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Inside Trump's quest to alter the judiciary

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The collapse of three of President Donald Trump's judicial nominations in the span of a week has embarrassed the White House, revealed weaknesses in its vetting process and threatened to cause Senate Republicans to apply more scrutiny to the president's picks.

In their push to fill scores of vacancies on federal circuit and district courts at the historic pace demanded by Trump, White House officials have overlooked vulnerabilities in the backgrounds of some nominees. Critics allege that White House counsel Donald McGahn, who is overseeing the process, has sacrificed traditional qualifications for ideological purity and youth.

But the downfalls of three nominees — Jeff Mateer, Matthew Petersen and Brett Talley — are also aberrations in what has been a quiet yet undeniable success for Trump: a year-long drive to permanently alter the judiciary by nominating and confirming conservative jurists to lifetime appointments on the federal bench.

The president has told advisers that he is focused on three main criteria: that his nominees be young (in most cases younger than 50, and preferably younger than 40), conservative and strict constitutionalists.

“He clearly understands that this is going to be one of his enduring legacies,” said Leonard Leo, a Trump adviser on judges and the executive vice president of the Federalist Society. “He is excited about how many more judges he's going to get to pick. He likes to know the statistics, the facts and figures.”

Typically when discussing potential nominees, Leo said, Trump asks one overarching question: “He'll say, ‘He's not weak, is he?’ ”

So far, Trump has nominated 59 people for federal judgeships. Among them, 19 have been confirmed by the Republican-controlled Senate: Justice Neil Gorsuch to the Supreme Court, 12 circuit court judges and six district court judges.

“President Trump's judicial appointments have been one of the most prominent accomplishments of the year, and for decades to come Justice Neil Gorsuch will put his mark on America's jurisprudence,” said Kellyanne Conway, counselor to the president.

Remaking the judiciary is arguably the most ideological project of Trump's presidency. The campaign to fill court vacancies has been led by McGahn, who has deep roots in the conservative movement, and he has a willing partner in Senate Majority Leader Mitch McConnell, R-Ky.

The push has support from conservative activists who helped propel Trump to victory in last year's election as well as other Republicans who are critical of the president in other areas.

“It’s one of the major pillars of a successful presidency, because it has an impact on the country for 30 or 40 years and it’s embraced by both economic conservatives and social conservatives, so it’s a win-win,” said Scott Reed, chief strategist for the U.S. Chamber of Commerce.

The effort has been marred by the three recent high-profile failures. Mateer was forced to withdraw when it was discovered he had said in 2015 that transgender children are part of “Satan’s plan.” And Talley had his nomination fall apart after he reportedly posted a defense of “the first KKK” in an online comment in 2011 and because he failed to disclose a conflict of interest: His wife, Ann Donaldson, works for McGahn as chief of staff in the White House Counsel’s Office.

Then there is Petersen, who also is close to McGahn, having worked with him on the Federal Election Commission. Petersen withdrew Dec. 18 after being publicly humiliated by a viral video showing him struggling to answer basic questions about legal procedure in his Senate confirmation hearing.

“McGahn got caught with his fingers in the jar trying to slip his buddies in there, but they’re playing for averages — so you got 12 done and missed on two. So what?” said one Republican strategist close to the White House, who spoke on the condition of anonymity to be candid.

White House officials said Talley’s and Petersen’s ties to McGahn are not the sole reasons they were nominated. Talley had an influential booster in Sen. Luther Strange, R-Ala., with whom he has worked, while Petersen was promoted by some conservative lawyers as a sensible addition to the U.S. District Court for the District of Columbia because of his expertise in election law.

This month’s trio of failures could alter the dynamic in the Senate, where many of Trump’s nominees have sailed through.

Neil Gorsuch, right, meets with Sen. Richard Blumenthal, D-Conn., on Feb. 8 when Gorsuch was President Trump’s nominee for the Supreme Court. (Bill O’Leary/Washington Post)

“I’ve heard some of my colleagues question whether the administration will make them walk the plank again for nominees who are so obviously and disastrously unqualified,” said Sen. Richard Blumenthal, D-Conn., who is on the Senate Judiciary Committee.

So far this year, four of Trump’s nominees have been judged by the standing committee of the American Bar Association to be “not qualified.” By comparison, no nominee received that rating from the ABA during President Barack Obama’s first two years in office. Trump’s aides have criticized the association’s process.

Nan Aron, president of the Alliance for Justice, a liberal advocacy group, said the failures should be “a wake-up call.”

“The fact that three now are out signifies, I think, something important about the cumulative impact of a string of wholly unsuitable judicial candidates,” Aron said. “Finally senators are saying, ‘Enough is enough.’ ”

Trump has also come under criticism for the lack of diversity among his nominees — who are overwhelmingly white and male.

While the White House has suffered from disorganization in some areas, the judicial nominee process has been relatively efficient and analogous to those in past administrations.

Trump's sister, Maryanne Trump Barry, is a senior judge on the U.S. Court of Appeals for the 3rd Circuit. But despite this, the president has given McGahn almost unilateral authority to run his nominations process.

McGahn and his staff curate lists of names that have been developed with input from Vice President Pence, Conway and what one adviser called the "conservative illuminati," including Leo, lawyer Chuck Cooper and some key GOP senators, such as McConnell and Sen. Tom Cotton of Arkansas. For instance, Pence strongly pushed for Amy Coney Barrett on the U.S. Court of Appeals for the 7th Circuit and Don Willett on the 5th Circuit; they were confirmed.

"It's been a machine," said Ilya Shapiro, a senior fellow at the Cato Institute, who has been helping McGahn identify nominees. "There's been a concerted push to find people with paper trails showing dedication and intellectual commitment to originalism and textualism, rather than simply someone who you think might be a loyal Republican or otherwise checks certain partisan boxes."

Many of the nominees were first identified during the 2016 campaign and transition. The White House plays a heavier hand in selecting circuit court nominees, because they represent regions of the country, but sometimes defers to home-state senators for recommendations on district court nominees.

McGahn took control of the process early on, when the West Wing was chaotic, but some other advisers have chafed at his top-down approach, which they say has led to avoidable errors and at times strained relations with some senators who feel cut out of the process.

Candidates visit the White House for interviews, which take place in the counsel's office and tend to last about an hour, according to officials. They are quizzed about legal statutes, criminal procedure and precedents, and their writings and career backgrounds are dissected. Working with a team of 20 or so, McGahn usually picks a couple of finalists for each vacancy and asks for Trump's sign-off at weekly meetings.

Sometimes Trump brings up names of people he has heard about or calls outside advisers like Leo to ask about particular candidates, but he largely assents to the recommendations of others. Critics accuse him of "outsourcing" the process to the Federalist Society, the Heritage Foundation and other conservative groups.

While McConnell and Trump, and McGahn and Trump, have clashed on other topics, the men have largely been simpatico on judges. Trump has told advisers that he has received more praise on judges than any other topic and has outdone his predecessors. In a recent meeting with Christian conservative activists, Trump praised McConnell for having blocked so many of Obama's nominees to preserve vacancies.

"I've got to hand it to him," the president quipped, according to someone in the room. "When I walked into the Oval Office on the first day, there were over 100 judgeships waiting for me."

Leo said Trump is acutely aware of how much his supporters care about judicial appointments. "He is engaged in a way that I would not have imagined, that is not typical of presidents," he said.

Blumenthal said that, much to his chagrin, Trump is "shifting the federal courts in seismic and lasting ways and shifting the ideological frame of the judicial branch."

McGahn has prioritized candidates in their 30s and 40s, calculating that they could hold their seats on the bench for decades.

“It’s not a knockout factor, but there’s a thumb on the scale for nominating younger people,” said John G. Malcolm, a vice president at the Heritage Foundation who advises the White House.

At the recent conservative activists meeting, Trump joked that friends had asked to become judges now that he was president, according to two people in the room. The president said he recommended them to his staff, but his aides tossed out their names.

The reason: They were too old.

“I had to tell them no,” Trump said of his friends, according to attendees.

The president then paused, laughed and offered a clarification: “Actually, I had someone else tell them no.”