



## Don't Fear the Clowns

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*This article is part of a weeklong series on President Trump's first year in office.*

If there's an ongoing, intractable meta-debate that characterizes the Trump era, it's the one in which the president's critics accuse one another of being too "distracted" by "shiny objects" to track the truly pernicious changes the administration is cooking up. In truly meta fashion, this debate can itself become a distraction, but it does at least serve to highlight the ways in which Donald Trump's tweets and hysterics can draw attention away from daily assaults on the environment, public education, and religious and ethnic minorities. In the world of the federal judiciary, it's easy to see that same dynamic at work.

For 10 minutes in December, the public was agog at the spectacle of Sen. John Kennedy of Louisiana, in his grits 'n' biscuits twang, shredding a Trump judicial pick to ribbons over his lack of courtroom experience. Kennedy's evisceration of federal district court nominee Matthew Spencer Petersen was a good show, as shows go, serving to highlight the ways in which some of Trump's judicial selections were unprepared, entitled, and rushed through the vetting process. Petersen withdrew his nomination not long after video of his abject performance went viral. The White House also pulled back two nominees: Jeff Mateer, who has referred to transgender children as a part of "Satan's plan," and 36-year-old Brett Talley, who has never tried a case and once defended the "original KKK."

The vanquishing of these clearly unqualified men could be seen as both a victory for Trump's opponents and a vindication of the notion that there should be some minimum competency standard for those we're putting on the bench for life. But Petersen, Mateer, and Talley are really best understood as shiny objects. It's been a mistake for the public and the press to focus so much attention on that handful of laughable nominations and pay very little attention to the smart, well-qualified judges who are actually poised to reshape the judiciary.

Trump won't destabilize the judicial branch by pushing through a few clownish nominees who'll scrape through a vetting process that includes no vetting. The danger will come from the likes of

Amul Thapar, newly confirmed to the 6<sup>th</sup> U.S. Circuit Court of Appeals; Judge Joan Larsen, also at the 6<sup>th</sup> Circuit; Allison Eid at the 10<sup>th</sup> Circuit; Don Willett and James Ho at the 5<sup>th</sup> Circuit; and Amy Coney Barrett at the 7<sup>th</sup> Circuit. Eid, Larsen, and Willett have all served as supreme court justices in their various states. Some served in vaunted positions at the Justice Department or in legal academia. While many were questioned about controversial stances at their hearings—Barrett, for instance, has raised questions about the precedential force of *Roe v. Wade*—they

These nominees are not jokes, and they are not cartoonish bumbler. They are highly effective and respected thinkers with agendas not unlike that of Trump's Supreme Court nominee Neil Gorsuch. They will create a judicial branch that is hostile to women's rights, workers' rights, voting rights, LGBTQ protections, and the environment. And they will do so capably and under the radar. We giggle at the Trump judges at our peril.

To be sure, the president will also put forward a boatload of partisans and hacks. In his eight years as president, none of Barack Obama's nominees were rated unqualified by the American Bar Association. Trump has had four nominees so tagged in a single year. But Trump came into office with more than 150 vacancies on the federal bench. That unqualified gaggle is just a drop in the judicial bucket.

Trump has shattered every previous presidential record when it comes to filling vacancies on the courts. The Senate has confirmed 23 of Trump's nominees, filling one Supreme Court seat, 12 circuit court seats, and 10 district court seats. By way of contrast, Obama filled a mere three circuit court seats in his first year in office.

On account of the logjam created by recalcitrant Senate Republicans at the end of the Obama presidency, there are a great many seats to fill. So long as the GOP holds the Senate, Trump is going to fill them all. The president's slate of nominees is, thus far, roughly 91 percent white and 81 percent male. (As the Cato Institute's Ilya Shapiro said recently, "If you're looking at originalists and textualists, there's just not that many ... females of color in that pool.") Most of Trump's nominees are consistently some mix of anti-choice, anti-gay rights, anti-minority, and pro-business. Their average age skews younger than we have previously seen. Many are younger than 50 and may serve for decades. And since there is little Democrats can do to stop the juggernaut, the focus settles on the KKK boosters.

All of this was perfectly predictable, if you consider that Trump carried a clear majority—56 percent to 41 percent—of those voters who ranked the composition of the Supreme Court as "the most important factor" in their decision. This segment of the electorate was immediately rewarded when a Supreme Court vacancy that had been held open for almost a year went to Neil Gorsuch, whose tenure has thus far been marked by aggressive questioning and opinion writing and a voting record more closely aligned with Clarence Thomas than John Roberts.

And Trump didn't merely deliver his supporters a Supreme Court justice. He also handed over virtually all of the vetting and wrangling of judicial nominees to the Heritage Foundation and the Federalist Society, groups that have openly sought to render the federal bench—in the words of Leonard Leo, the executive vice president of the Federalist Society—"unrecognizable." Speaking to the Federalist Society's annual meeting, White House counsel Don McGahn announced that

Trump had started with two lists: mainstream candidates who could be easily confirmed and prospects “too hot for prime time—the kind of people who make some people nervous.” The first list, McGahn joked, was pitched in the trash.

Given this administration’s unprecedented opportunity to stack the federal courts with experienced conservatives, it’s hard to understand how and why the Petersens and Mateers and Talley have been getting to the nomination phase in the first place. At least some of the fault for the truly unfit nominees evidently belongs to McGahn. Petersen is a member of the Federal Election Commission, where he worked with McGahn. Talley, meanwhile, is married to McGahn’s chief of staff, a fact he forgot to disclose to the Senate Judiciary Committee.

If the short, tumultuous tenure of Gorsuch at the high court has revealed anything, it’s that being a judge is a team sport, and also one that requires years of negotiations and good behavior. Grandstanders and bullies rarely fare well across the decades and their influence tends to be limited. Justice Antonin Scalia’s influence was limited at the high court as a result of a lifetime of throwing punches. Gorsuch may or may not learn the lesson about reining in the eye-rolling and condescension.

Similarly, if Trump puts a handful of incompetents up, they will not necessarily achieve massive changes. But picking steady, reliable team players dedicated to curbing women’s reproductive freedom, worker protections, and civil rights will have profound effects. These are the jurists to watch, and also the jurists to fear.