TAKE BACK THE COURT

Date: December 9, 2019

To: Democratic presidential campaigns

From: Aaron Belkin, Director, Take Back the Court
Jeremy Paris, Principal, The Raben Group and Strategic Adviser, Take Back the Court

Re: **Executive Orders will be vulnerable to Federal Courts**: Trump appointed judges and justices put at risk the the core tools used by a new president to set policy priorities, establish direction for the government, and control the regulatory process

---

Your campaign to become the next president has focused on the bold new change required to address emergencies facing this Nation on issues like climate change, access to health care, immigration, LGBTQ rights, gun violence, reproductive rights, and more.

To date, much of the debate has focused on candidates' plans for new laws to address these issues. However, the first order of business for the next president upon assuming office will be immediate action through the use of Executive Orders. These vital tools are used by a new president to set policy priorities, establish direction for the government, and control the regulatory process. In fact, most of the Democratic candidates have laid out their plans to use Executive Orders for these purposes.

Yet any new Executive Orders, regulations, and other executive branch policies will be particularly vulnerable to challenges in a Supreme Court and lower federal courts increasingly stocked by Donald Trump appointed judges and justices like Brett Kavanaugh. In a short memorandum opinion issued last month, Justice Kavanaugh forecast his skepticism for the more robust regulations we can expect from a Democratic president to protect things like clean air and water, fair labor standards, food safety, background checks on firearm sales, and limits on campaign donations campaign when he signaled he will be a fifth vote on the Supreme Court for reviving long dormant legal doctrines to take direct aim at many of the modern tools of government.[1]

[1] "Brett Kavanaugh Is Ready to Join the Supreme Court's Conservatives to Tear Down Key Federal Regulations" Slate, by Mark Joseph Stern, Slate, November 25, 2019. *Available* at https://slate.com/news-and-politics/2019/11/kavanaugh-nondelegation-gundy-supreme-court.html.

This memo is intended to unpack the challenges you can expect from the Supreme Court in response to attempts to use executive orders in the course of governing, as your predecessors have. If elected, your ability to achieve your agenda will be limited by this threat. Without a plan to address the partisan courts the thoughtful plans you all have laid out for executive action on the nation's pressing challenges are in grave danger.

Introduction: Executive Orders will face immediate challenges in the courts

Take Back the Court (TBtC) has established that the Supreme Court, with a conservative majority led by Chief Justice John Roberts, is likely to severely limit — if not strike down — legislation meant to address significant national issues. However, this challenge by the courts to the agenda of the next Democratic president is not limited to legislation. Right wing courts are also likely to hinder the core tools used by a new president to set policy priorities and establish direction for the government — Executive Orders and, more broadly, control of the regulatory process — through the use of preliminary injunctions and other court decisions. With the past as our guide, we can expect right wing lower court judges to deploy preliminary injunctions as they did to devastating effect during President Obama's second term to halt his ability to govern through executive order. Backed by an even more partisan Supreme Court (with Justice Brett Kavanaugh in place of Justice Antony Kennedy), the lower courts will be more emboldened and the Supreme Court is likely to let these injunctions stand.

The bold, new change required to address emergencies facing this nation on issues like climate change, access to health care, immigration, LGBTQ rights, gun violence, reproductive rights will require the new president to take immediate action through the use of Executive Orders and sustained action through regulations, not just laws. In fact, most of the Democratic candidates have laid out their plans to use Executive Orders for these purposes. The conversation about the theft of the Supreme Court and the partisan takeover of the lower federal courts has thus far focused on their unwillingness to allow bold new statutes to survive judicial review. But new Executive Orders, regulations, and other executive branch policies will be just as vulnerable as new laws.

Bold new laws are vulnerable to partisan federal courts

Studies by TBtC have established the threat posed by the partisan majority on the Supreme Court led by Chief Justice Roberts to legislation meant to address significant national issues. Earlier

this year, TBtC demonstrated how conservative justices will use an array of dubious legal interpretations at their disposal to dismantle climate change legislation, including an exceedingly narrow interpretation of statutes that empower federal agencies.[2] Upcoming studies will make similar findings about the likely hostility of the Supreme Court and lower federal courts to other top democratic legislative priorities such as measures to deal with the epidemic of gun violence and preserve women's control of their reproductive health and choices. Put simply, the Supreme Court and lower federal courts stocked increasingly with President Donald Trump's appointees[3] will pose a significant threat to the legislative agenda of a Democratic majority in Congress and Democratic president addressing serious national issues and taking action to restore democracy.

However, the threat does not end (or begin) with legislation. The other critical tools at the new President's disposal for governing and agenda setting — such as Executive Orders — are just as vulnerable to the courts. People focused on the ability of the new Democratic president to achieve her or his agenda need to take stock of this threat and understand that, without addressing the partisan courts, the president will be hamstrung.

Executive Orders: Critical and traditional tool for setting the direction of an Administration

Courts taking action to limit or strike down executive orders at the outset of a new President's term could have an immediate and devastating impact on the president's ability to control policy and the direction of government. On Day One of the next Democratic administration, the new president is likely to issue numerous executive orders reversing or rolling back damaging policies of the Trump Administration on issues such as reversing rules that undermine the Affordable Care Act, immigration, environmental protection, LGBTQ rights, gun violence, reproductive rights, and many more.

These kinds of orders would be well in line with the tradition of the modern presidency. Executive orders are typically a prominent feature of the beginning of presidential administrations, particularly when the transition involves the shift between political party, as a new president seeks to take immediate action on key priority items, roll back damaging policies before they can do additional damage, and put down markers for subsequent regulatory action

[2] "The Roberts Court Would Likely Strike Down Climate Change Legislation", Samuel Moyn and Aaron Belkin, September, 2019. Available at https://www.takebackthecourt.today/scotus-will-overturn-climate-change-legislation. ("The Court's conservative justices have an array of dubious legal interpretations at their disposal for dismantling climate change legislation, including an exceedingly narrow interpretation of statutes that empower federal agencies, an expansive reading of the Takings Clause and the Tenth Amendment, and a preferential application of the Commerce Clause.")

[3] "Trump's Judicial Legacy," Carrie Johnson, NPR, August 2, 2019. Available at https://www.npr.org/2019/08/02/747520685/trumps-judicial-legacy.

through agency rulemaking processes that can take months if not years to complete.[4] Executive orders are also part and parcel of a broader legislative agenda, serving as markers ahead of the heavy lift needed to pass significant legislation through a divided Congress (even if the Democrats retake the Senate majority, the filibuster and other procedural hurdles mean that some of the slowing/limiting features of divided government would remain).

Executive orders have been used by every president at the start of administrations to stake out new positions relating to the management of the government[5] or new frameworks and priorities for the regulatory process.[6] Presidents also issue Executive Orders throughout their administrations and many of the nearly 14,000 executive orders issued to date have been consequential, from President Lincoln's Emancipation Proclamation to President Truman's order abolishing discrimination in the armed forces to President Eisenhower's order sending federal troops to desegregate Central High School in Little Rock, Arkansas.[7]

2020 presidential candidates have made clear Executive Orders are part of their plans

In the course of the 2020 presidential campaign, Democratic Presidential candidates have talked openly about their plans to use the tools of presidential action like executive orders to advance their agendas. Promises of executive action have been a part of plans put forth by candidates on issues such as immigration, access to prescription drugs and other health care[8], combating climate change[9], and addressing disparities in racial and gender pay.[10]

---

[4] "Democrats hate Trump's executive orders. Why are they promising so many of their own?", Chelsea Janes, Washington Post, October 3, 2019. Available at https://www.washingtonpost.com/politics/democrats-hate-trumps-executive-orders-why-are-they-promising-so-many-of-their-own/2019/10/03/9f065c08-d800-11e9-a688-303693fb4b0b_story.html ("Look at what happens in the first few weeks of the last two or three presidential administrations," said Phillip J. Cooper, professor of public administration at Portland State University and author of 'By the Order of the President.' "They walk in the door and in a period of about two months, they issue a large number of these things, to try to show their constituents that they are indeed responding to what they ran on.")

[5] "Executive Orders: Issuance, Modification, and Revocation," Congressional Research Service (CRS), April 16, 2014, 7-5700, www.crs.gov, RS20846, at 7, citing example of February 17, 2001 Executive Orders issued by President George W. Bush revoking President Bill Clinton's executive orders regarding union dues and labor contracts and significantly altering several requirements pertaining to government contracts.

[6] *See* CRS memo at 7-8, citing a series of Executive Orders issued by President Obama at the start of his first term regarding the regulatory process and agency coordination. ("The practice of Presidents modifying and revoking executive orders is exemplified particularly where orders have been issued to assert control over and influence the agency rulemaking process.")

[7] "Executive Orders 101: What are they and how do Presidents use them?", The National Constitution Center, January 23, 2017. Available at https://constitutioncenter.org/blog/executive-orders-101-what-are-they-and-how-do-presidents-use-them/

[8] "Why I'm Endorsing Elizabeth Warren: Elizabeth or Bernie? It's a difficult and wonderful choice to have", Ady Barkan, The Nation, November 20, 2019. Available at https://www.thenation.com/article/ady-barkan-elizabeth-warren-endorsement/.

[9] "Democrats hate Trump's executive orders. Why are they promising so many of their own?", Chelsea Janes, Washington Post, October 3, 2019. Available at

Plans to combat gun violence are especially clear examples of plans by Democratic candidates to use Executive Orders to shift policy. Per the Washington Post:

> "As the Democratic candidates offer plan after plan, many are promising single-handed presidential action — rather than new laws that must be pushed through a sluggish Congress — to combat the nation's big problems. That trend was particularly evident at a gun safety forum in Las Vegas Wednesday, where almost every candidate who spoke has promised some kind of executive action to bolster gun control."[11]

For example, while an executive order banning assault weapons might not pass constitutional muster under the Court's long-standing test (see below — the Court is likely to view this as an area where Congress has spoken by allowing he previously enacted ban to sunset), there is ample ground for taking significant immediate action via executive order. Per Lindsay Nichols of the Giffords Law Center, the President could take unilateral action on guns through the Department of Justice and its agencies, such as the FBI and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), which regulates the gun industry and enforces federal firearms law.[12]

For example, through executive orders the President could strengthen infrastructure for the background check system, prioritize enforcement of existing laws[13], and set in motion a rewrite of ATF regulations to establish broader definitions of "firearm" or "machine gun" or types of ammunition like "armor piercing, "what counts as "mental defective" for the purposes of a background check, or the definition of "engaged in the business" of guns for purposes of being a licensed federal firearms dealer. Even these kinds of commonsense, narrowly drawn and customary uses of discretionary presidential authority could be at risk of novel 2nd Amendment zealotry if it finds a friendly federal judge to issue a national preliminary injunction.

---

https://www.washingtonpost.com/politics/democrats-hate-trumps-executive-orders-why-are-they-promising-so-many-of-their-own/2019/10/03/9f065c08-d800-11e9-a688-303693fb4b0b_story.html

[10] "Trump's policy agenda has relied on issuing executive orders. 2020 Democrats are promising to do the same if they take the White House.", by Joseph Zeballos-Roig, Business Insider, Sep 17, 2019. Available at https://www.businessinsider.com/how-much-can-democrats-implement-through-executive-action-trump-2019-9.

[11] *Id.*

[12] "How Can a President Tackle Gun Violence Via Executive Action?", by Alex Yablon, The Trace,, October 2, 2019. Available at https://www.thetrace.org/2019/10/presidential-candidates-executive-action-on-guns/.

[13] *Id.*

Preliminary Injunctions by partisan courts during Obama's Second Term are predictive

Executive Orders are published directives from the president managing the operations of the federal government that carry with them the force of law.[14] Without delving too far into the arcana of administrative law and agency rulemaking, the president's ability to issue executive orders forms a critical part of his or her ability to govern. Yet, if past is prologue, we can expect partisan judges backed by a conservative Supreme Court to resume the project they deployed to devastating effect during President Obama's second term to halt his ability to govern through executive order.

> "Near the end of the Obama Administration, national injunctions stymied many of the President's policies. Most prominent was the injunction in Texas v. United States, a case brought by Texas and a number of other states to challenge an immigration program, 'Deferred Action for Parents of Americans and Lawful Permanent Residents,' which gave lawful presence to millions of aliens for various federal-law purposes…. That preliminary injunction was affirmed by the Fifth Circuit, and by an evenly divided U.S. Supreme Court.240 Texas v. United States."[15]

The decision by a divided Supreme Court in 2016 that prevented President Obama from implementing the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program is particularly telling. The four conservative justices left in place the lower court injunction preventing President Obama's 2014 order from protecting up to five million parents of citizens or lawful residents from deportation and providing them with work permits.[16] This decision stated no reasoning but deferred to the arguments of Republican attorneys general alleging executive overreach and was considered by most, including President Obama, a significant blow to his ability to enact his agenda. According to President Obama, the Court's decision, "is part of the consequence of the Republican failure to give a fair hearing to Mr. Merrick Garland, my nominee to the Supreme Court."[17]

During President Obama's second term, a single federal district court in Texas also issued national preliminary injunctions halting the Department of Labor's "Persuader" regulation, regulations regarding public restrooms, regulations requiring government contractors to report

---

[14] *See* CRS memo.
[15] Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 418 (2017), at 458-459. Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/1359
[16] "Supreme Court Tie Blocks Obama Immigration Plan", by Adam Liptak and Michael D. Shear, New York Times, June 23, 2016, Available at https://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html.
[17] "Obama slams 'frustrating,' 'heartbreaking' Supreme Court immigration decision", Politico, June 23, 2016, Sarah Wheaton and Nick Glass. Available at https://www.politico.com/story/2016/06/obama-slams-supreme-court-immigration-decision-224728.

labor violations, extending overtime pay to four million people, and a rule interpreting an antidiscrimination provision in the Affordable Care Act (ACA). The Sixth Circuit also issued a stay of the Clean Water Rule adopted by the Environmental Protection Agency in 2015.[18]

While Congress in theory can revoke or modify a President's executive orders issued pursuant to a delegation of authority to the President, this happens very rarely in practice in modern times.[19] The real crucible for the next Democratic president's ability to act through executive orders will be the courts. The same partisan federal judges who issued these national injunctions and many more now appointed by President Trump, now backed by an even more staunchly partisan court with the replacement of Justice Kennedy by Justice Kavanaugh, lie in wait to enjoin to orders of a new Democratic president in order to benefit of their own policy and partisan preferences.

The Roberts Court has repeatedly jettisoned "judicial restraint" for partisan ends

In addition to the history of conservative judges striking down Obama orders and regulations, the Supreme Court's narrow right wing majority has demonstrated a willingness to abandon its purported principle of "judicial restraint" in order to achieve partisan results. So we should not expect the Court to be restrained by notions like "judicial restraint" in its assessment of the next Democratic president's executive orders. This history suggests that the Supreme Court will likely let lower court preliminary injunctions blocking executive orders stand.

Senator Sheldon Whitehouse, who has served on the Senate Judiciary Committee for 12 years and been involved in the confirmation hearings for four Supreme Court justices and hundreds of lower federal court judges, examined 73 5-4 decisions of the Supreme Court during Chief Justice Roberts' tenure.[20] His study made clear the predictive pattern of the Court's conservative majority in jettisoning judicial restraint in order to reach decisions that further its political beliefs:

> "The pattern is unmistakable and troubling. What makes it all the more troubling is how often the conservatives abandoned so-called "conservative" judicial philosophies to reach the desired outcome. Members of the conservative wing had assured senators at their confirmation hearings that they would simply "call balls and strikes,"[8] "follow the law

[18] *Id.*
[19] *See* CRS report at 9, *citing* Adam L. Warber, Executive Orders and the Modern Presidency 118-120 (2006): "Congressional repeals of executive orders are relatively rare in modern times, primarily because such legislation could run counter to the President's interests and therefore may require a congressional override of a presidential veto. One study has suggested that less than 4% of executive orders have been modified by Congress."
[20] "A Right-Wing Rout: The Roberts Court's Partisan Opinions", by Sen. Sheldon Whitehouse (D-R.I.), Issue Brief for the American Constitution Society (ACS), April 2019. Available at: https://www.acslaw.org/wp-content/uploads/2019/04/Captured-Court-Whitehouse-IB-Final.pdf.

> of judicial precedent,"[9] and respect the "strong principle" of stare decisis as a limitation on the Court.[10] Once confirmed, they discarded these doctrines when they proved inconvenient to the outcomes the Roberts Five desired. Even the pet conservative doctrine of "originalism" was ignored when necessary. And doctrines about modesty and respect for decisions by elected members of Congress collapsed. In fact, as the Appendix at the end of this Issue Brief catalogues, in nearly 55 percent of the 73 cases, the conservative majority disregarded one or more of the following judicial principles: (1) precedent or stare decisis; (2) judicial restraint; (3) originalism; (4) textualism; or (5) aversion to appellate fact finding."[21]

As his study demonstrates, on issues like opening the floodgates of corporate and dark money funded political ads in our elections[22], combating gun violence[23], permitting corporations to control their employees access to reproductive health care[24], protecting corporations from liability by limiting employees access to court[25] and their ability to bring collecting claims under the Fair Labor Standards Act,[26] making it harder for people to bring age discrimination claims,[27] preventing workers from banding together to address workplace violations such as sexual harassment and racial discrimination,[28] and overturning precedent to gut public sector unions,[29] the Supreme Court has tossed aside notions of judicial restraint alongside other supposedly limiting principles of judicial decision-making.

It is likely that, with a Democrat in the White House, the pattern established by the "73 partisan decisions by the Roberts Five giving wins to key conservative and corporate interests,"[30] will continue. If the new president issues orders and regulations that are against the interests of Republican special interests and donors, we can expect the court to find a way to reach out and limit them or strike them down. With a quarter of all powerful federal appellate judges in the country already appointed by President Trump, and a right wing majority on the Supreme Court locked in with the appointment of Justices Gorsuch and Kavanaugh, these partisan impulses to set aside judicial restraint for political ends apparent for years on the Roberts court are likely to be only further emboldened.

---

[21] *Id,* at 4.
[22] *See* Citizens United v. FEC, 558 U.S. 310 (2010), see 558 U.S. at 948 (Stevens, J., dissenting); FEC v. Wisconsin Right to Life, see 551 U.S. at 504 (Souter, J., dissenting)
[23] District of Columbia v. Heller, see 554 U.S. at 680 (Stevens, J., dissenting)
[24] Burwell v. Hobby Lobby Stores, 573 U.S. 682 (2014), at 746 (Ginsburg, J., dissenting).
[25] 14 Penn Plaza v. Pyett, 556 U.S. 247 (2009), see 556 U.S. at 277 (Stevens, J., dissenting).
[26] Genesis Healthcare v. Symczk, 569 U.S. 66 (2013), see 569 U.S. at 79 (Kagan, J., dissenting).
[27] Gross v. FBL Financial Services, 557 U.S. 167 (2009), see see 557 U.S. at 190 (Stevens, J., dissenting)
[28] Epic Systems v. Lewis, 138 S. Ct. 1612 (2018).
[29] Janus v. AFSCME, 138 S. Ct. 2448 (2018), at 2487 (citing Abood v. Detroit Board of Education) (Kagan, J., dissenting)
[30] https://www.acslaw.org/issue_brief/briefs-landing/a-right-wing-rout-what-the-roberts-five-decisions-tell-us-about-the-integrity-of-todays-supreme-court/

The Framework of Analysis: How conservative courts will find a new skepticism of executive power

The Constitution does not explicitly provide for presidential executive orders (or memoranda or proclamations), nor does it set forth standards. Rather, the President's authority to issue Executive Orders comes from implied Article II constitutional powers (establishing the executive power, commander in chief, and duty to "take Care that the Laws be faithfully executed" as well as from express or implied authority delegated in statutes by Congress.[31] Presidents starting with George Washington have done so on a broad range of issues. The use of Executive Orders is a presumptively lawful use of presidential power though subject to challenge to challenge in the court.

In assessing the legality of executive orders, the Supreme Court will apply the framework from Justice Robert Jackson's famous concurring opinion in *Youngstown Sheet & Tube Co*.,[32] the case in which the Supreme Court limited the power of President Truman to order the Secretary of Commerce to take control of private steel mills to avert a strike by steelworkers during the Korean War. The Jackson concurrence, one of five concurrences in that 5-4 decision, rested on the idea that while there are implied Presidential powers, those powers are "based on the proposition that presidential powers may be influenced by congressional action."[33]

Justice Jackson established a tripartite framework of analysis:

1. Areas in which "the President's authority to act is considered at a maximum when he acts pursuant to an express or implied authorization of Congress;
2. "[A] zone of twilight" in situations where Congress has not acted, under which the President can act under her own independent authorities though mindful of the potential concurrent authority of Congress to act; and
3. Powers at their "lowest ebb" deserving of greater scrutiny by the courts where the President "takes measures incompatible with the express or implied will of Congress ... for he can only rely upon his own constitutional powers minus any constitutional powers of Congress over the matter."[34]

Of course, a framework is only as sound as those judges applying it. In assessing the legality of executive orders issued by a Democratic president, federal courts motivated to cut off or limit

[31] *See* CRS report at 1-3; see also U.S. CONST., art. II, §§1-3.
[32] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
[33] *See* CRS report at 4.
[34] *See Youngstown Steel* at 635-638.

presidential power could make a lot of hay out of this test. How they consider which part of this tripartite framework can be the whole ballgame. Is it a place where Congress has acted; where Congress has granted express or implied power to the president, has Congress been silent, or is the president's order incompatible with some act of Congress express or implied? The choice within the framework could determine the outcome of whether the court lets an executive order stand or strikes it down.

To be sure, there are well grounded reasons for skepticism of executive authority and instances in which it is important for courts to intervene. The pending challenge to President Trump's order ending DACA based on its purported illegality is one of these instances. We saw the damage done during the Bush Administration by acting through orders and other Presidential decrees that made claims of extraordinary commander in chief authority during the war on terror.

There are also instances such as the Supreme Court's 5-4 decision to uphold President Trump's Muslim Ban in which the Court allowed an Executive Order to stand even though it was at odds with American law and tradition and unmoored from the rational rulemaking and legal frameworks that typically give courts, Congress, and the American people a framework for assessing the basis of presidential action. The Muslim Ban decision in particular relied on extraordinary deference by the Court to the presumption of Presidential normalcy even when contradicted by facts — the President's own words and deeds — plainly before it.

Yet, a new Democratic administration should not expect to rely on this same extraordinary deference to Presidential authority, or even normal deference to the powers of the president along the lines of the Jackson test from *Youngstown Steel*. Rather, we can anticipate that Republican appointed judges and Justices, chosen and confirmed because of — not despite — their partisan bona fides, will turn deference into skepticism and find legal hooks to strike down a Democratic President's executive orders rather than to save them, as they have done with President Trump's.

The long term conservative project to dismantle the modern regulatory state provides tools and language to block the next president's executive action

With a Democratic president in charge of the Administration and the regulatory process, we can expect right wing judges and justices to resume with vigor their multi-generation battle to do away with the modern regulatory state. Through tools developed and well honed by the Federalist Society and Heritage Foundation, these judges and justices will engage in a technocratic sounding but highly consequential battle to undercut the ability of Administration to make robust use of numerous laws that require expert-driven regulation to achieve their purposes, such as the Clean Air Act and the Clean Water Act.

Indeed, in a short memorandum opinion issued last month, Justice Kavanaugh opened a new front in this battle, signaling that he will be a fifth (and decisive) vote on the Supreme Court for reviving the long dormant "non-delegation" doctrine to put at peril any of the robust regulations we can expect from a Democratic President to protect everything from clean air and water to fair labor standards to background checks on firearm sales and food safety.[35]

It is beyond the scope of this study, but we can expect right wing justices and judges to use an extremely narrow interpretation of agency authority in evaluating not just new statutes, but also the scope of the administration to regulate pursuant to existing statutes. Justice Kavanughs's embrace of Justice Gorsuch's argument "for reinvigorating the long-dormant non-delegation doctrine"[36]is but one tool they will use. As TBtC observed in its climate change study, Justice Gorsuch, for example, has demonstrated "fierce opposition" to a key principle of federal jurisprudence called "Chevron deference," named after the Supreme Court's 1984 decision to defer to agencies' interpretation of the statutes that empower them due to the expertise within the agency (as opposed to the courts).[37] Justice Gorsuch has gone even further than Justice Antonin Scalia, a notable skeptic of the regulatory state, in seeking to do away with Chevron deference. He has said that he considers Chevron "a potential threat to the fundamental obligation of the judiciary to interpret federal statutes and 'say what the law is.'"[38]

To date, the efforts by conservative justices to dismantle the regulatory state have been narrowly kept at bay, including through the use of smart strategic efforts by Justice Elena Kagan to craft narrow and moderate decisions to pick off unlikely votes from conservative justices. Last term, in a case called *Kisor v. Wilkie,*[39]Justice Kagan rescued an obscure but important legal doctrine called Auer deference — which involves the court's deference to an agency's interpretation of its own regulations (whereas Chevron deals with a court's deference to an agency's interpretation of a statute). She did so by narrowing the focus of Auer deference only to cases where the disputed regulations are genuinely ambiguous. Her conclusion that "[w]hat emerges is a deference doctrine not quite so tame as some might hope but not nearly so menacing as they might fear"

---

[35] *See* Stern article, *Available* at https://slate.com/news-and-politics/2019/11/kavanaugh-nondelegation-gundy-supreme-court.html.
[36] *See* TBtC climate study at 6,8. citing David H. Gans, The Selective Originalism of Judge Neil Gorsuch, Const. Accountability Ctr., https://www.theusconstitution.org/wp-content/uploads/2017/12/CAC-Selective-Originalism-of-Gorsuch.pdf.
[37] *See* TBtC climate study at 6,8.
[38] *Id*., *citing* Jonathan H. Adler, Gorsuch's Judicial Philosophy Is Like Scalia's—With One Big Difference, Wash. Post (Feb. 1, 2017), https://www.washingtonpost.com/opinions/gorsuchs-judicial-philosophy-is-like-scalias—with-one-big-difference/2017/02/01/44370cf8-e881-11e6-bf6f-301b6b443624_story.html?utm_term=.bb714bb582fe.
[39] *Kisor v. Wilkie*, No. 18-15, 588 U.S. ___ (2019).

led Chief Justice Roberts, typically a reliable critic of federal regulations, to sign on to her majority opinion.[40]

But, with the addition of Justice Kavanaugh to the bench, who gained a reputation on the D.C. Circuit "for closely scrutinizing the EPA's actions and environmental regulations,"[41] it will be only a matter of time — and the inauguration of Democratic president — before these tactical victories give way and the partisan majority on the Court returns with vigor to its work of gutting environmental and workplace regulations. His memorandum opinion embracing Justice Gorsuch's revival of the non-delegation doctrine makes this clear and imminent. As TBtC concluded in its climate study, "[f]ederal agencies currently enjoy broad statutory authority to execute their congressionally assigned missions. Despite well-established precedent, the Supreme Court could take an overly narrow view of the statutory authorities given by Congress to federal agencies."[42] We can expect the Court and partisan federal courts now dominated by right wing judges to use these same tools to narrow or eliminate the ability of a new Democratic president to pursue her or his agenda through robust regulation.

Conclusion: The next President must have a plan for the courts

As currently constituted, the federal courts will pose a significant challenge to the efforts of a Democratic president and Congressional majority to achieve policy change. This partisan roadblock against progressive governance is precisely what Senator Mitch McConnell intended to achieve when he manipulated the size of the Court to steal a seat in 2016. Along with attacks on voting rights, partisan gerrymandering, abuse of the filibuster, and reliance on undemocratic structures such as the Electoral College and an increasingly unrepresentative Senate map, Republicans' theft of the Court is part of a concerted effort by a partisan minority to undermine democracy and impose right-wing policy against the will of the people.

Our most fundamental rights and values depend on the next President having a plan not just for policy change, but for addressing the courts-- including the Supreme Court- as a key element of restoring democracy through structural reform.

[40] "Is the Supreme Court's Fate in Elena Kagan's Hands?" Margaret Talbot, The New Yorker, November 11, 2019 at [cite]. https://www.newyorker.com/magazine/2019/11/18/is-the-supreme-courts-fate-in-elena-kagans-hands
[41] *See* TBtC climate change study, at 8.
[42] *Id*..