Trump's Takeover of the Courts

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ARTICLE

TRUMP’S TAKEOVER OF THE COURTS

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I. INTRODUCTION

Courts administer justice only when fair judges sit on the bench—judges who truly believe in and recognize the words inscribed above the US Supreme Court—“Equal Justice Under Law.” Federal courts have acknowledged and protected our civil and human rights over time: ending legal apartheid in education in 1954;1 recognizing marriage equality for interra-

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CIAL COUPLES IN 19682 AND FOR LGBTQ PERSONS IN 2015;3 RECOGNIZING THE RIGHT TO PRIVACY IN 1965;4 AND UPHOLDING THE RIGHT TO BODILY AUTONOMY AND ABORTION IN 1973.5 FOR THESE FUNDAMENTAL RIGHTS AND MORE, THE ROLE OF FEDERAL COURTS IS SIGNIFICANT.

HOWEVER, OUR COURTS HAVE NOT ALWAYS PROTECTED AND RECOGNIZED THE RIGHTS OF ALL PEOPLE. TWO NOTORIOUS DECISIONS, PLESSY V. FERGUSON6 AND KOREMATSU V. UNITED STATES,7 DEMONSTRATE HOW THE FEDERAL COURTS CAN PROTECT THE INTERESTS OF THE POWERFUL AND MAINTAIN SYSTEMS OF INJUSTICE UNDER THE GUISE OF PROMOTING THE “RULE OF LAW.” THOUGH PLESSY AND KOREMATSU ARE NEARLY UNIVERSALLY ACCEPTED AS STAINS ON OUR COURTS’ HISTORY, ROLLBACKS OF OUR CIVIL AND HUMAN RIGHTS CONTINUE TODAY. THE COURTS HAVE BEEN TRANSFORMED INTO A TOOL TO THREATEN CIVIL RIGHTS AND OUR DEMOCRATIC SAFEGUARDS. DECISIONS LIKE SHELBY COUNTY V. HOLDER,8 WHICH GUTTED THE VOTING RIGHTS ACT, AND TRUMP V. HAWAII,9 WHICH Upheld President Trump’s Muslim ban, ARE PRODUCTS OF AN INTENTIONAL STRATEGY TO REVERSE PROGRESS TOWARD EQUAL JUSTICE UNDER LAW AND ROB COMMUNITIES OF COLOR OF POWER. THE STRATEGY IS TWO-PRUNGED: PURSUE LITIGATION AND STACK THE COURTS WITH IDEOLOGUES. THIS ENSURES THAT ATTORNEYS ARGUING ANTI-CIVIL RIGHTS CASES ARE MET WITH SYMPATHETIC JUDGES IN COURT.

WHO SERVES ON THE BENCH MATTERS, ESPECIALLY FOR CIVIL AND HUMAN RIGHTS. THE TRUMP ADMINISTRATION, AIDED BY SENATE REPUBLICAN LEADER MITCH MCCONNELL, MADE TRANSFORMING THE COURTS A PRIORITY BECAUSE IT IS PERHAPS THE MOST ENDURING AND DAMAGING STRATEGY FOR CEMENTING THEIR POLITICAL AGENDA. THIS ARTICLE REVIEWS THE TRUMP ADMINISTRATION’S EFFORTS TO ALIGN WITH SENATE REPUBLICANS AND STACK THE FEDERAL JUDICIARY WITH BIASED AND UNQUALIFIED JUDGES. IN PARTICULAR, THIS ARTICLE EXPLORSES: (1) TRUMP’S FIXATION ON THE FEDERAL JUDICIARY; (2) TRUMP AND SENATE REPUBLICANS’ CAMPAIGN TO BREAK THE JUDICIAL SELECTION AND NOMINATIONS PROCESS; AND (3) HOW IDEOLOGICAL AND EXTREME NOMINEES ARE BEING USED TO TRANSFORM THE COURTS TO ROLL BACK VITAL CIVIL AND HUMAN RIGHTS.

II. TRUMP’S FIXATION ON THE FEDERAL JUDICIARY10

President Trump, who is constitutionally charged with nominating federal judges, openly flouts constitutional norms and laws, and condemns

10. Note: The information presented in this article is accurate as of September 2019. While the trends in the rapid confirmation of judges and the types of judicial nominees we have seen since this remain consistent, a number of additional lifetime nominees have been confirmed,
court decisions. Courts have been a backstop against some of the Trump administration’s most egregious, racist, and xenophobic policies. Lower courts have, for example, ruled the Muslim ban illegal and unconstitutional,11 protected sanctuary cities,12 and refused to allow a citizenship question on the 2020 census form.13 In response, the president regularly takes to Twitter and lashes out with his disdain for our judiciary—and the judges who rule against his administration and his personal financial interests.

When Judge James Robart in the US District Court for the Western District of Washington issued a temporary restraining order blocking Trump’s discriminatory Muslim ban,14 he blamed the judge for any potential future security issues. He tweeted, “Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!”15 Then, when Judge Jon Tigar in the US District Court for the Northern District of California issued a temporary restraining order that blocked the administration from prohibiting people from seeking asylum,16 Trump once again took to Twitter, writing that the Ninth Circuit is out of control, has a horrible reputation . . . They know nothing about [security and safety at the border] and are making our Country [sic] unsafe. Our great Law Enforcement [sic] professionals MUST BE ALLOWED TO DO THEIR JOB! If not there will be only bedlam, chaos, injury, and death. We want the Constitution as written!”17

And before taking office, then-candidate Trump attacked Judge Gonzalo P. Curiel of the US District Court for the Southern District of California, who was assigned the case of alleged fraud by Trump University.18 While on the campaign trail, Trump claimed the Indiana-born judge was a “hater” be-

numerous concerning lawsuits have been filed and/or decided, the president has personally gone after additional federal judges, the president was impeached for demanding interference in our elections, and many other relevant events that impact our federal judiciary have occurred.

11. See, e.g., Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017).
cause his “Mexican heritage” made it so Judge Curiel had “an inherent conflict of interest” given Trump’s promise of “building a wall.” By assailing the character and dignity of judges—even ascribing future threats to judges’ decisions—Trump aims to discredit and delegitimize the entire judicial system as an independent and equal branch of our government.

Additionally, Trump is actively working to change the outcomes in cases like these by installing his own judges. Already, the Senate has confirmed 152 lifetime judges nominated by the president. In just two and a half years in office, the president has nominated two of the nine Supreme Court justices and transformed nearly 25 percent of seats on the US circuit courts of appeals. Trump and Vice President Mike Pence laud themselves for these appointments in ways previous presidents bragged about their policy changes, and the Senate majority leader, Kentucky Republican Mitch McConnell, brags about this when he is criticized for his stunning lack of legislative action.

Trump, Pence, McConnell, and their allies have confidence that the judges they choose to serve in lifetime positions will be able to achieve through the courts what they cannot do legislatively. Those they nominate for judgeships are selected by a few in the small legal conservative community because their records align with the Republican party’s agenda. Their work to advance a partisan agenda through the courts has been in the making for decades, and their current operations to fundamentally alter our courts are incredibly well-funded by “the wealthy donor class.”

While vying for the Republican presidential nomination, Trump desperately tried to assert some bona fides to make more of the “establishment” Republican party comfortable. To do so, he appealed to the Republican base’s cultivated interest in the courts. In May 2016, Trump

19. Id.
26. Senator Sheldon Whitehouse (D-R.I.) has written and spoken extensively on this topic. Many of these writings are available at https://medium.com/captured-court.
released a list of potential nominations for the very Supreme Court seat that Chief Judge Merrick Garland had been nominated to fill.\textsuperscript{27} This list was compiled by the Federalist Society and Heritage Foundation—extreme right-wing institutions that have been masterminding the takeover of our courts to roll back vital civil rights and protections.\textsuperscript{28} Trump promised that his nominees would be in the mold of Justice Antonin Scalia and that they would eviscerate \textit{Roe v. Wade}, devastate the Affordable Care Act, and strike down any gun safety law.\textsuperscript{29}

As Trump’s first White House counsel, Don McGahn, bragged, the Federalist Society and Heritage Foundation nominees were “too hot for prime time . . . the kind of people that would make some people nervous.”\textsuperscript{30} McGahn and others were assured that they could build a list of non-mainstream potential nominees because “Leader McConnell is going to get it done.”\textsuperscript{31} Ultimately, the shortlist assuaged many in the Republican party’s fears about Trump. At least in this regard, it appeared Trump might take direction from those entrenched in institutions whose purpose is to concentrate conservative power for the benefit of the Republican party and the wealthy.\textsuperscript{32}

Since winning the presidency, Trump has delivered on his promise to his base to stack the courts with those who serve his agenda. During his

\begin{itemize}
\item \textsuperscript{31} \textit{Id.}
\end{itemize}
time in office, by virtue of the more than 150 lifetime confirmations thus far, his impact will endure for decades.

III. RIGGING THE JUDICIAL SELECTION AND NOMINATION PROCESS

Some of the most solemn constitutional responsibilities for the president and Senate are the selection and confirmation of judges who serve in these lifetime seats. The process for the selection and confirmation of judges has been shaped by decades of rules, traditions, and norms. To achieve their transformation of the courts, Trump and the Senate Republicans have broken these rules, traditions, and norms surrounding the selection and confirmation process, rigging the process in their favor.

A. The Judicial Selection and Nominations Process

To understand this breakdown, we will first review how this process has traditionally worked. Article III, the shortest article in our Constitution, describes the role of the judicial branch, but prescribes little guidance. It does say that judges serve “during good behavior,” which has come to mean lifetime appointments. This was intended to insulate judges from political whims and provide independence from the other two political branches of government. Further, to ensure lifetime judges do not simply act as agents of the president, Article II, Section 2, of the Constitution provides that the president nominates individuals to serve as federal judges and the Senate provides “advice and consent” on those nominations. Over time, norms have developed to facilitate the process of “advice and consent,” provide some predictability, and check the president’s power.

Only by working together do the two political branches, the executive and legislative, appoint the 870 active Article III judgeships. Announcements of judicial vacancies initiate the process. Senators play an instrumental role in selecting the district and circuit court judges who would serve in

33. Though the Constitution does not give members in the House of Representatives a formal role in the nomination and confirmation of judges, they do play important roles when it comes to the judiciary. The Constitution only requires us to have one Supreme Court (U.S. Const. art. III, § 1), but Congress—both the House and Senate—establish lower courts. (U.S. Const. art. I, § 8). They decide the number of judgeships and locations of districts. They also can pass law requiring codes of ethics, provide oversight on the courts, impeach sitting judges (discussed below), and use the power of their position to discuss the power of the courts. Representatives also have an important role in raising visibility about the importance of the courts.

34. U.S. Const. art. III, § 1.
35. The Federalist No. 78 (Alexander Hamilton).
37. There are 870 active Article III judgeships—nine Supreme Court justices, 179 Courts of Appeals judges, 673 (663 of which are permanent) district court judges, and nine Court of International Trade judges. See Administrative Office of the U.S. Courts, Authorized Judgeships, https://www.uscourts.gov/sites/default/files/allauth.pdf.
their state. 38 This is especially true at the district court level because the courts are entirely within the states the senators represent. 39 Conversely, circuit court nominees will serve several states in a region, and therefore senators who represent the states where that appellate seat is located often recommend candidates and are consulted by the White House to reach an agreement on the nomination. 40

While no clear rules exist for how senators work with the White House on selecting nominees, their input has historically been considered invaluable. Senators often understand the landscape of their jurisdictions, know their legal community and needs of the bench, and are aware of issues facing the community. In addition, because the next steps of the process involve the Senate’s review and consideration of nominees, this input and “advice” is critical for securing confirmation of the nominees. Upon reviewing senators’ recommendations, and often after significant negotiation, the president publicly nominates an individual for a judicial vacancy.

After this formal announcement, the nomination is sent to the Senate and referred to the Senate Judiciary Committee. As part of the committee’s vetting process, senators and their staff research nominees’ records and review the “Senate Judiciary Questionnaire,” a document that requires nominees to provide information about their work experience, memberships, affiliations, conflicts, awards, and more. 41 In addition, the committee reviews FBI background checks and other materials, including letters of support or opposition from individuals and organizations. 42

For more than a hundred years, the Senate Judiciary Committee chair has provided for home-state senators’ input into the nomination. More formally, a tradition was created where the Committee chair provides “blue slips,” literal blue pieces of paper, to those senators to indicate their support or opposition to the nominee. 43 When both senators from a state return their blue slips supporting the nomination to the chair, the committee holds a hearing for the nominee. This hearing is the only public opportunity for committee members to question the nominee about their experience, temperament, candor, judgment, and judicial philosophy. 44 After the committee hearing, senators can follow up with written questions that the nominee must answer. 45 Then, the committee either takes no action or moves for-

39. Id.
40. Id.
44. Committee on the Judiciary, supra note 41.
45. Id.
ward with the nomination by “reporting out” the nomination as favorable, unfavorable, or without recommendation.46

B. Breaking Norms

In the past two years, however, the process has quickly unraveled. The Supreme Court nominations of both Neil Gorsuch and Brett Kavanaugh demonstrated the lengths to which Senator McConnell will abandon tradition and norms to rig the process. McConnell’s raw naked power grab in 2016 exemplifies the extent to which he will abuse the process to take over the courts.47 After US Supreme Court Justice Antonin Scalia passed away, McConnell refused to let his Republican caucus, which controlled the Senate majority and thus the ability to schedule hearings and votes, consider President Obama’s nominee, US Court of Appeals for the District of Columbia Circuit Chief Judge Merrick Garland. Initially, then-Senate Judiciary Committee chair, Chuck Grassley, a Republican from Iowa, considered scheduling a hearing for Garland.48 Other Republican senators also expressed interest in reviewing the record of the next Supreme Court nominee,49 yet McConnell quickly tamped down any defections from his caucus, taking an unprecedented and unprincipled position that no president should have her or his nominee considered during a presidential election year.50 McConnell even bragged, “One of my proudest moments was when I looked at Barack Obama in the eye and . . . said ‘Mr. President, you will not fill this Supreme Court vacancy.’”51 Ultimately, McConnell prevented the Senate from fulfilling its constitutional responsibility and converted the Senate confirmation process into a partisan power grab.52

In addition to putting Gorsuch in a Supreme Court seat that should have been filled by President Obama, Trump had the opportunity to fill a second Supreme Court vacancy. To confirm Kavanaugh, the Senate Republicans once again fundamentally changed the process. From the start, Kavanaugh’s confirmation process was riddled with unprecedented

46. RYBICKI, supra note 42, at 6.
52. Lithwick, supra note 47.
breakdowns—from hiding records to a disastrous limited background investigation after multiple sexual assault allegations were made public.53 Most importantly, this breakdown was not isolated to the Supreme Court; to stack the lower courts, the Senate Republicans devastated several long-standing traditions and norms.

During Obama’s final years in office, in addition to holding open a Supreme Court seat, McConnell refused to fill more than one hundred lower federal court vacancies in hopes that a Republican president would do his bidding and place more conservative judges on these courts.54 As soon as Trump took office, he and his then White House Counsel, Don McGahn, quickly moved to transform all federal courts by rapidly nominating individuals to seats that the Republican majority held open during Obama’s final years in office. For example, on March 21, 2017, Trump nominated Amul Thapar to a Kentucky seat on the US Court of Appeals for the Sixth Circuit.55 This seat had been open since August 2013, and after years of trying to consult with the senators from Kentucky, Obama nominated Kentucky Supreme Court Justice Lisabeth Tabor Hughes to that seat in 2016.56 McConnell refused to move her nomination and let it expire. Trump then nominated Thapar, who was the first judicial nominee to be confirmed after Gorsuch.57

Other seats were also quickly filled. Shortly after Thapar’s confirmation, Trump nominated Kevin Newsom to an Alabama seat on the US Court of Appeals for the Eleventh Circuit. This seat had also been vacant since 2013, as the senators from Alabama could not reach an agreement with the Obama White House.58 Eventually, Obama nominated Judge Abdul Kallon to the seat, who would have been the first African American from Alabama to serve on the circuit,59 but his nomination also expired. Trump instead

59. Id.
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nominated, and the Senate swiftly confirmed, Newsom, who is on Trump’s Supreme Court shortlist,60 to that seat.61 Stephanos Bibas was nominated and confirmed to a seat on the US Court of Appeals for the Third Circuit, a seat to which Obama previously nominated Rebecca Haywood. Haywood would have been the first African American woman on the Third Circuit, but Republican Pennsylvania Senator Pat Toomey slowed her nomination so it would expire.62 Ralph Erickson was confirmed quickly after his nomination to the US Court of Appeals for the Eighth Circuit by Trump, displacing Obama’s nominee, Jennifer Puhl.63

C. Discarding Consultation and Blue Slips

As discussed above, before the Trump administration, the home-state senators played a significant role in providing “advice and consent” as demonstrated in the blue slip tradition. In the more than hundred-year blue slip tradition, the Senate confirmed only three nominees over the objection of a single home-state senator.64 A nominee was never confirmed over objections of two home-state senators.65 However, to accomplish the Trump administration’s record-setting number of circuit court confirmations, the Senate Judiciary Committee chairs discarded the blue slip tradition and pushed forward nominees who lacked the support of their home-state senators.

The first senator to devastate the tradition of respecting home-state senators’ role in consultation was then-Chair Chuck Grassley. Previously, Grassley spoke and wrote extensively about his commitment to upholding the blue slip.66 He betrayed his word when he moved forward with a nominee to the US Court of Appeals for the Eighth Circuit, David Stras, despite a home-state senator’s objection.67 Stras, who was nominated to a Minne-

60. The White House, supra note 27.
67. Confirmation Hearing on the Nomination of David Ryan Stras, of Minnesota, to be United States Circuit Judge for the Eighth Circuit, Vice Diana E. Murphy, Retired: Hearing
sota seat on the appellate court, was on Trump’s Supreme Court shortlist. At the time of his nomination, he had neither then-Senator Al Franken nor Senator Amy Klobuchar’s support. As Franken’s spokesperson explained, “Rather than discuss how senators traditionally approached circuit court vacancies or talk about a range of potential candidates, the White House made clear its intention to nominate Justice Stras from the outset.” After a few months, Klobuchar returned her blue slip to indicate her support for the nomination. With only one blue slip returned, Grassley scheduled a hearing for Stras, and the nomination was reported out of committee to the full Senate. At the time of his confirmation, Senator Tina Smith, Franken’s successor, also a Democrat, was serving in the Senate. She, like her predecessor, did not support the nomination. She voted against Stras’s confirmation, citing her concerns about his judicial philosophy.

The lack of consultation between the White House and senators has not been limited to Democratic senators. Senator John Kennedy, a Republican from Louisiana, reluctantly returned a blue slip for Kyle Duncan, a nominee to a Louisiana seat on the US Court of Appeals for the Fifth Circuit. However, Kennedy wrote on his blue slip that he was “undecided.”

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68. The White House, supra note 27.
70. Confirmation Hearing on the Nomination of David Ryan Stras, supra note 67.
72. During his hearing, Stras was asked about the unanimous landmark civil rights decision Brown v. Board of Education which ended the appalling “separate but equal” doctrine that allowed for legal apartheid in the U.S. Senator Smith stated:

I may not agree with the way in which Justice Stras approaches every decision that comes before him, but I think it’s important to understand how he grapples with questions of basic justice—questions where the case demands more than simply a rote application of precedent, but instead requires that judges fully appreciate the moral gravity of the questions presented. . . . Justice Stras’ judicial philosophy does not leave room for that kind of decisionmaking, and I decided to vote against him.

73. For example, Trump nominated Michigan Supreme Court Justice Joan Larsen, who is also on his U.S. Supreme Court shortlist, to a Michigan seat on the U.S. Court of Appeals for the Sixth Circuit in May 2017. It was reported that Senators Debbie Stabenow and Gary Peters from Michigan were not consulted, and only given notice shortly before the public announcement. Senators Peters and Stabenow eventually did return their blue slips which advanced Larsen’s nomination and she was confirmed a few months later in November. Kim, supra note 69.
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Grassley insisted on scheduling a hearing at which Kennedy expressed that White House Counsel Don McGahn had not consulted with him, but, instead, was “on the scarce side in one conversation of being polite” when he told Kennedy that Duncan was to be the nominee.76 Ultimately, Kennedy did support Duncan’s nomination and he was narrowly confirmed.77

In addition to advancing numerous nominees lacking support from one of their home-state senators, Grassley scheduled an unprecedented hearing over objections from both home-state senators during a Senate recess. Eric Miller was nominated to a Washington seat on the US Court of Appeals for the Ninth Circuit over strong objections of both Democratic Senators from Washington State, Patty Murray and Maria Cantwell.78 His nomination garnered significant opposition, not only for the historic nature in which it proceeded but also for his long record of arguing against tribal sovereignty.79 Still, the Senate Republican majority confirmed him in February 2019.80

Dismissing consultation and pushing through nominees over objections of home-state senators rewarded Trump with forty-three circuit court confirmations, thirteen of which occurred only as a result of destroying this tradition.81 The Senate confirmed six nominees over objections of at least


81. To date, the Senate Judiciary Committee chairs—Grassley and Graham—have proceeded over objection of home-state senators fourteen times—including seven times over objection of both home-state senators. Nominees who lacked one blue slip: (1) David Stras (8th Cir., Minn.) confirmed Jan. 30, 2018; (2) Michael Brennan (7th Cir., Wis.) confirmed May 10, 2018; (3) David Porter (3d Cir., Pa.) confirmed Oct. 11, 2018; (4) Chad Readler (6th Cir., Ohio) confirmed Mar. 6, 2019; (5) Eric Murphy (6th Cir., Ohio) confirmed Mar. 7, 2019; and (6) Peter N. Venable (3d Cir., Pa.) confirmed July 16, 2019. Nominees who lacked two blue slips: (1) Ryan Bounds (9th Cir., Or.)
one home-state senator and made history by confirming the first nominee—and then an additional six more—who lacked blue slips from both home-state senators.62 Six more individuals were also nominated and confirmed without senate consultation to serve on federal courts in the District of Columbia (DC).63 Because DC does not yet have statehood, and therefore no senators with voting privileges in the chamber, there are no blue slips. Nonetheless, traditionally the delegate from DC has a say in who serves on the district and circuit courts in DC.64

The most recent Senate Judiciary Committee chair, Senator Lindsay Graham, has also refused to respect the position of home-state senators for appellate positions. At the time of writing this article, Graham has not abandoned blue slips for district court nominees and has repeatedly stated he will keep that tradition in place during his tenure.65 Given the damage to the process and the senate majority’s efforts to render the blue slip meaningless, the previous blue slip practice of proceeding only when both home-state senators support the nomination is relegated to history. As the ranking member of the Senate Judiciary Committee, Senator Dianne Feinstein from California, noted, “what goes around, comes around,”66 and “it’s hard not to see [the disregard of blue slips] coming back to bite Republicans when they’re no longer in power in the Senate.”67

D. Limiting Inquiry: Stacked and Sham Hearings

Under the leadership of Senators Grassley and Graham, the Senate Judiciary Committee hearings have largely become a charade. Prior to Senator Grassley’s tenure as chair, the practice was to have only one circuit court nominee testify at a hearing. This allowed senators time to ask nominees withdrawn 2018; (2) Eric Miller (9th Cir., Wash.) confirmed Feb. 26, 2019; (3) Paul Matey (3d Cir., N.J.) confirmed Mar. 12, 2019; (4) Joseph Bianco (2d Cir., N.Y.) confirmed May 8, 2019; (5) Michael Park (2d Cir., N.Y.) confirmed May 9, 2019; (6) Kenneth Lee (9th Cir., Cal.) confirmed May 15, 2019; (7) Daniel Collins (9th Cir., Cal.) confirmed May 21, 2019; and (8) Daniel Bress (9th Cir., Cal.) confirmed July 9, 2019.


87. Paul, supra note 82.
important questions about their experience, judicial philosophy, integrity, and temperament. The hearing is often the only time senators talk to the nominee directly and it is the only opportunity for the public to hear from the nominee. Since Trump took office, the Senate Judiciary Committee chairs have scheduled nine hearings with more than one circuit court nominee on the panel.88

In addition to stacked hearings, for the first time in history, the Senate Judiciary Committee chair scheduled and held hearings during a Senate recess.89 Shortly after Kavanaugh’s contentious confirmation to the Supreme Court, Grassley scheduled two hearings for other controversial nominees during the October senate recess.90 In total, ten nominees had hearings with only one or two senators in attendance.91

E. Speedy Confirmations

Once the committee reports out a nomination, even if unfavorably, the nomination is placed on the Senate’s executive calendar. The Senate majority leader is then able to schedule a vote on the nomination. In recent years,


90. The two hearings were: (1) Allison Jones Rushing (4th Cir., N.C.); Corey Maze (N.D. Ala.); Rodney Smith (S.D. Fla.); Thomas Barber (M.D. Fla.); T. Kent Wetherell III (N.D. Fla.); and Wendy Berger (M.D. Fla.): Committee on the Judiciary, Nominations, U.S. SENATE (Oct. 17, 2018, 10:00 AM), https://www.judiciary.senate.gov/meetings/10/17/2018/nominations; and (2) Eric Miller (9th Cir., Wash.) and Bridget Bade (9th Cir., Ariz.); Karin Immergut (D. Ore.); and Richard Hertling (Ct. Fed. Cl.): Committee on the Judiciary, Nominations, U.S. SENATE (Oct. 24, 2018, 10:00 AM), https://www.judiciary.senate.gov/meetings/10/24/2018/nominations.

91. Totenberg, supra note 89.
to move to the final vote, cloture has been frequently invoked on nominations. Cloture ends debate in the Senate by establishing a time limit for debate.\textsuperscript{92} Until 2013, Senate rules required a vote of at least sixty senators to support cloture and proceed to ending debate on the nomination.\textsuperscript{93} This changed when Republicans refused to move forward on nominees, including blocking Obama’s three nominees to the US Court of Appeals for the DC Circuit.\textsuperscript{94} Then-Majority Leader Harry Reid, a Democrat from Nevada, reduced the threshold to a simple majority for nominations to district and circuit court judgeships.\textsuperscript{95} In 2017, to end debate on Neil Gorsuch’s nomination to the Supreme Court, McConnell reduced the number of votes needed for Supreme Court nominations as well.\textsuperscript{96} Once the final vote occurs, every senator can cast a vote in support or opposition of the nomination. If the nomination receives a majority of “yes” votes, the nominee is confirmed, and the president appoints her or him as a federal judge.

In the 115th Congress, the Senate could debate a nomination after cloture was invoked for thirty hours. During this time, the Senate confirmed a record number of Trump’s circuit court nominees—thirty—in addition to fifty-three district court nominees.\textsuperscript{97} In an attempt to fill district court vacancies quickly, McConnell unilaterally changed the number of post-cloture debate hours for district court nominees from thirty to two hours.\textsuperscript{98} This led to a significant uptick in the number of district court confirmations—forty-six since the change.\textsuperscript{99}

Given the troubles with vetting and other ways in which the Senate majority has short-circuited the process, the reduction of debate time is troubling. For senators who do not serve on the Judiciary Committee, this debate time is often their first opportunity to seriously review the nominee. At least twice during post-cloture debate time, nominations have failed because deeply disturbing information has come to senators’ attention.

First, the nomination of Ryan Bounds to an Oregon seat on the US Court of Appeals for the Ninth Circuit failed moments before the final con-

\textsuperscript{92} Elizabeth Rybicki, Senate Consideration of Presidential Nominations: Committee and Floor Procedure 9 (2019).
\textsuperscript{93} Valerie Heitshusen, Senate Proceedings Establishing Majority Cloture for Supreme Court Nominations: In Brief, 1 (2017).
\textsuperscript{95} Denis Steven Rutkus, Appointment Process for U.S. Circuit and District Court Nominations: An Overview 5 (2016).
\textsuperscript{96} Heitshusen, supra note 93.
\textsuperscript{97} Rybicki, supra note 92, at 9–10.
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confirmation vote. Bounds, nominated over objections of Democratic Senators Jeff Merkley and Ron Wyden of Oregon, did not reveal controversial racist and sexist college writings to the commission that interviewed him. Still, his nomination proceeded and the Senate invoked cloture by a narrow vote of fifty to forty nine. In the last few hours of debate, his record came into focus and senators found it to be too extreme. The day after cloture was invoked, Bounds’ nomination was withdrawn.

Similarly, Thomas Farr’s nomination to the US District Court for the Eastern District of North Carolina failed in the final hours of post-cloture debate. Farr vigorously defended North Carolina’s voter suppression law, which the US Court of Appeals for the Fourth Circuit held “target[s] Afri-


The lack of proper vetting, stacked hearings, extreme nominees, and limited time for the full Senate to consider nominations has reduced senators’ ability to fulfill their constitutional responsibilities. Thus, by Trump and Senate Republicans’ design, the Senate has confirmed more nominees without appropriate scrutiny. The next section discusses the consequences of this lower threshold for the independence and impartiality of the federal judiciary.

IV. TAKING OVER THE COURTS

Senate Republicans have broken the rules to stack the courts with as many ideologues as possible—and as quickly as they can. This section dis-
cusses the extent to which most of the 152 confirmed lifetime nominees: \(^{106}\) (1) reflect an extreme conservative ideology; (2) are primarily white and male, reflecting a stunning lack of diversity; (3) demonstrate incompetence based on lack of legal experience and troubling judicial temperament and bias; and, (4) have embarrassing and disqualifying records.

A. Extreme Conservative Ideology

The current judicial selection and nominations apparatus has been entrusted to a small circle of powerful legal conservative stalwarts, with Leonard Leo in the center. \(^{107}\) Leo has served as an advisor to the White House and nearly every outside institution tangentially related to the nominations process, including the Federalist Society where he serves as an executive vice president. \(^{108}\) Leo expressed his determination to transform the courts to reflect a specific extreme conservative ideology \(^{109}\) while advising Trump during his campaign. It is clear Leo only recommended individuals who are hostile to reproductive rights, in particular, as well as other civil rights. \(^{110}\) Ed Whelan, a conservative activist, declared that “No one has been more dedicated to the enterprise of building a Supreme Court that will overturn Roe v. Wade than the Federalist Society’s Leonard Leo.” \(^{111}\) Leo’s commitment to dismantling hard-fought civil and human rights achievements is evidenced in those he has helped bring into the nomination process.

Unsurprisingly, most of Trump’s judicial nominations are members of the far-right Federalist Society. \(^{112}\) Gorsuch and Kavanaugh’s involvement in the Federalist Society and demonstrated records opposing civil and human rights landed both on Trump’s Supreme Court shortlist. \(^{113}\) Lower court nominees have also been selected for their demonstrated commitment to the conservative legal movement; those who have been confirmed share distinguishing characteristics—many have written briefs arguing that it was permissible to deny marriage equality in Obergefell v. Hodges, \(^{114}\) advanced

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108. Id.

109. Id.

110. Id.

111. Id.


legal arguments that *Roe v. Wade* is unconstitutional, filed briefs in *U.S. v. Texas* claiming the Affordable Care Act was unconstitutional, vigorously defended anti-educational equity causes in cases such as *Fisher v. University of Texas at Austin*, and advanced arguments that people should not have access to contraceptive services through their health care coverage in *Sebelius v. Hobby Lobby Stores*. Additional examples of conservative ideologues include Chad Readler, who was leading the US Department of Justice’s Civil Division at the time of his nomination to an Ohio seat on the US Court of Appeals for the Sixth Circuit. Readler filed the Justice Department’s brief in *Texas v. United States*, which refused to defend the Affordable Care Act and its protections for the millions of people who live with pre-existing conditions, claiming that it was unconstitutional. Furthermore, Eric Murphy was nominated and confirmed to the same court after serving as Ohio’s solicitor general and defending numerous efforts to restrict voting rights and arguing against marriage equality in *Obergefell v. Hodges*, claiming that it would be “disruptive . . . to our constitutional democracy.” Lastly, Michael Park was nominated and confirmed to a seat on the US Court of Appeals for the Second Circuit while defending the Trump administration’s attempts to add a citizenship question to the 2020 census and arguing that equal opportunity admissions programs in higher education should be dismantled.


Many nominees proudly tout their loyalty to the conservative agenda. Don Willett was confirmed to the Fifth Circuit after serving as a Texas Supreme Court justice and proudly claiming:

I’ve built a record that is widely described—well, universally described—as the most conservative of anybody on the [Texas] Supreme Court. I’ve garnered support from every corner of the conservative movement. There’s no ideological daylight to the right of me... I’m universally regarded to be the most conservative member of the court, which is a label that I accept with, frankly, gladness and gusto.\textsuperscript{123}

Another nominee, Halil “Sul” Ozerden, the nominee for the US Court of Appeals for the Fifth Circuit, also tried to demonstrate his ties to the Republican party during his hearing. Ozerden received significant opposition from ultra conservative organizations,\textsuperscript{124} including The First Liberty Institute, a far-right organization that was founded as part of the Free Market Foundation and specializes in defending clients such as Chick-fil-A, which they say has been targeted for “blatant religious discrimination.”\textsuperscript{125}

During the hearing, Texas Republican Senator Ted Cruz exposed that nominees receive Republicans’ support only when they have a reliable record that openly demonstrates that they have met the “test” outlined by President Trump during his presidential campaign.\textsuperscript{126} As Cruz stated, “Trump promised the American people he would nominate judges in the mold of Justice Scalia and Justice Thomas.”\textsuperscript{127} And while on the campaign trail Trump clearly enunciated litmus tests for judges he would appoint, Cruz’s Senate test also demands potential jurists’ loyalty to advancing conservative political causes. He presented the First Liberty Institute’s five standards for their opposition to Ozerden in front of the Committee:

He is not a conservative. He has never been affiliated with the conservative movement. He has never volunteered his time to advance conservative causes. He has never been active in conservative legal circles and he has never written any decisions that have advanced conservative principles.\textsuperscript{128}

Ozerden responded to the question about what he did for the cause prior to his service as a district court judge by saying:


\textsuperscript{125} Chick-fil-A, First Liberty Institute, https://firstliberty.org/cases/chick-fil-a.


\textsuperscript{127} Id.

\textsuperscript{128} Id.
During the time I was in practice, I did participate in supporting different candidates in different campaigns. . . . I was a board member of the County Republican Club, things like that, during my time in private practice. . . . And so, once I’m in public service, I can’t engage in that type of activity. . . . I understand the concerns you’ve raised and I certainly respect these organizations you’ve mentioned and the work they do, but I think if you look at the totality of my record, it misunderstands my record.129

He went on to insinuate he would have issued decisions touting his conservative credentials had he presided over the cases that would have been more controversial, saying:

I think is important to keep in mind is as a sitting District Court judge, I don’t get to pick and choose my cases. I can only take the cases that are filed in front of me. And I don’t sit in the state capital which tends to be where most of these kinds of cases I think you’re referring to are filed.130

By demanding Ozerden demonstrate conservative loyalty, Cruz unveils that he and Senate Republicans are not selecting umpires who will “call balls and strikes;”131 nor are they calling for a test of professional competence, fairness, integrity, or temperament. Rather, the standard applied to judicial nominees seeking Republican support is proof of commitment to advancing the conservative cause to serve in the independent judicial branch of government.

Other Trump nominees have said and/or written offensive and blatantly false information that goes even beyond party loyalty. Wendy Vitter was nominated and confirmed to the US District Court for the Eastern District of Louisiana. At a 2013 panel, she urged people to share disinformation about contraception, including a pamphlet containing dangerous lies such as contraceptive pills cause incest, infidelity, and violent death for women taking the pill.132 Vitter also spoke at a protest outside of a Planned Parenthood facility and claimed that “Planned Parenthood . . . kill[s] over 150,000 females a year.”133 She was also one of the first nominees who refused to state that the landmark civil rights case ending legal apartheid in education in the United States, Brown v. Board of Education, was correctly

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129. Id. at 6.
130. Id.
decided. Since then, dozens of other nominees have failed to state that Brown was correctly decided. This raises alarming questions about nominees’ adherence to precedent if placed on the bench and whether they believe that the question of legal segregation is open for debate.

Numerous nominees have controversial and offensive writings, some from their time as college and law students and others well into their professional careers. Ryan Bounds’s offensive writings ended up costing him a seat on the US Court of Appeals for the Ninth Circuit. For others, however, the writings were but minor obstacles in their path to confirmation. For example, Neomi Rao, confirmed to the US Court of Appeals for the DC Circuit, wrote numerous offensive articles—complaining about the “hysteria over date rape” and blaming women for drinking before someone rapes her because “if she drinks to the point where she can no longer choose, well, getting to that point was part of her choice.” She scoffed at public leaders who discuss race and discrimination, saying, “Race may be a hot, money-making issue.” These and other demeaning statements demonstrating her hostility to the LGBTQ community and environmental protections have tracked well into her legal career, including as head of the Office of Management and Budget.

139. See Letter from The Lead. Conf. on Civil and Human Rights to the U.S. Senate, Oppose the Confirmation of Neomi Rao to the U.S. Court of Appeals for the District of Columbia Circuit (Feb. 1, 2019), https://civilrights.org/resource/oppose-the-confirmation-of-neomi-rao-to-the-u-s-court-of-appeals-for-the-district-of-columbia-circuit. For example, Rao claimed the Yale Bisexual, Gay, and Lesbian Co-op was “spreading myths about AIDS and ‘raising awareness’ about homophobia/heterosexism. If you didn’t know better, you’d think that Yale was the most difficult place in the world to be gay, rather than one of the easiest.” See id. at 5. She also wrote that:

The multiculturalists are not simply after political reform. Underneath their touchy-feely talk of tolerance, they seek to undermine American culture. They argue that culture, society and politics have been defined – and presumably defiled – by white, male heterossexuals hostile to their way of life. For example, homosexuals want to redefine marriage and parenthood; feminists in women’s studies programs want to replace so-called male rationality with more sensitive responses common to womyn.

Id. at 5–6. Rao also stated that “multiculturalism fans the flames of minority resentment against everybody else, including other minorities,” id. at 3. Rao also said a Yale environmental organization had a “dangerous orthodoxy” and that “[t]he three major environmental bogeymen, the greenhouse effect, the depleting ozone layer, and the dangers of acid rain, are all cited in [the organization’s] manual though all three theories have come under serious scientific attack.” Id. at 7 (alteration in original). She talked about “eco-insanity on college campuses.” Id.
Another nominee was disgraced, and his nomination withdrawn, after video footage of his inflammatory comments were made public. Jeffrey Mateer, nominee to the US District Court for the Eastern District of Texas, formerly served as general counsel to the First Liberty Institute prior to his position in the Texas Attorney General’s office. While giving a speech, Mateer said that transgender children were evidence of “Satan’s plan.” He also expressed regret about the passage of laws prohibiting dangerous and dehumanizing conversion therapy. After these speeches were covered by media outlets, the Trump administration and the Senate did not proceed with Mateer’s nomination.

A colleague of Mateer’s from the First Liberty Institute, Matthew Kacsmaryk, however, was confirmed to the US District Court for the Northern District of Texas. With a similar background to Mateer, Kacsmaryk’s career is dedicated to anti-reproductive rights and anti-LGBTQ equality causes. He wrote about the “Long War Ahead” that needed to be waged against LGBTQ persons. He lamented the Supreme Court’s recognition of marriage equality, saying that it has been “weaponize[d]” by a bill, the Equality Act, which would prohibit discrimination on the basis of sex in housing, employment, credit, education, and other areas that enable people to fully engage in public life.

Trump’s nominees possess disturbing, extreme records reflective of a far-right ideology. Their statements and work demonstrate hostility toward reproductive rights, racial justice, health care, disability rights, immigrant rights, rights of working people, voting rights, LGBTQ equality rights, and environmental protections. Even though civil and human rights organizations have repeatedly sounded the alarm, most of these nominees have been confirmed. The concerns raised during the nominations process have, unfortunately, been realized as those judges issue devastating rulings in their new positions.

141. Id.
144. Id.
B. Astonishing Lack of Representation and Diversity

Our courts rely on the public’s trust, and for this reason, representation matters greatly. As Oregon Supreme Court Justice Virginia L. Linder stated,

Diversity on the bench matters. It matters to real people, with real disputes, who need our court system to resolve those disputes. A diverse bench matters . . . because it helps ensure that—win, lose or draw—all who walk through the courthouse doors will be treated with dignity and will be fully and fairly heard. Diversity on the bench, in short, is fundamental to the promise of equal justice for all.146

The numbers speak for themselves: more than 85 percent of Trump’s nominees are white, and nearly 70 percent are white men.147 Only three (2 percent) nominees are women of color, and none are Latina.148 Not a single African American or Latinx nominee has been confirmed to the circuit courts.149 Only one LGBTQ Trump nominee has been confirmed by the Senate.150 The Trump administration’s default nominee is young, white, and male—and this is not a coincidence. Instead, it is a manifestation of the far-right legal community from which these nominees are selected.

This lack of representation in the judicial nominees from the current presidential administration starkly contrasts previous administrations. President Jimmy Carter was the first president to address the significant lack of diversity on the federal courts. Carter made representation a priority because he understood that the integrity of the courts depends on having judges reflective and representative of the communities they serve. He encouraged the creation of selection commissions, which would move away from a system where senators themselves picked nominees. He noted that senators selected nominees who looked like them—overwhelmingly white and male.151 Carter advocated for commissions comprised of members from various communities, gender identities, races, ethnicities, and professional

148. One of the three women, Karen Scholer (N.D. Tex.), was originally nominated by President Obama on March 15, 2016 but her nomination expired and Trump re-nominated her on September 7, 2017. See id.
149. See id.
TRUMP’S TAKEOVER OF THE COURTS

backgrounds.\textsuperscript{152} Most presidents since Carter have nominated more diverse individuals. President Obama made great strides to diversify the bench—demographically and professionally.\textsuperscript{153}

Certainly, prior to Trump’s presidency, there was still great progress to be made. This is especially acute in the circuit courts where there are only six active judges who are women of color out of 179 active total judgeships.\textsuperscript{154} The cumulative impact of the Trump administration has been to de-diversify the federal bench.\textsuperscript{155} For example, the Eighth Circuit has eleven active judges—only one of these judges is a woman and only one is a person of color.\textsuperscript{156} Of the eleven judges, four judges were appointed by Trump and all were white men. Obama nominated Jennifer Puhl to one of these seats, but the Senate failed to move on her nomination. Trump then nominated, and the Senate confirmed, Ralph Erickson to that seat.\textsuperscript{157} The US Court of Appeals for the Seventh Circuit now has no active judges of color.\textsuperscript{158} Out of the eleven active judges on the bench, Trump appointed four of them, again all white.\textsuperscript{159} Similarly, the US Court of Appeals for the Third Circuit has fourteen active judges, and only two are women. Obama nominated Rebecca Haywood to a Pennsylvania seat in the Third Circuit. Had she been confirmed, she would have been the first African American woman to serve on the court.\textsuperscript{160} Instead, Trump nominated and the Senate confirmed four white men to the Third Circuit. Additionally, the Fifth Circuit, has seventeen active judges, but, even as a jurisdiction with a significant Latinx population, there is not a single active Latinx judge on the court.\textsuperscript{161}

\textsuperscript{152} Id.

\textsuperscript{153} For example, President Obama nominated more African American women than any other president. Out of the sixty-two African Americans confirmed to lifetime positions, twenty-six were women. Donna Owens, Obama’s Legacy on Judicial Appointments, By the Numbers, NBC News (Jan. 19, 2017), https://www.nbcnews.com/storyline/president-obama-the-legacy/obama-s-legacy-judicial-appointments-numbers-n709306.

\textsuperscript{154} See Diversity on the Bench, supra note 147.


\textsuperscript{156} See Diversity on the Bench, supra note 147.


\textsuperscript{158} See Diversity on the Bench, supra note 147.

\textsuperscript{159} See id.


Given that these judges will serve for decades to come, the impact not only immediately changes the representation of communities on the bench but does so for future generations as well. The disturbing lack of diversity is compounded by concerns of the kinds of nominees who have been nominated as some, for example, have written support for the KKK and dozens have refused to state that the Supreme Court’s unanimous landmark civil rights decision, Brown v. Board of Education, was correctly decided.

C. Incompetence

There are many ways in which Trump nominees are not qualified for a lifetime position. Perhaps the most basic threshold, however, is professional competence, which encompasses legal experience, judicial temperament, and bias, all of which are explored in this subsection.

1. Lack of Experience

The Trump administration places little value on experience, especially for district court nominees—as many lack trial experience. This was in the spotlight at the hearing for Matthew Petersen, nominated by President Trump in September 2017 to serve in the US District Court for the District of Columbia. Under questioning by Senator John Kennedy, Petersen acknowledged he had never handled a trial case, civil or criminal, in any court; he had never argued a motion; and he could not answer basic questions about standards and procedures frequently involved in trials. After a video of this embarrassing exchange spread on the internet, he withdrew from consideration.

Brett Talley, who was thirty-six at the time of his nomination to the US District Court for the Middle District of Alabama, had only been a member of the federal bar for ten years and his experience was unrelated to what would be required of a federal judge. Much of his post-law school experience...
career was as a ghost hunter.\textsuperscript{167} His ghost hunting experience likely also helped inform his many horror novels.\textsuperscript{168} He also served as a political speechwriter\textsuperscript{169} and wrote politically motivated articles, such as “Democrats, the Party Who Cried Racist.”\textsuperscript{170} The ABA Standing Committee on the Federal Judiciary\textsuperscript{171} noted in their letter defending Talley’s “not qualified” rating that “he does not have the requisite trial experience or its equivalent.”\textsuperscript{172} Ultimately, his nomination failed—though likely for other reasons as will be discussed below.\textsuperscript{173} Holly Teeter’s nomination to the US
District Court for the District of Nebraska was also questioned due to a lack of sufficient trial experience.174 Regardless, the Senate confirmed Teeter to the seat.175 Justin Walker, nominated to the US District Court for the Western District of Kentucky, is thirty-seven years old, has never tried a case, and has taken only one deposition for a state court case.176

Another nominee, Jonathan Kobes, nominated to the US Court of Appeals for the Eighth Circuit, lacked the “requisite experience” and, per the ABA Standing Committee, possessed no “evidence of his ability to fulfill the scholarly writing required of a United States Circuit Court judge.”177 Kobes was nominated to the seat to which President Obama nominated Jennifer Puhl, whose nomination expired. Kobes, who served as Senator Rounds’s chief counsel, replaced Puhl as the nominee. Kobes was the last nominee to be confirmed in the 115th Congress, and his nomination nearly failed. Vice President Pence was brought in to break the tie in both the cloture vote and the final vote.178 This was the first time in history a judge was confirmed by such a tie-breaking vote.179

Charles Goodwin, a nominee for and now judge of the US District Court for the Western District of Oklahoma, was questioned about his perceived “weak” work ethic.180 Peers noted Goodwin’s “frequent absence from the courthouse until mid-afternoon,” and “[i]naccessibility issues” which “generated concerns about the timely and efficient administration of justice.”181

This lack of experience in nominees under any other administration would have been an anomaly. For the Trump administration, this is routine.


181. Id.
2. Judicial Temperament and Bias

Given Trump’s own temperament, it might be unsurprising that poor judicial temperament and bias also manifest in several of his nominations. Kavanaugh’s vindictive testimony in front of the Senate Judiciary Committee, after the courageous testimony of Dr. Christine Blasey Ford, demonstrated an astounding lack of judicial temperament.182 After lying to the committee and in interviews,183 Kavanaugh lashed out and blamed those who opposed his nomination and personally attacked senators who questioned him.184 But Kavanaugh does not stand alone amongst Trump nominees for lifetime positions who have concerning temperament and judgment. For example, John Bush, a nominee and now judge on the Sixth Circuit, used a pseudonym and wrote more than 400 posts on the blog, “Elephants in the Bluegrass.”185 His posts called to “gag” Speaker Pelosi—referencing her as “Mama Pelosi”186—and writing that the “two greatest tragedies in our country—slavery and abortion—relied on similar reasoning and activist justices at the U.S. Supreme Court.”187 Bush also promoted fake news sources that President Obama was not born in the United States.188 The revelation shocked some senators, but Bush was still narrowly confirmed in a party-line vote.189

Brett Talley, mentioned earlier for his lack of legal experience, failed to disclose his more than 16,000 posts on a University of Alabama message board.190 He wrote about controversial topics—even defending the early KKK.191 He also failed to disclose on his Senate Judiciary Committee Questionnaire that his wife was then serving as the chief of staff to the

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190. Stern, supra note 162.

191. Id.
White House counsel—a potential conflict of interest.\footnote{192} Though Talley was reported out of committee by a party-line vote,\footnote{193} his nomination failed when it ultimately became too embarrassing for the White House and Senate majority to proceed with Talley’s candidacy.\footnote{194}

L. Steven Grasz, a nominee and now judge on the US Court of Appeals for the Eighth Circuit, was questioned about his inability to separate his personal beliefs from his duties as a judge. The ABA Standing Committee noted that it would be hard for Grasz to relinquish his deeply held personal beliefs.\footnote{195} In an article he wrote, “Chief Justice Roberts will go down in history not as the disinterested umpire he promised to be, or the advocate of judicial restraint his supporters believed him to be, but rather as the one who ushered in the ultimate transfer of limitless power to the federal government.”\footnote{196} When questioned, “Grasz explained his exaggeration as a reaction to his sense of betrayal by a Supreme Court justice whom he had publicly supported.”\footnote{197} He also made statements about the “moral bankruptcy which is the legacy of Roe v. Wade,” which “raises questions of ability to assess issues neutrally and free of bias.”\footnote{198} The ABA Standing Committee also noted that his peers said, “Grasz had been inappropriately aggressive and that his conduct towards opposing counsel could be difficult, bordering on incivility.”\footnote{199} Due to this, many individuals refused to talk to the ABA Standing Committee for fear of retribution from Grasz and his allies.\footnote{200} Further, Grasz omitted from his Senate Judiciary Committee questionnaire an incident where he used confidential information to improperly influence the selection of Nebraska’s non-partisan Judicial Nominating Committee.\footnote{201} This “again substantiated peers’ concerns that Mr. Grasz’ judgment may be overcome by his political and ideological allegiances.”\footnote{202} Ultimately, Senate Republicans disregarded these various concerns and

\begin{footnotes}
\item[193] Results of Executive Business Meeting, SENATE JUDICIARY COMMITTEE (Nov. 9, 2017), https://www.judiciary.senate.gov/imo/media/doc/11-9-17%20Results%20of%20Executive%20Meeting.pdf.
\item[196] Id. at 15.
\item[197] Id.
\item[198] Id. at 14.
\item[199] Id. at 6.
\item[200] Id. at 5.
\item[201] Pamela A. Bresnahan et al., supra note 195, at 13.
\item[202] Id. at 17.
\end{footnotes}
voted to confirm Grasz to the Nebraska seat on the Eighth Circuit in December 2017 by a narrow vote of fifty to forty-eight. 203

3. Hidden Records and Omissions

The importance of thoroughly vetting lifetime nominees cannot be overstated. Once confirmed, the only recourse is impeachment, which is incredibly difficult and rare. 204 The public and senators rely upon the White House counsel’s office, the Department of Justice, and the senators’ selection advisors and staff to review potential nominees’ records and backgrounds to ascertain their truthfulness, experience, reputation, potential conflicts of interest, history with the justice system, temperament, and integrity. While this leaves some discretion, the ability for potential nominees to be forthright and truthful is a basic standard all individuals considering lifetime positions should meet.

Despite this, as the instances described above demonstrate, numerous nominees have failed to share information pertinent to their nomination. 205 The most high-profile attempt to hide a nominee’s record involved Justice Kavanaugh’s nomination to the Supreme Court. Records from his time as staff secretary and in the White House counsel’s office during the George W. Bush administration were obscured. The unprecedented jettisoning of the review and release of records by the non-partisan National Archives meant that the only records the Senate and the public saw were those vetted by President Bush’s personal lawyer. That lawyer only released approximately 10 percent of the records to the Senate, a smaller percentage of which was available for review by the public. 206 This obstruction prompted some senators to file a lawsuit to seek relevant documents. 207

As mentioned earlier, Brett Talley, the failed nominee for the US District Court for the Middle District of Alabama, also failed to disclose information pertinent to service on the federal bench. He omitted from his questionnaire thousands of blog posts and comments he wrote on topics


204. See generally, Jared P. Cole & Todd Garvey, Cong. Res. Serv., R44260, Impeachment and Removal 4 (2015) (removing a judge from office requires the House of Representatives to initiate impeachment proceedings against the judge and two-thirds of the Senate must vote to convict the judge. This is an exceedingly rare occurrence—the Senate has convicted only eight of the fifteen federal judges impeached by the House of Representatives).


such as the KKK, immigration, abortion, and gun safety. 208 Ironically, at the time of his nomination, and for months after, Talley worked in the Department of Justice’s Office of Legal Policy vetting nominees with the purpose of ensuring a thorough review of their background and disclosure of such important information. 209 Many others hid from the Senate Judiciary Committee their private Twitter accounts. This included prolific tweeter, US Court of Appeals for the Fifth Circuit nominee and current judge, Don Willett, whose distasteful tweets were the focus of his hearing. 210 Other nominees failed to list their private Twitter accounts, including Judges John Nalbandian, Jonathan Kobes, and Thomas Kleeh. 211

V. CONCLUSION

The Trump administration and Senate Republican’s efforts to accomplish through the courts what they cannot legislatively are not coincidental—indeed, they are part and parcel to the larger agenda to roll back decades of progress on civil and human rights.

Trump, himself, is fixated on the federal courts. Judges have frustrated his business and his political agenda. He clearly seeks to remake the courts with those judges he believes will advance his financial and political agenda. He barreled into the presidency while the Senate majority leader broke the rules to hold open a Supreme Court and more than one hundred lower court seats. It was the perfect storm: The small extreme conservative legal community could influence not only litigation strategy, but also the judges who would later decide the cases. It is not an accident that the attorney, Chad Readler, who argued that the Affordable Care Act is unconstitutional is now serving on a court one step below the Supreme Court. By confirming judges like Readler who have demonstrated records of hostility to many of our fundamental civil and human rights, Trump and Senate Republicans can achieve policy change through our courts.

But Trump did not do this alone. Senate Republicans had to fundamentally destroy the norms and guardrails that have long facilitated the nomination and confirmation processes to remake the courts. By disregarding the

211. Id.
role of home-state senators in the selection and confirmation of judges, packing hearings with multiple controversial nominees, scheduling hearings during recess, and limiting the amount of time the Senate can debate the nominations, Trump and the Senate Republicans have changed the rules to swing the outcome in their favor. With more than 150 lifetime judges confirmed in the Trump administration, the harmful impact on our civil and human rights will be felt for generations. While court decisions recognizing equal justice under law have been celebrated throughout our history, too many court decisions demonstrate just how fragile our hard-fought rights can be. The Trump administration, enabled by this Senate majority, is putting even more of our rights at risk.