



The White House is admitting defeat on two of Trump's most controversial judicial nominees

Andrew Prokop

December 14, 2017

The White House threw in the towel on two of President Donald Trump's most controversial judicial nominees this week, telling reporters for NPR and Politico that nominations of Brett Talley and Jeff Mateer to district court judgeships are dead.

Both nominations had proved too much for some Senate Republicans to stomach. Talley combined inexperience and lack of qualifications (he'd never tried a case before and only practiced law for three years) with a brazen conflict of interest (he didn't tell the Senate that his wife is chief of staff to Trump's White House Counsel). Mateer, meanwhile, had described transgender children as evidence of "how Satan's plan is working" in a 2015 speech.

In the end, even Senate Judiciary Committee Chair Chuck Grassley (R-IA) — usually a reliable Trump supporter — saw the writing on the wall, and urged the White House to give up on both Talley and Mateer. They did so.

Despite these two defeats, the bigger picture is that Trump has been fairly successful at getting several staunch conservatives confirmed to lifetime judicial posts so far in his term — and even at convincing some key Democratic senators to let his picks in their respective states move forward.

However, while he's making an impact, and has the potential to make even more of one in the coming years, some on both sides of the aisle are exaggerating just how dramatic the change has been so far.

Republican leaders are bragging about their accomplishments to please conservative activists ("There has never been anything like what we've been able to do together with judges," Trump has said), while some of the left are bemoaning a "rightwing takeover of the US court system."

The reality of what's happened is more complex.

Trump's court confirmations so far, by the numbers

As of Thursday morning, President Trump had gotten one Supreme Court justice, 11 appellate court judges (with a vote on a 12th slated for Thursday afternoon), and five district court nominees confirmed by the Senate so far this year.

These new judges will be on the courts for a long time — their average age is around 50. If they want to, they could serve for life. (In practice, many eventually retire or, after age 65, take “senior status,” which lets their seats be filled by new appointees.)

- **Supreme Court Justice Neil Gorsuch’s** confirmation was obviously tremendously important and has been **much-discussed already**. Its main impact, though, was to restore the status quo that existed on the Supreme Court before Antonin Scalia’s death last year, rather than to send the Court into a new direction. (That may happen with Trump’s next appointee, should another vacancy arise.)
- **The five district court judge confirmations** are just a drop in the bucket — **677 of these positions exist**. (Trump has made around 30 more nominations to other vacancies here, but the Senate hasn’t confirmed them yet.)
- **The 11 appellate (or circuit) court judge confirmations**, though, are where the real action is. These are the federal courts that are just below the Supreme Court. They “wield profound influence over Americans’ lives, getting the final word on about 60,000 cases a year that are not among the roughly 80 the Supreme Court hears,” the **New York Times’s Charlie Savage has written**.

In recent months, Senate Majority Leader Mitch McConnell has made holding votes on Trump’s appellate nominees one of his top priorities. And as the **Washington Examiner’s Ryan Lovelace points out**, Trump has already tied the record for appeals court confirmations for a president’s first year in office, and he’s expected to outright break it with another confirmation this week.

Trump’s picks for these posts generally appear to be hard-line conservatives — even more so than past Republican presidents’ judges. “This is a stronger (and younger) crop of nominees than even George W. Bush managed,” **Ilya Shapiro of the Cato Institute recently gushed**. “There is little concern of anyone moving left or being a “squish.”” (The new nominees are also **very white and male**.)

Both of these — the speed of the confirmations, and the further-right ideology of the nominees — are newly possible because of a 2013 Senate rules change. Before then, a 60-vote supermajority was necessary to move these nominations through the Senate. But Democrats, who were in the majority at the time, changed the rules because Republicans were blocking some of President Obama’s appellate court picks.

Now, it’s possible to confirm these nominees with a simple majority. That means picking moderates who can win bipartisan backing is less important, so long as the president can keep his own party in the Senate unified behind him.

But let’s keep things in context

All of this might make you think the Trump White House and the Republican Senate has made a stunningly successful push that has already permanently transformed the appeals courts. (In commentary from both liberals and conservatives, words like **“unprecedented”** and **“extraordinary”** are often used).

That indeed may take shape over the next few years — particularly if Republicans hold onto the Senate in the 2018 elections. What’s actually happened so far, though, is less dramatic.

Take the appellate courts. While it is true that Trump will break a “record” by getting at least 12 appellate judges confirmed this year, keep in mind that there are 179 appellate court judgeships overall.

Furthermore, Trump has not yet managed to tip the balance on even a single appellate court from majority-Democratic appointees to majority-Republican appointees — that is, his changes to particular courts have been rather marginal so far. Indeed, most of his confirmed appellate judges have been for courts that oversee conservative areas of the country and that already had conservative reputations — namely, the 5th, 6th, and 8th Circuits. (More on why that is in a minute.)

The broader context is that as quickly as the White House has tried to move on judges, there are still two important impediments to what they can do here.

First, though Senate rules now allow these nominees to be pushed through on a party-line vote, that process still eats up a lot of valuable Senate floor time. If any senators object, the nominee has to survive a “cloture” vote from the full Senate. Then it takes another 30 hours to move to a final vote.

The problem is that the Senate can’t have more than a few things on the floor at once. So floor time is a scarce and precious commodity. And McConnell has to juggle many different priorities — considering legislation and amendments, confirming Trump’s executive branch nominees, and confirming judges. (Earlier this year, McConnell **got an earful from conservative groups** complaining he wasn’t spending enough floor time on judges.)

The death of the blue slip has been greatly exaggerated

The other major constraint on Trump here is the Senate Judiciary Committee is still for the most part adhering to the **blue slip tradition** — a custom in which the committee will block hearings on a judicial nominee if either senator from that nominee’s home state objects (by refusing to return a “blue slip” indicating approval of holding hearings on that nominee).

Though it’s geographically limited, the blue slip is hugely important, because it’s the one remaining way Democrats in the Senate minority can block Trump’s judicial nominees. Indeed, the **Times’ Charlie Savage reported** that blue slips have shaped Trump’s entire judicial nomination strategy:

- The White House has nominated many judges in red states represented by Republican senators, because blue slips from them are easy to get. (This is why so many of the nominees he’s confirmed so far are in deep red territory.)
- Conversely, Trump hasn’t even bothered to nominate many judges in blue states represented by liberal Democratic senators — primarily because it would be so hard to get blue slips from those senators.
- And they’ve tried to work with Democratic senators who have reputations as moderates, or who represent states Trump won, in hopes of getting blue slips from them for judicial nominees in their respective states.

And indeed, the White House has had some success — Democratic senators in Michigan, Pennsylvania, Indiana, North Dakota, and Colorado have all returned blue slips for Trump

appellate judge picks from their respective states whom they deemed qualified enough, and who have since been confirmed.

There were two recent cases in which Grassley weakened the blue slip somewhat that have gotten a lot of attention. He **defied the tradition** by moving forward both on an appellate court nominee from Minnesota whom Sen. Al Franken (D-MN) wanted blocked, and on an appellate court nominee from Louisiana for whom Sen. John Kennedy (R-LA) hadn't returned a blue slip.

But Kennedy's objections didn't last long — he **quickly came around** and announced he'd back the nominee in question. And the Minnesota nominee, David Stras, wasn't a purely partisan matter, since Franken's fellow Minnesota senator Amy Klobuchar **did return her blue slip** for him.

Now, the blue slip tradition of course could be further weakened next year. Controversies over a Wisconsin nominee **Sen. Tammy Baldwin (D) wants blocked**, and an Oregon nominee **both Democratic senators from that state want blocked**, could lie ahead. But so far this year, the blue slip has been a tremendously important constraint on how much Trump can change the courts.

So while Trump is making a real impact on the judiciary, and has the potential to make a far bigger one in the coming years, what's happened so far is less dramatic than it's sometimes portrayed. Transforming the courts, after all, can't happen overnight.