



13 Troubling Judicial Nominees You Missed This Year

By Tony Hanna and Abbey Meller

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The bitter nomination process involving now-U.S. Supreme Court Justice Brett Kavanaugh, which culminated in a contested confirmation vote on October 6, brought the importance of the federal judiciary to the forefront of American political consciousness. Around the country, tens of thousands of people rallied to protest the influence and effects of the judicial system on issues affecting everyone: health care reproductive rights, civil rights, disability justice, gun violence prevention, and more.¹ Although Senate Republican leaders worked hard to shield Kavanaugh's record from public oversight, hundreds of brave people risked arrest to protest both outside and inside Kavanaugh's confirmation hearing and, later, at the sham hearing² to investigate the legitimate claim of sexual assault made against Kavanaugh by Christine Blasey Ford.

Yet, while concerned citizens were rightfully paying attention to the important debate taking place over the future of the U.S. Supreme Court, the Trump administration and its allies in the Senate were also busy reshaping the lower federal courts. This year, the Senate confirmed a record 65 lower court judges³ to lifetime seats on the federal judiciary. An additional 67 judicial nominees are currently pending Senate action;⁴ the Senate could still vote on these nominations before the end of the year.

In short, the Trump administration and its allies in the Senate are working at a breakneck pace to turn the federal courts into a hyper-conservative body that will implement a partisan political agenda from the bench. Ninety-nine percent of the cases filed in federal court are decided in the lower courts, and appeals court judges have significant discretion to interpret the law and U.S. Constitution within their jurisdictions. This issue brief summarizes essential information about 13 of the most troubling federal circuit court nominees put forward in 2018.

1. Stuart “Kyle” Duncan, 5th Circuit

Nominated January 8, 2018; confirmed April 24, 2018

Kyle Duncan has dedicated his legal career to fighting against the rights of women and the LGBTQ community both as a volunteer and as a conservative activist lawyer. Duncan served as the lead counsel in *Burwell v. Hobby Lobby Stores Inc.*,⁵ which infamously held that corporations are allowed religious exemptions to providing contraceptive coverage to their employees. Duncan also represented the Gloucester County School Board in the case⁶ against Gavin Grimm,⁷ a transgender boy who fought for his constitutional and statutory right to use the restroom in accordance with his gender identity. Additionally, Duncan has argued that the decision in *Obergefell v. Hodges*, which guaranteed marriage equality, “raises a question about the legitimacy of the Court.”⁸

Duncan was confirmed 50-47 by the Senate in April and has already begun his conservative crusade from the bench. In July, he joined a dissent in *Mance v. Sessions*⁹ that would make it easier for courts to strike down commonsense gun violence protection laws. In this case, the law in question prohibits firearms dealers from selling guns out of state.

2. Michael Brennan, 7th Circuit

Nominated January 8, 2018; confirmed May 10, 2018

Since 1979, every senator in Wisconsin has used the bipartisan Wisconsin Federal Nominating Commission¹⁰ to vet federal judges. In 2018, the Trump administration broke that norm to nominate Michael Brennan to the 7th Circuit. To add insult to injury, Brennan was ultimately confirmed over the blue slip¹¹ objection of his home-state senator, Tammy Baldwin (D). Brennan, following his belief that conservative judges do not have to follow precedent with which they disagree, has advocated for judges to substitute their own views for those of Congress when those views are in conflict.¹²

During his time as a trial court judge in Milwaukee, several of Brennan’s decisions were overturned¹³ by higher courts. This includes a case¹⁴ where he directly ignored Supreme Court precedent by denying a motion to suppress evidence, as well as another case¹⁵ where he evicted a tenant without citing any precedent. He has continued his judicial activism on the federal bench, ruling, for example,¹⁶ against a plaintiff who brought a credible invasion of privacy case against two police officers. Brennan was confirmed by a vote of 49-46.

3. Andrew Oldham, 5th Circuit

Nominated February 15, 2018; confirmed July 18, 2018

As general counsel to Texas Gov. Greg Abbott (R), Andrew Oldham supported laws, cases, and policies attacking immigrants, the environment, civil rights, and other progressive priorities. On multiple occasions, Oldham joined then-Oklahoma Attorney General Scott Pruitt—who was replaced¹⁷ as the Environmental Protection Agency (EPA) administrator this year—in suing the EPA¹⁸ to undermine environmental regulations.

Oldham also led Texas in successfully curtailing the expansion of the Deferred Action for Childhood Arrivals program,¹⁹ which would have allowed more Dreamers and their parents to enter and remain in the country. Finally, he was an architect of Texas' voter suppression law,²⁰ not to mention his regressive record on reproductive rights, housing, disability rights, health care, workers' rights, and more.²¹

Republican senators ignored all of these troubling signs and confirmed Oldham 50-49 on a straight party-line vote. In August,²² he was the deciding vote in a case²³ that upheld a Texas practice of keeping low-income people in jail—even for minor misdemeanor offenses for which they cannot afford to post bail.

4. Britt Grant, 11th Circuit

Nominated April 10, 2018; confirmed July 31, 2018

Britt Grant has a record consistent with that of others who appear on President Donald Trump's Supreme Court short list: a history of stacking the deck against the powerless. As solicitor general of Georgia, Grant defended²⁴ a "fetal pain" law that criminalized abortions after 20 weeks and filed an amicus brief²⁵ on behalf of Hobby Lobby in *Sebelius v. Hobby Lobby Stores Inc.*—later *Burwell v. Hobby Lobby Stores Inc.*—that gave some employers a religious exemption to the Affordable Care Act's contraception mandate.

During her tenure as solicitor general, Grant contributed to another amicus brief²⁶ in *Obergefell v. Hodges*, which stated that the definition of marriage as being between a man and a woman did not violate the Constitution's Equal Protection Clause. Grant was also involved in amicus briefs in support²⁷ of stripping the Voting Rights Act and of voter suppression in Ohio²⁸ in *Kobach v. United States Election Assistance Commission*. She was confirmed 52-46.

5. David Porter, 3rd Circuit

Nominated April 12, 2018; confirmed October 11, 2018

David Porter is another Trump judicial nominee who was confirmed over the objection of his home-state senator, Pennsylvania's Bob Casey Jr. (D).²⁹ When Porter was first floated by Sen. Pat Toomey (R-PA) as a nominee to a Pennsylvania district court in 2014, more than 40,000 people³⁰ signed a petition calling on Sens. Casey and Toomey to reject him. Their reasoning was clear: He could not be a fair or impartial judge.

Before being nominated, Porter had a long history of aligning himself with far-right groups such as the Federalist Society³¹ and the Center for Vision and Values, which objects to LGBTQ rights³² and a living minimum wage.³³ He also formed a group that opposed the nomination of Supreme Court Justice Sonia Sotomayor³⁴ and argued against the legality of the Affordable Care Act.³⁵ Porter was confirmed to the 3rd Circuit by a vote of 50-45.

6. Jonathan Kobes, 8th Circuit

Nominated June 11, 2018; confirmed December 11, 2018

Last week, Jonathan Kobes became the second of Trump’s judicial nominees confirmed³⁶ to the federal bench despite being unanimously rated “Not Qualified”³⁷ by the nonpartisan American Bar Association (ABA). The first was Steven Grasz, who was confirmed to the 8th Circuit in December 2017.³⁸ The ABA attributed the rating to Kobes’ lack of experience, concluding that he had “neither the requisite experience nor evidence of his ability to fulfill the scholarly writing required”³⁹ to be a federal judge.

Kobes represented⁴⁰ fake women’s health care centers, defending a law that required abortion providers to tell women that having an abortion increases the likelihood of suicide⁴¹—something proven to be untrue.⁴² Senate Republicans could not marshal the 51 votes needed to confirm Kobes, so for the first time in U.S. history, the vice president cast a tiebreaking vote⁴³ to confirm a judicial nominee to a lifetime position on the federal bench.

7. Paul Matey, 3rd Circuit

Nominated April 12, 2018; currently in committee

The Trump administration nominated Paul Matey over the objection of both of his home-state senators in New Jersey.⁴⁴ There is no record of any judicial nominee being confirmed over the objection of both home-state senators in U.S. history.⁴⁵ Before nominating Matey, the White House consulted⁴⁶ with a former Republican governor, Chris Christie, rather than the two sitting home-state senators, one of whom, Cory Booker (D), is a member of the Senate Judiciary Committee. Matey served as the deputy chief counsel in the governor’s office during the Bridgegate⁴⁷ scandal, in which Christie was alleged to have ordered the closing of access lanes to the George Washington Bridge from Fort Lee, New Jersey, in an act of political retribution against the Fort Lee mayor.

8. Eric Murphy, 6th Circuit

Nominated June 18, 2018; currently in committee

Eric Murphy was nominated to the 6th Circuit despite the strong opposition of his home-state senator, Sherrod Brown (D-OH).⁴⁸ As solicitor general of Ohio, Murphy defended the state’s practice of purging voters from the rolls, making it harder for people of color, veterans, and low-income people to vote.⁴⁹ This case was infamously affirmed by a closely divided U.S. Supreme Court⁵⁰ earlier this year. Murphy also defended⁵¹ Ohio’s law prohibiting same-sex marriage all the way up⁵² to the Supreme Court,⁵³ where he lost.

Some of the other clients he has defended include a school board⁵⁴ that refused to allow a student to use the bathroom that matched his gender identity, employers⁵⁵ who refused to provide their employees with contraceptive coverage, and tobacco companies⁵⁶ trying to avoid paying damages for the deaths their products directly caused.

9. Chad Readler, 6th Circuit

Nominated June 18, 2018; currently in committee

Chad Readler was also nominated to the 6th Circuit over the strong opposition of Sen. Brown.⁵⁷ The day Readler was nominated, he filed a brief⁵⁸ for his employer, the U.S. Department of Justice, in the federal district court in Texas arguing for the elimination of the Affordable Care Act—including all protections for pre-existing conditions. In 2016, while a lawyer at the conservative firm Jones Day, Readler defended⁵⁹ the Trump campaign from allegations of voter intimidation in Ohio and supported⁶⁰ other restrictive voting laws in Ohio, including purging voter rolls and limiting early voting. Furthermore, Readler backed⁶¹ the Trump administration's policy of separating immigrant children from their parents at the border. He also filed a brief⁶² regarding the *Flores* agreement with the goal of removing the limit on the length of time that immigrant children may be detained.

10. Eric Miller, 9th Circuit

Nominated July 19, 2018; currently in committee

Eric Miller is another nominee whom the administration has put forward over the objection of both home-state senators⁶³ representing the state of Washington. Miller has a well-documented record of anti-Native American litigation. Miller, who clerked for Supreme Court Justice Clarence Thomas, is perhaps best known for his role in litigating and winning cases⁶⁴ that, among other things, dismantled tribal sovereignty and denied aboriginal claims to lands.

He also has troubling views regarding the availability of class-action lawsuits⁶⁵ and corporate culpability for harms and illnesses such as mesothelioma.⁶⁶ Miller holds the distinction of being one of just a handful of judicial nominees formally opposed⁶⁷ by the National Congress of American Indians.

11. Allison Jones Rushing, 4th Circuit

Nominated August 27, 2018; currently in committee

At 36 years old, Allison Jones Rushing is the youngest⁶⁸—though not the least-qualified⁶⁹—Trump judicial nominee yet. Having graduated from law school just 11 years ago, her record is sparse, but her short career is highly controversial and extreme. Rushing worked for Alliance Defending Freedom, which the Southern Poverty Law Center has classified as a hate group.⁷⁰ During her tenure there, she wrote an article⁷¹ that criticized the enforcement of the First Amendment's establishment clause, which prohibits Congress from establishing a national religion. In 2013, Rushing participated in a panel on same-sex marriage where she repeatedly referenced the late Supreme Court Justice Antonin Scalia's opinion that *United States v. Windsor*,⁷² which ruled the Defense of Marriage Act unconstitutional, was a departure from "traditional" ideas of marriage and morality.⁷³

12. Neomi Rao, District of Columbia Circuit

Nominated November 14, 2018; currently in committee

Brett Kavanaugh's elevation to the Supreme Court left a vacancy on the U.S. Court of Appeals for the District of Columbia Circuit, often referred to as the second-most powerful court in the country.⁷⁴ Trump is trying to fill it with Neomi Rao, a woman who has adopted a staunch position in favor of the demeaning, often alcohol-fueled practice of "dwarf-tossing."⁷⁵ Rao has written two law review articles and a blog post in which she expresses her belief that outlawing the practice infringes on the right of the dwarf to be tossed. Of course, defending such actions has serious dignity and safety concerns, as outlined by CAP's Rebecca Cokley⁷⁶—never mind the fact that Rao has also led the administration's efforts to dismantle environmental, health, safety, and other important regulations.⁷⁷ In 2016,⁷⁸ Rao took millions of dollars from the Koch brothers to found a center at George Mason University's Antonin Scalia Law School for the "Study of the Administrative State,"⁷⁹ essentially transferring Rao's nickname as the "regulatory czar"⁸⁰ to teaching students about eliminating government rules.

13. Ryan Bounds, 9th District

Nominated January 8, 2018; withdrawn July 24, 2018

Ryan Bounds made national headlines twice this year. The first time, he became the first judicial nominee to be pushed through to the Senate floor over the objections⁸¹ of both of his home-state senators. The next was when he became the first of two federal judicial nominees this year whose nominations were torpedoed⁸² by Sen. Tim Scott (R-SC). The main qualms with Bounds' nomination from the perspective of the Republican Party's sole black senator were the fringe views⁸³ on multiculturalism and racism that Bounds repeatedly expressed while writing for the *Stanford Review*. Bounds went so far as to refer to "sensitivity" toward people of color and the LGBTQ community as a "pestilence"⁸⁴ that "threatens to corrupt our scholastic experience and tear our student community asunder."

These are not the only terrible views he has expressed, but they were the ones that sunk him with Sen. Scott. Yet, considering that Senate Republicans gained two seats in the 2018 midterms, it is possible that Bounds will be re-nominated and more easily confirmed.

Conclusion

The days when conservatives argued for judicial restraint are long gone. Last year, President Trump confirmed 12 of his appellate nominees—the most any president has confirmed⁸⁵ during his first year in office. This year, he confirmed 18 more. Each of his judicial nominees has been like the last: narrow-minded elitists who are more concerned with protecting corporations and the powerful than everyday Americans. And before the end of 2018, Senate Republicans will try to confirm as many as possible of the remaining judicial nominees pending before them.

Hopefully, this task will be tougher given that Kavanaugh's nomination renewed millions of American's awareness of the courts' influence on the many issues about which they care. Trump's judicial nominees this year have been less qualified and more malicious than at any point in the nation's history; the Senate must refuse to confirm them.

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Endnotes

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