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As high court term begins, Trump reshapes federal judiciary from top to bottom

Henry Gass

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Amul Thapar's first opinion as a federal circuit court judge didn't exactly make headlines when it was published in August.

An Ohio man sued an online retailer, claiming he'd been misled over the \$27 price of portable speakers. Writing for a unanimous panel of three judges on the US Sixth Circuit Court of Appeals, Judge Thapar disagreed, siding with the retailer.

Nonetheless, the long-term implications of Thapar's ascension to the Sixth Circuit could be significant. He is the first of potentially hundreds of conservative judges President Trump is expected to place in lifetime appointments on federal courts. Eight months into a presidency so far short on legislative victories, it is the profile of nominees the president is nominating, and the pace with which the Republican-controlled Senate is confirming them, that has conservatives cheering the loudest.

"I've generally not been at all shy of being critical of this administration," says Jonathan Adler, a professor at Case Western Reserve University School of Law in Cleveland, "but when you look at this, they are steaming ahead with putting forward slates of highly-qualified nominees on a regular basis."

Mr. Trump has nominated 58 people for federal judgeships, and, as of Sept. 28, the Senate had confirmed seven of them, far outpacing his immediate predecessors. While some of the nominees have raised concerns because of past controversies – including one who described transgender children as part of "Satan's plan," and another who called Justice Anthony Kennedy a "judicial prostitute" – what is winning Trump plaudits on the right is their conservative credentials. Specifically, an adherence to originalism, a largely conservative philosophy defined by interpreting the US Constitution as the Framers would have intended.

In other words, they all fit the mold of Neil Gorsuch, a committed originalist, whose confirmation to the Supreme Court in April is arguably Trump's greatest achievement to date. Indeed, the "Trump effect" on American law will begin to be felt in earnest during the high court's term that begins Monday. With Justice Gorsuch, a 5-to-4 conservative majority has been restored on the court after the death of Justice Antonin Scalia, and this term is likely to deliver conservatives some big wins on issues from religious freedom and partisan gerrymandering to public sector unions and the travel ban.

When describing the new term, Justice Ruth Bader Ginsburg predicted it would be "monumental."

The most federal appointments in 40 years

But with his lower court appointments, legal scholars say, Trump has the ability to shape American jurisprudence in an even broader and more durable way.

Thanks in part to obstruction by Senate Republicans – in addition to Merrick Garland, former-President Barack Obama’s pick to replace Justice Scalia, Senate Republicans also blocked a host of lower court nominees, including the Sixth Circuit seat Thapar now occupies – Mr. Trump entered office with twice as many judicial vacancies as Obama. Combining those with older judges who could accept “senior status,” a kind of semi-retirement, Trump could appoint more federal judges than any president in the past four decades.

While these appointments may not attract as much attention as a Supreme Court pick, they are arguably more important, experts say: Collectively, they hear tens of thousands of cases each year, while the Supreme Court hears less than a hundred.

“Relatively few of their decisions are reviewed on appeal. For most litigants in the federal system the federal trial judge is *the* judge,” says Judith Resnik, a professor at Yale Law School in New Haven, Conn. “Their powers are enormous.”

Federal trial judges, she adds, “make findings of fact and conclusions of law, they control the timing and the pace of litigation, and their wisdom and their kindness are essential to the well-functioning judiciary.”

Only one of 11 federal appeals courts had a Democratic majority when Mr. Obama entered office; and when he left nine of them did. One of those courts, the Fourth Circuit, made a decisive ruling against Trump's travel ban earlier this year.

The lower federal courts, particularly appeals courts, are also an increasingly popular pool from which to draw Supreme Court nominees. For decades, conservative groups such as the Federalist Society have been building up a network of legal scholars and jurists committed to originalism. With a membership upward of 70,000 attorneys and law students, the organization gained a reputation as a “conservative pipeline” to the high court.

Many of Trump’s judicial nominees so far are Federalist Society members. Several others – including Thapar – were included in the list of 21 potential Supreme Court nominees he released during the campaign. The campaign drew up the list last year with heavy consultation from conservative groups the Heritage Foundation and the Federalist Society.

Conservatives are more enthused by Trump’s judicial nominations than other recent Republican presidents in large part because of the endorsement from groups like the Heritage Foundation and Federalist Society, who have been frustrated by Republican judicial appointments drifting to the ideological center and left during their careers.

The nominees so far “are all highly qualified, highly credentialed ... committed conservatives,” says Elizabeth Slattery, a legal fellow at the Heritage Foundation in Washington.

“It’s always hard to tell what a nominee’s going to be like once they’re confirmed,” she adds. “But I can tell you from the nominees President Trump has made so far that many of them are cut from the same cloth as Neil Gorsuch, Clarence Thomas, and Antonin Scalia.”

Unlike the George W. Bush administration, the Trump administration seems to be looking to nominate not just conservatives, but originalists specifically, says Ilya Shapiro, a senior fellow at the libertarian Cato Institute.

“They don’t want to just avoid [nominees] moving to the left in office, but also want to avoid the John Roberts scenario, who was a loyal Republican and served the administration, but who is perhaps too judicially restrained,” he adds. “There’s definitely been an effort to identify people who are seriously committed to doctrines and modes of analysis rather than just being seen as conservatives or Republicans.”

Too extreme for the bench?

In the eyes of critics, however, many of Trump’s nominees are too extreme to be worthy of confirmation. In particular liberal groups and Senate Democrats have locked onto controversial statements some nominees have made as reasons to block their confirmation.

- Damien Schiff, a lawyer with the conservative Pacific Legal Foundation nominated for a seat on the US Court of Federal Claims, described Justice Kennedy in [a 2007 blog post](#) as a “judicial prostitute,” and also wrote that he disagrees with a landmark ruling that decriminalized sodomy;
- Jeff Mateer, a top lawyer in the Texas attorney general’s office and nominated to the US District Court for the Eastern District of Texas, once described transgender children as part of “Satan’s plan”;
- John Bush, a Kentucky lawyer confirmed to the Sixth Circuit in July, wrote controversial posts on an anonymous blog that disparaged gay rights and compared the *Roe v. Wade* decision legalizing abortion to the *Dred Scott* decision that affirmed the right to own slaves;
- Amy Coney Barrett, a professor at Notre Dame Law School and a nominee for the US Seventh Circuit Court of Appeals, has been scrutinized by The New York Times for being a member of the oath-bound religious cult People of Praise.

“There’s thousands of eminently qualified Republican lawyers who would be outstanding judges. That’s not who this president is nominating,” says Dan Goldberg, legal director of the liberal Alliance for Justice. “Instead he seems to be seeking out the most extreme, most polarizing, most ideologically conservative jurists possible.”

“Whether our civil rights laws are properly enforced, worker protection [laws], protections for the environment, protections for consumers, protections for investors,” he adds, “much of this will be decided by the lower court judges the president is putting in place.”

The Federal Claims court for example is the court that heard challenges to the “don’t ask don’t tell” ban on homosexual service members. It would also [likely be the court](#) where challenges to a transgender military ban would play out, experts say.

How much weight to private statements?

When it comes to the judicial confirmation process, some experts say, a nominee’s private statements should not be given much, if any, weight compared to their qualifications and legal writing – particularly in the social media age.

“It would be sad for the country if any lawyer or private attorney or legal academic engaged in Twitter or social media were disqualified from the bench from any intemperate remark they made. I think that would cover a wide swath of people across the ideological spectrum,” says Professor Adler. “The question is what conduct can we expect as a judge.”

Other legal experts disagree, however.

“Qualifications include views, and views include what people have written, whether it’s in published articles or blog posts,” says Professor Resnik. “Federal judges are called upon all the time to make rapid-order decisions. What they say quickly as well as what they say slowly counts.”

Furthermore, while there are a large number of vacancies in the federal court system, caseloads as a whole have also been gradually declining for a decade. So while there should be an urgency to fill vacancies in the busiest courts, Resnick says, that shouldn’t be the case for every vacancy.

“We’re looking for patience, for kindness, for thoughtfulness, for wisdom, for generosity of spirit, and for understanding the conflicting needs of the different kinds of litigants that come before the court,” she continues. “A [vacancy] crisis shouldn’t be the justification for giving anyone life tenure who doesn’t have the qualities of fair-mindedness and open-mindedness that are requisite for being a good judge.”