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## **Democrats Are Fighting Trump's Judges Like Never Before, But Trump's Still Winning**

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President Trump, who wouldn't have won had it not been for the Supreme Court vacancy created by Justice Antonin Scalia's death, has now ensured that a major part of his legacy is in the judiciary. Having appointed nearly a third of all circuit judges — a record 30 in his first two years, about the same as Bush and Obama *combined* at that point in their presidencies, and 50 in three (where Obama had 55 in two terms) — he has also had back-to-back Supreme Court picks. And Justices Ginsburg (87), Breyer (82), and Thomas (72) aren't getting any younger.

That's a big deal, because a president has few constitutional powers more important than picking judges. Legislative victories can be short-lived, regulations can be rescinded, and policy guidance isn't worth the paper it's written on. But judicial appointments are for life; those black-robed arbiters continue shaping our world long after the president who appointed them has left the White House.

And all this goes just as much or more for the lower courts, which decide 50,000 cases annually, dwarfing the Supreme Court's output. An important ruling on nonprofit-donor disclosures was made in April 2016 by a district judge appointed by Lyndon Johnson.

Every four years, a president appoints 20 percent or more of the federal judiciary. To put it another way, when President Obama took office, only one of the 13 federal appellate courts had majorities of Democratic appointees — the west-coast Ninth Circuit — but when he left, nine did. When Trump was inaugurated in January 2017, there were 108 vacancies in the lower courts, which rose to about 150 before a Senate rule change enabled speedier confirmations.

The remaining vacancies — all in district courts — are mostly in states where both Democratic senators refused to negotiate any sort of deal, preferring to leave their states shorthanded rather than allow Trump to get any say in their judges.

These judicial slots were real wildcards. If a constitutional lawyer who had been president of the Harvard Law Review (Obama) deprioritized judicial nominations in his first few years, how much would a celebrity real-estate developer care? Would Trump see these as patronage posts for his casino lawyers and others he encountered in the entertainment world? Would he just focus on immigration and trade and let the judiciary erode away?

### Selecting Committed and Vibrant Originalists

To his credit, the president let the White House Counsel's office run the show. Senators will occasionally insist on cronies, but the ratio of solid, "movement" nominees to establishmentarian hacks is exceedingly high. The result has been Trump's biggest success, with judges of the same

kind and caliber as those conservative-constitutionalist Ted Cruz would have picked — and probably better than Jeb Bush or Mitt Romney. This administration has surpassed even George W. Bush in picking committed and youthful originalists, particularly in the circuit courts, and getting them through the Senate.

There is little concern of anyone moving left or being a “squish.” Former White House Counsel Don McGahn likes to say that, rather than “outsourcing” judicial selection to the Federalist Society, he “insourced” the operation, meaning that his team, which was far leaner than in previous administrations, were all “Fed Soc” members who understood the need for solid judges with a record of accomplishment.

That’s why it’s no surprise that so many of Trump’s nominees are intellectual superstars, and why the Democrats have tried to smear them in various ways. Senator Dianne Feinstein (D-Calif.) said about Seventh Circuit Judge Amy Coney Barrett, the odds-on favorite to be elevated if Justice Ruth Bader Ginsburg’s seat becomes vacant, that “the dogma lives loudly within you” — which sounds like a rejected Star Wars line.

Fifth Circuit Judge Don Willett was assailed for humorous tweets, particularly one about a constitutional right to marry bacon. D.C. Circuit Judge Neomi Rao and Second Circuit Judge Steven Menashi were attacked for their (standard conservative-libertarian) collegiate writings, as was Ryan Bounds, a Ninth Circuit nominee who ultimately withdrew when two Republican senators, Tim Scott (S.C.) and Marco Rubio (Fla.), unreasonably declined to support him.

Democratic California senators Feinstein and Kamala Harris tried especially hard to block Patrick Bumatay, who became the first openly gay Ninth Circuit judge and first circuit judge of Filipino descent. Unlike some of their colleagues in deep-blue states, including Minority Leader Chuck Schumer (D-N.Y.), they also haven’t played ball on district judges, despite judicial emergencies in California’s federal courts. The ABA too has been a source of renewed controversy, with nine nominees rated “not qualified,” including three circuit nominees whose ratings seem based almost entirely on ideological disagreements.

### Reversing the Tide

Returning to numbers, on Inauguration Day, Republican-appointed majorities remained only in the Fifth, Sixth, Seventh, and Eighth Circuits, basically the middle of the country. While those majorities have grown and gotten younger, and more originalist, more interesting is how Trump and McConnell have been able to reverse the tide in the other nine circuits. For only the second time, the Senate confirmed double-digit circuit judges three years in a row.

The Third Circuit, based in Philadelphia, was the first one to flip from Democratic-appointed majorities to Republican-appointed ones. Then in quick succession came the New York-based Second and the Atlanta-based Eleventh. A far more significant shift has occurred on the Ninth Circuit, which has moved from 19 Democrat-appointed judges, nine Republican-appointed, and one vacancy, to 16 Democrat and 13 Republican.

The resulting ratio of D:R appointees is lower than in five other circuits. Ideological rebalancing is already being felt in the makeup of three-judge case panels and, unique to this court, the “limited” *en banc* panels of eleven. And the Ninth Circuit skews old, so if Trump is reelected, it could end up with a GOP-appointed majority for the first time since before the Carter-era judiciary expansion (which is why the court skews left in the first place).

Realizing the danger in all this to a jurisprudential non-theory of social-justice-seeking, Democratic senators have used every parliamentary trick in their power to slow this Trump train. They no longer have the biggest brake, the filibuster — Senate Majority Leader Mitch McConnell (R-Ky.) frequently thanks his predecessor Harry Reid (D-Nev.) for having gotten rid of it for lower-court judges — so they've forced more cloture votes than in all previous presidencies combined.

Nearly 80 percent of Trump's judicial nominees have faced cloture votes, including many who are confirmed with upwards of 90 votes. In comparison, about three percent of Obama's nominees faced cloture votes and fewer than two percent in the previous five presidencies. Until the Senate majority voted to cut back on floor time, Democrats also demanded the full 30 hours of floor time per nominee the rules allowed, even on judges who ultimately got approved by voice vote.

Democrats are also refusing to return "blue slips," the home-state senators' prerogative to have significant say in whether to let a nominee be considered. Judiciary Committee Chairman Chuck Grassley (R-Iowa) thus made them non-dispositive for circuit nominees, assuming that the White House engaged in good-faith consultation — a policy Chairman Lindsey Graham (R-S.C.) has continued.

#### Facing Massive Democratic Party Opposition

As it happens, Trump's 203 Article III judicial appointees have received more than 4,500 no votes, while all 329 of Obama's judges got 2,039. Trump's judges have received nearly half of all no votes in U.S. history, an average of about 22 per judge (and about 36 per circuit judge) — as compared to just over 6 per judge under Obama, 2 under George W. Bush, 1.3 under Clinton, and the rest fewer than one. In 2019 alone, when the Senate confirmed 102 judges, 12 percent of the total and second-highest ever for one year, those judges received 88 percent more no votes than all 2,680 judges confirmed in the 20th century.

The number confirmed in 2019 is eclipsed only by the 135 in 1979, when Congress had just created 150 new judgeships and President Carter's Democrats had a 59–41 Senate majority. Judiciary Committee Chairman Ted Kennedy (D-Mass.) even considered seven circuit nominees in one hearing and the Senate confirmed more than 20 judges on a single day at least twice, confirming more than 97 percent of judges on voice vote and taking *no* cloture votes. It was a different world.

One final statistic: The average Democrat has voted against nearly half of all Trump judicial nominees, while the average Republican voted against fewer than 10 percent of Obama nominees and — get this — since the turn of the 20th century, senators of one party voted against fewer than 2 percent of nominees of the other.

It's a shame that quality nominees are confirmed on party-line votes; only 16 of 53 circuit judges confirmed under Trump have gotten more than 60 votes. But we've gotten here because we're at the culmination of a long trend whereby different legal theories map onto ideologically sorted parties. Federal judges are a big deal, so it's understandable that senators try to advance or block as many as possible.

That's why I'd never tell senators to vote for a nominee they think will do damage to the Constitution and the rule of law. Senator Graham really impressed me in the Kavanaugh fight,

but he and Senator Susan Collins (R-Maine) are wrong to simply defer to presidents from both parties so long as their judicial nominees are qualified as a matter of intellect and experience.

For senators and citizens alike, it's absolutely appropriate to question judicial philosophy. Judicial nominations are now properly an election issue, so it's heartening that voters are paying attention.

*This essay is adapted from the author's forthcoming book, Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court, due out from Regnery this month.*

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