

Mother Jones

How Donald Trump Is Remaking the Federal Courts in His Own Image

The president's judicial nominees have been notably white, male, and conservative.

[Kate Harloe](#)

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When Donald Trump took office, he inherited more than 100 federal judicial vacancies. It was a nearly unprecedented number, roughly twice the number that President Barack Obama inherited in 2009. Trump has moved quickly to fill these lifetime appointments with a slate of the most conservative and least diverse nominations since Reagan.

While Trump's legislative efforts can be repealed and his executive orders undone, federal judges are [rarely removed](#) from the bench. By working to install judges with remarkable speed, Trump and his grateful conservative allies are creating a durable legacy that will last long beyond his administration. And as the minority party, Democrats in Congress have few tools to oppose him aside from a Senate tradition allowing lawmakers to block certain nominations affecting their home states.

Beyond new Supreme Court Justice Neil Gorsuch, Trump has already nominated judges to more than half the vacancies, putting forward an astonishing 18 names for federal appellate courts and 40 more for the district courts. Of those, 12 have been confirmed. By this time in Obama's first year, only two circuit court judge and four district judges had been confirmed.

Trump's nominees are, so far, roughly 90 percent white and 80 percent male. "You're going radically backward, even further back than George W. Bush in terms of diversity," says Chris Kang, a former Obama White House lawyer who oversaw judicial selections for four years. "The Supreme Court only hears 80 cases a year. For 99 percent of cases, the lower courts, whether the federal district trial level or court of appeals, has the last say and is the last stop," says Daniel Goldberg of the Alliance for Justice, a liberal legal advocacy organization. "Whether they have a fair day in court comes down to who these lower-court judges are."

Trump's nominees are less diverse than judges appointed by every administration dating back to Reagan

While the average age of current US district court and circuit judges at the time of their appointment has been about 50 years old, according to [a 2017 congressional report](#), Trump's nominees for these lifetime appointments skew slightly younger.

"We're going to have great judges, conservative, all picked by the Federalist Society," Trump promised during a June 2016 interview on Breitbart News radio. According to data compiled by American Bridge in September, Trump has proved true to his word. Nearly half of his nominees

have been drawn from the 65,000 members of the influential organization of conservative lawyers, students, and scholars, or have participated in its events or publications.

“I’m sure that some of these picks any Republican president would pick,” says Kang. “But it’s remarkable how clear they are about where this is being sourced...to ideological partisan interest groups,” he continues, pointing to the Federalist Society. “It’s so brazen.”

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In May, Leonard Leo, the executive vice president of the Federalist Society who has been deeply involved in Trump’s selection of nominees, gave a speech at an Acton Institute event, boasting of his organization’s role in transforming the judiciary, and leaving no doubt about the change he sought: “I would love to see the courts unrecognizable,” [he said](#).

While the Federalist Society has been given an unprecedented role in judicial selection, the American Bar Association’s Standing Committee on the Federal Judiciary has largely been dismissed. For almost 50 years dating back to the Eisenhower administration, the ABA provided administrations of both parties an independent evaluation of prospective nominees before they were formally named. George W. Bush’s administration rolled back the practice in 2001, pleasing conservatives who argued the ABA was a liberal-leaning interest group. (“It would be particularly inappropriate, in our view, to grant a preferential...treatment to a group such as the ABA,” Alberto R. Gonzales, then White House Counsel, [wrote in a 2001 letter](#).) Though the practice was reinstated under Obama, in March of 2017 White House Counsel [Don McGahn](#) sent a letter [to the Bar Association](#), turning it away in terms similar to Gonzales’. The White House did “not intend to give any professional organizations special access to our nominees,” McGahn wrote.

“These folks are on a mission. Their mission is not neutrality, their mission is not independence, their mission is a takeover,” warns Kristine Lucius, executive vice president of The Leadership Conference on Civil and Human Rights.

Early in her career, Lucius worked in the Clinton Justice Department researching potential judicial nominees. She went on to work for the Senate Judiciary Committee for 15 years. She describes Trump’s nominees as “the most extreme I have seen.”

One nominee who has drawn criticism from liberal groups is John K. Bush. The president of his local chapter of the Federalist Society, Bush mostly worked in private practice before being confirmed to the 6th Circuit Court of Appeals in July. For nearly a decade, Bush was a prolific blogger, writing more than 400 pseudonymous posts. One called abortion one of the “two greatest tragedies in our country,” the other being slavery. In another, he wrote about passport application forms that included same-sex parents: “Henceforth, the application will ask for ‘Mother or Parent 1’ and ‘Father or Parent 2.’ I suppose that’s better than ‘Thing One’ or ‘Thing Two.’”

Jeff Mateer, first assistant attorney general of Texas and a Trump nominee for a judgeship in the state’s Eastern District, has defended gay conversion therapy and warned that the Supreme

Court's decision legalizing same-sex marriage could lead to polygamy and bestiality. In a 2015 speech, [he said](#) transgender children are proof that "Satan's plan is working."

[Thomas Farr](#) is a nominee for a judgeship in the Eastern District of North Carolina—a court that has not, as [the NAACP Legal Defense Fund points out](#), ever had a black judge in its entire 143 year history.* According to a biography by [Alliance for Justice](#), Farr, who is white, "has been the go-to private attorney for North Carolina Republicans in their efforts to dilute African-American votes and implement laws aimed at making it more difficult for communities of color to vote." Farr [represented](#) the state of North Carolina in its effort to defend an election law that the 4th Circuit later determined "target[ed] African Americans with almost surgical precision." When the state's new governor and attorney general refused to defend the law any further, Farr, a member of the Federalist Society since 1985, continued the state's appeal to the Supreme Court, [arguing that](#) the law was "lenient" and "sensible." (The court declined to hear the case.)

In September, Trump nominated Gregory Katsas to fill a vacancy on the DC Court of Appeals. For the previous nine months, Katsas had served in the White House as a deputy assistant and deputy counsel to the president, advising Trump on issues including the travel ban and DACA and, according to [BuzzFeed](#), providing "legal advice on a few discrete legal questions" regarding the special counsel's Russia investigation. Katsas refused to answer questions about the "nature of that legal advice" in his confirmation hearing. A member of the Federalist Society who, according to the Alliance for Justice, has spoken at least 53 times at organization events, Katsas is a staunch advocate of expansive executive powers and has drawn questions about whether he could fairly adjudicate cases involving his former administration bosses.

One Trump nominee defended a voting law overturned for "target[ing] African Americans with almost surgical precision."

Other Trump nominees include people who have been members of, provided legal support to, or had other noteworthy links to the National Rifle Association, the Republican National Lawyers Association, the US Chamber Litigation Center, and a variety of pro-life organizations and local Republican parties.

While there are almost no restrictions on whom the president can nominate as a judge, candidates for vacancies in district courts are often first identified by home state senators of the president's own party. It's [also typical](#) for the president to negotiate with both home state senators, regardless of their party, before selecting a nominee. Already, Trump has broken with this practice [by going around](#) existing nomination processes and selection panels in Democratic-leaning states. "This administration, unlike the Bush administration, is not consulting with home state senators," said the Leadership Conference's Lucius. "That's another kind of norm, a check and balance, that is breaking down."

That norm is closely tied to a procedural tradition known as the "blue-slip process." Dating back [to 1917](#), the system requires both home state senators to return a signed blue slip approving a potential district court nominee before the Senate Judiciary Committee will move forward with the nomination. It was designed to ensure that the president, no matter the party, takes time to negotiate with senators about nominees that will affect their states. (Seats on appellate courts

have customarily been divided among the states they oversee, so blue slips to fill appellate vacancies must be returned by the senators from the departed judge's home state.)

Blue slips have played a central role in a conflict in Oregon, where the Trump administration [nominated Ryan Bounds](#), an assistant United States attorney in the state, to the district court without first clearing his nomination with a bipartisan judicial selection committee overseen by Democratic Sens. Jeff Merkley and Ron Wyden. The senators [responded the next day](#), refusing to go along with the nomination. "As we have made clear, we do not intend to return our blue slips for Ryan Bounds," they wrote, "or any other nominee who has not been selected through our judicial selection process."

A similar situation arose in Wisconsin, where Trump put forward a nominee who failed to win the support of the state's bipartisan panel. Sen. Tammy Baldwin, a Democrat, has yet to return her blue slip. Similar conflicts have been set off between the White House and Democratic senators from [Minnesota](#), Michigan, and Colorado.

The White House declined to answer *Mother Jones'* questions about its nominations, but it provided a statement assailing Senate Democrats for using "petty political tactics to delay and obstruct" judicial nominations: "The President has delivered on his promise to nominate highly qualified judges, starting with Justice Gorsuch. Now, it is time to confirm the outstanding nominees because it's what the American people deserve."

But the blue slip's status as long-standing Senate tradition—not law—means it wouldn't be hard for impatient conservatives to do away with.

Senate Majority Leader Mitch McConnell, who, when the Senate was controlled by Democrats at the outset of the Obama administration, [signed a letter in support](#) of the process, has recently complained that blue slips have been used to "blackball."

In [an October interview](#) with the *Weekly Standard*, he went as far as to say that blue slips would no longer be used, before his spokesman Don Stewart walked back the statement, [telling the Huffington Post](#) that McConnell was sharing his own "position on the matter" and not announcing a formal change.

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Republicans used blue slips to block judges 18 times under Obama—but that number doesn't convey the degree to which Republicans used the leverage they provided to obstruct the former president's judicial nominees, said both Kang and Lucius. "The [Obama] White House tried very hard to negotiate with Republican senators to find consensus nominees, and not every Republican senator engaged in good faith," said Kang, recounting [several occasions](#) where prenomination negotiations dragged on or caused the Obama White House to abandon nominees they viewed as compromise picks. The delays contributed to the huge number of vacancies that Trump inherited, Kang says, pointing out that Obama was able to confirm just 22 judges in the last two years of his presidency—"the fewest since President Truman."

The final decision on whether to break with blue slips rests with Sen. Chuck Grassley (R-Iowa), the chair of the Senate's Judiciary Committee. In 2015, Grassley [wrote an op-ed](#) saying he intended to "honor" them, describing them as a "tradition...designed to encourage outstanding nominees and consensus."

Grassley has so far held to his word, but right-leaning activists and Republican senators like Tom Cotton (R-Ark.) and Jeff Flake (R-AZ), have advocated a change.

In August, the Judicial Crisis Network, [with the help of several other conservative groups](#) including the Tea Party Patriots and Concerned Women for America, launched a \$500,000 [ad campaign](#) opposing Democrats' "abuse" of this tradition. Carrie Severino, the organization's chief counsel, has [argued that](#) Democrats are "abusing Senate rules" by using blue slips to "obstruct President Trump's extraordinary judicial nominees."

With Trump's legislative agenda largely floundering, conservative activists have been cheered by his administration's quick work in the courts, and its potential to hand right-leaning jurists the power to decide major constitutional questions long after Trump is gone.

"Trump knows that one of the most powerful things to unite his base and Republican senators who are not fans of his is to talk about this takeover of the third branch," says Lucius.