



It's Time For Trump To Update His Supreme Court Short List

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One of the key innovations of Donald Trump's 2016 campaign was his public list of potential Supreme Court nominees. After Justice Antonin Scalia's passing thrust the court into the forefront of the presidential election, candidate Trump produced a list of judges that held the Republican coalition together and ultimately attracted swing voters in key states.

Three years later, after appointing two justices, the president heads into a reelection campaign where the Supreme Court is no less of an issue. Eighty-six-year-old Justice Ruth Bader Ginsburg's recent cancer treatment is just the latest health concern this leftist icon has faced. She's vowed to outlast the current president, but if Trump is reelected, the odds seem to be against her. And don't forget that Justice Stephen Breyer is 81 years old.

So it would be both smart politics and good governance to update the list of SCOTUS contenders. When a vacancy emerges, whether before or after the election, who will be considered?

Let's start with the old list of 24 judges: the original 11 from May 2016, another 10 added that September, and another five added in 2017, minus Neil Gorsuch and Brett Kavanaugh. From that group, subtract the six who are older than 60; when longevity is the coin of the realm, you're not gonna see a repeat of Justice Ginsburg, the only sexagenarian to join the high court in nearly 50 years (not counting the unsuccessful nominations of Robert Bork, Harriet Miers, and Merrick Garland).

Also remove the two young'uns, Eleventh Circuit Judge Britt Grant (41) and Oklahoma district judge Patrick Wyrick (38). I think the world of these two, and they're perfectly suited to be federal judges, but it's just too early to elevate them.

That leaves 16, but before we start evaluating them, let's pause and take into account the last three years. A lot has changed, including President Trump's record number of appointments to the circuit courts of appeal.

Among those who don't already appear on the list, I would add the following superstars: Third Circuit Judge Stephanos Bibas, Fifth Circuit Judge James Ho, Fifth Circuit Judge Andrew Oldham, D.C. Circuit Judge Neomi Rao, and my dark-horse, Walmart general counsel Rachel Brand (previously associate attorney general, the number-three Justice Department official, and destined for future high office, judicial or otherwise). Of those, the erudite Oldham joins Grant and Wyrick in the "hold" pile because he only turned 40 last year.

That leaves 20 people hailing from all over the country and representing diverse educational backgrounds, with only a handful having graduated from Harvard or Yale law schools. Without any presidential puffery, it's a terrific list.

If the seat to be filled is Ginsburg's, President Trump will be hard-pressed not to pick a woman, particularly if the vacancy arises before the election—or even, frankly, before the 2022 midterms in a second Trump term. The favorite here is Seventh Circuit Judge Amy Coney Barrett, who already made the short list for what became Kavanaugh's seat. A former Scalia clerk and Notre Dame law professor, Barrett was viciously attacked for her Catholic beliefs at her confirmation hearing, so expect more of that if she's the pick.

The second major contender would be Rao, a former clerk to Justice Clarence Thomas and a George Mason law professor who was the “regulatory czarina” (head of the White House Office of Information and Regulatory Affairs) before joining the bench this summer. Rao, whom I've known for many years, is an expert in administrative law—the law of executive agencies and other regulatory bodies—an area that will be ripe for Supreme Court review in coming years.

The other possibilities, who have been mentioned before with varying degrees of seriousness, are, in my estimation of likelihood of being picked: Sixth Circuit Judge Joan Larsen, a former Scalia clerk who has mostly stayed under the radar; Judge Margaret Ryan of the Court of Appeals for the Armed Forces, who was a Thomas clerk and would be an intriguing pick because of her little-known D.C.-based court; and Tenth Circuit Judge Allison Eid, a Thomas clerk who is less likely to be tapped because she shares a home state, Colorado, with Gorsuch.

If it's not the Ginsburg vacancy, then the field is wide open. In addition to the women, there's Third Circuit Judge Thomas Hardiman, who once drove a taxi and has become known for his Second Amendment opinions, was the runner-up the two last times, so perhaps the third time will be the charm.

Sixth Circuit Judge Raymond Kethledge is also a strong contender, although with a lower profile in Washington than many others. Eighth Circuit Judge Steve Colloton and (especially) Eleventh Circuit Judge William Pryor were considered before, but are now in their late 50s and have a more socially conservative profile so may be harder to confirm.

The Lee brothers are an intriguing duo. Although only 48, Mike Lee is the senior senator from Utah and one of the nerdiest policymakers on Capitol Hill (in a good way). Older brother Tom Lee is a justice on Utah's high court and a pioneer of the “corpus linguistics” approach to statutory interpretation. Both would be solid originalists.

Then there are two judges who have been on “extended” short lists: the Fifth Circuit's Don Willett and the Sixth Circuit's Amul Thapar. Willett became “Twitter laureate” when he was on the Texas Supreme Court and has made a name for himself defending economic liberty and constitutional structure. (Full disclosure: I once exchanged Constitution bowties with him.) Thapar, a favorite of home-state Kentucky Sen. Mitch McConnell, was Trump's very first circuit nominee and someone about whom I've written favorably. Both are personable, strong writers, and politically connected.

Finally, we have a pair of 45 year-old former Thomas clerks who have come on strong as scholarly and savvy jurists. Ho, one of my proposed list additions, succeeded Ted Cruz as solicitor general of Texas. He's gotten national attention for opinions on campaign finance and

the (non-)application of current employment-discrimination law to sexual orientation and gender identity. Having immigrated from Taiwan as a child, Ho would be the first Asian-American justice—as would Rao or Thapar.

Judge David Stras of the Eighth Circuit was the first Jew on the Minnesota Supreme Court. An affable former law professor who's written on a variety of legal subjects, Stras recently ruled that the First Amendment protects videographers from having to film a same-sex wedding, hewing closely to the line suggested by the Cato Institute in a brief we filed alongside professor Eugene Volokh.

In sum, it's hard to narrow down the favorites. A lot will depend on interviews with the White House counsel's office and the president. But there's an embarrassment of riches here. Regardless of who the eventual choice is, President Trump would be wise to update his judicial list and re-release it on the campaign trail.

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