

the FEDERALIST

There are Better Reasons to Vote Against Trump than Judge Picks

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April 20, 2016

Early in this election campaign, when Donald Trump was just a curiosity who would surely declare victory and leave the race by Labor Day—remember those heady days?—people began asking me who the reality-TV star could possibly appoint to the Supreme Court. Would it be Judge Judy or Simon Cowell? Nyuk, nyuk; it was literally a parlor game.

Then when The Donald stayed in the race—but he'd be out any time now, right, after the next outrageous thing he said?—these questions became semi-serious. At one point, Trump told a reporter that his sister, Senior Judge Maryanne Trump Barry of the U.S. Court of Appeals for the Third Circuit (which covers New Jersey, Pennsylvania, and Delaware), would make a “phenomenal” justice.

We can consider that an unrealistic off-the-cuff response; his sister was probably the only judge he knew, and it's highly unlikely a president would appoint a 79-year-old (being a “senior” judge means working at a semi-retired workload). That's not to mention conservative opposition to Barry's abortion rulings, among other areas where she doesn't check the right jurisprudential boxes.

Then Trump Did Some Googling

I began joking that Trump would nominate his horse to the high court, in an allusion to the Roman emperor Caligula's (possibly apocryphal) appointment of his favorite horse to the Senate. It was worth a few laughs. Then Justice Scalia died and the speculation got all too real. That same night, February 13, at the GOP debate in Greenville, South Carolina, Trump mentioned Diane Sykes and Bill Pryor as possible replacements.

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Whoa. Sykes of the Seventh Circuit (Illinois, Indiana, Wisconsin) and Pryor of the Eleventh Circuit (Alabama, Florida, Georgia) are serious people, both appointed by George W. Bush, who would be on any Republican president's short list.

That certainly got my attention, and not just because of these judges' overall reputations. Sykes gave a speech at Cato's 2014 Constitution Day symposium, the written version of which is in the current *Cato Supreme Court Review*, while Pryor will be addressing Cato's religious-liberty conference in June. They're not libertarians—few judges are, though D.C. Circuit Judge Janice Rogers Brown fits the bill, and her being a black woman would make progressives' heads explode—but they'd be perfectly fine in my book.

In other words, the candidate himself—who thinks that conservatism means “conserving your wealth”—may not know originalism from origami, but at least he listened to the right adviser on that one. Then last month, Trump promised a list of five to ten people from which he would “guarantee” to nominate to the Supreme Court, and later said he was getting help from “the Federalist people” and the Heritage Foundation. No word on whether any of that is true—the Federalist *Society* is a #NeverTrump hotbed—but a month later, we're still waiting for the list.

It's Easy to Improve on Hillary

So where does that leave us? Judicial appointments are hardly among the top concerns of the median Trump voter, so it wouldn't be surprising if Trump's list, whenever it emerges, would be an attempt to placate the conservative legal elite. It wouldn't be binding on a President Trump, to be sure, but Senate Republicans—“Mitch and the entire group,” as His Hairness has called them—aren't likely to go along with someone unworthy of wearing Thomas More's hat.

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Indeed, if Trump is ever in an actual position to make nominations, it would almost certainly mean the GOP has retained its Senate majority and successfully pulled off its #NoHearingsNoVotes strategy regarding President Obama's Supreme Court nominee Merrick Garland. There may be populist unpredictability in other policy areas, but it's hard to see the Senate confirming some wildcard, at least to the Supreme Court.

But who knows about the lower courts?

See, here's the thing: if the *average* Trump judicial nominee is still going to be “better” than the average Hillary Clinton or Bernie Sanders nominee, there's still a lot of variance. On a 10-point scale, if the Democratic nominee is an average 3 and a range of 1 to 5, a Trump nominee would be an average 7 with a range of 0 to 10. Then you have to consider the “deals” a President Trump would make: “I'll appoint your judge if you build my wall.” There are many unknown unknowns here, as Don Rumsfeld would say.

In short, while there are plenty of reasons to vote against Trump, judicial selections—especially to the Supreme Court—are among the least of them. But that may not be saying much, particularly when judges are the bread-and-butter issue of Trump's main primary opponent.

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