission - are unelected, yet have real power. These agencies, with the full force of federal law, make regulations; prosecute violations; adjudicate cases; and impose punishments. Thus the three branches of government, executive, legislative and judicial, were rolled into one- leaving separation of powers doctrine in a shambles.

How did we get to this place? The rise of the administrative state was documented by the conservative lawyer, Mark Levin (who served in the Reagan justice department) in his book, *Liberty and Tyranny*. The EPA, for example has published binding regulations that neither the congress nor a majority of Americans would approve. The people never agreed that CO2 is a pollutant, but the EPA has made it one.

The Supreme Court (SCOTUS) is our last firewall against the administrative state. Congresses and Presidents have been part of the problem. The four liberal members of the court have been essentially useless. The four remaining conservatives / moderates on the court have sometimes resisted, but Scalia was the bulwark. He was always a powerful advocate for core constitutional principles. When the High Court refused in 2007 to invalidate the EPA's ruling labeling CO2 a "pollutant," Scalia dissented: "The issue was simply whether carbon was an environmental pollutant or not. I did not think it was ever regarded as that. It is not the Atmospheric Protection Agency. It's the Environmental Protection Agency." Scalia adds: "The framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers," wisely insisting on a system of "separated powers."

For an Obama appointee like Justice Elena Kagan, free speech is about "diversity." For Scalia, free speech was a red line: "It would be not much use to have a First Amendment ... if the freedom of speech included only what some future generation wanted it to include. That would guarantee nothing all."

If the Senate chooses to address each nominee separately it will be a trap. What if Obama nominates the liberal Kamala Harris, a former DA from California who happens to be African American? Opposition will be tarred as "racist" or "sexist," even though Harris outraged local police by twice refusing to seek the death penalty for the thugs who murdered San Francisco cops.

Since each nominee's rejection is a political trap, it is wiser to stonewall all of them...on principle. The big institutional questions - separation of powers, protection of personal liberties - go beyond liberal and conservative politics. In this case, the Senate may be our last firewall.

Gaskill, an Idaho Falls resident, was once the head of the University of Idaho Young Democrats – back when they sounded more like Republicans.