

**Opinions**

# Our bureaucrats may soon be flexing much weaker muscles

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By [Hugh Hewitt](#)

August 29 at 7:38 PM

With the Senate's [votes Aug. 16](#) to confirm A. Marvin Quattlebaum Jr. and Julius Ness Richardson to the U.S. Court of Appeals for the 4th Circuit, President Trump, with the assistance of Senate Majority Leader Mitch McConnell (R-Ky.), Judiciary Committee Chairman Charles Grassley (R-Iowa) and the entire GOP Senate Caucus has now confirmed 26 judges to the federal appeals courts since he took office. With another 10 nominees in the queue for the appellate bench and certain to be confirmed by year's end, a total of 40 by January is quite possible.

That would be a record number of appeals court judges for the first two years of a presidency, an achievement of enduring significance. And now that success could be cemented at the level of the Supreme Court.

Well-reported among court watchers is White House Counsel [Donald McGahn's](#) deserved reputation for animus towards so-called [Chevron deference](#) — a Supreme Court-created doctrine that is subject to erasure with the new majority on the Roberts court looming. The rule commends to federal judges a significant deference to the decision making of federal administrative agencies, staffed overwhelmingly by non-political career appointees. While they try to be fair, they are also impressed with their own expertise and views. Bureaucrats love their authority, and are not shy about using it. Federal courts have been slow to check all but the most egregious excesses of federal bureaucratic muscle flexing.

This Chevron deference buttresses bureaucratic confidence — or arrogance, depending on your point of view. Congress hasn't done its job of legislating with particularity as to rules of law for decades, telling agencies instead to “figure it out” through “notice and comment” rule-making. The federal courts simply refused to pick up the slack when it came to complex — and frankly, dull and difficult — rule-making and administrative proceedings. This combination of legislative lassitude and judicial inertia has left the [2 million federal bureaucrats](#) in de facto charge of much of the lives of Americans.

The vastness of the bureaucratic empire can be difficult to grasp until you wade into it or it attacks your liberty in ways large or small. Own property you'd like to build a house on? If the U.S. Fish & Wildlife Service says it may be land occupied by, say, the Delhi Sands flower-loving fly, then construction can't begin unless you get a permit, which is rarely if ever given. See, the fly flies very little, and not for long, and lives mostly underground. It's hard to see and of course you can't prove it isn't there, and hurting one is a felony.

Want to add a dock to your family's vacation cottage on a lake in Michigan or Wisconsin, Maine or Alabama? You will need an okay in most cases from the Army — the U.S. Army Corps of Engineers.

Thinking about expanding or dropping a particular sport program for men or women athletes at any college or university in the country? Be sure to clear it with the Education Department first.

The list is endless. More than 3,800 rules were published in 2016 alone. Over the past decade, on average [each new law spawns more than 25 rules](#). Thus overturning the Chevron doctrine, or at least narrowing it, would be a huge win for originalists who believe Congress should make the laws, even about insects and lakes and college sports, not career bureaucrats.

When Judge Brett M. Kavanaugh's Supreme Court confirmation hearings begin next week, progressives should hope Democrats on the Senate Judiciary Committee do not waste their time trying to trip him up on *Roe v. Wade* questions but rather try to elicit from him answers that would be useful in slowing the end of the era of agency bureaucrat domination, now coming to a close with the arrival of the Trump-nominated judges. Kavanaugh is an expert in this area. If senators from the left elicit from him even a few kind words about agency expertise, the progressive enthusiasts of the administrative state would be thrilled. I'm hoping Democrats on the Judiciary Committee use their time debating *Roe v. Wade* instead of shoring up Chevron. Next week will tell us which senators have an eye for "the long game," the one Trump, McConnell and Grassley have been winning in a rout.

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