

A Conservative's View of Donald Trump's Revised Supreme Court 'Short List'

On May 18, then-future Republican presidential nominee Donald Trump put out a list of 11 individuals, all sitting judges, who he would consider as a potential replacement for Antonin Scalia, who died unexpectedly last February, on the Supreme Court of the United States. Trump has now added 10 new names to that list.

As was the case with his original list, the men and women who have been added appear to be eminently qualified to sit on the high court. Nine of these individuals (Mike Lee, Thomas Lee, Allison Eid, Raymond Kethledge, Joan Larsen, David Stras, Margaret Ryan, Neil Gorsuch, and Steven Colloton) clerked for Supreme Court justices, and several others held distinguished clerkships as well.

Many of them have taught or continue to teach at prestigious law schools. Mike Lee is a sitting U.S. senator, and Charles Canady served four terms in the House of Representatives. While several served as state or federal prosecutors, at least one (Federico Moreno) served as a federal public defender.

One thing that is particularly striking about the Trump list is the geographic diversity and non-federal judicial experience of many of the identified individuals. As Scalia noted in his dissenting opinion in the same-sex marriage case, the current composition of the Supreme Court hardly reflects "a cross-section of America." He added:

[The] Court ... consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one

hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count).

Nine of the people on the Trump list, on the other hand, are sitting state supreme court justices from eight different states across the country. Two of them (Diane Sykes and Moreno) sat as state court judges before becoming federal judges. Although not a state court judge, Ryan sits on the Court of Appeals for the Armed Forces, which would likely give her a different perspective from most other federal judges.

Individuals with experience on state courts are less likely to have a jaundiced view of the competency of state court judges, who are sometimes treated like the figurative poor step-child by the federal judiciary. They are also more likely to pay greater heed to issues involving federalism, which also tends to get short shrift by federal legislators and judges.

This is important, for, as Justice Anthony Kennedy stated for a unanimous court in *Bond v. United States*:

Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. ... [T]he individual liberty secured by federalism is not simply derivative of the rights of the States.

When it comes to interpreting statutes and the Constitution, a judge must keep uppermost in mind that he or she did not write the text and should not attempt to rewrite that text through creative “interpretation” to mean something quite different from what was intended by its drafters, but which he or she personally considers more fair, wise or just.

In other words, a judge should interpret the text and structure of a statute or the Constitution, based on the

original public meaning of that text at the time it was adopted, and should not, under the guise of statutory or constitutional interpretation, impose on the rest of society his or her own policy predilections based on that judge's perceptions of contemporary mores. The men and women whose names have been added to the list appear to adhere to this view.

As I wrote in an earlier commentary, which contained my own list of eight individuals (six of whom are on Trump's list), it is not just the Scalia vacancy that needs to be taken into consideration.

By the time the next president takes the oath of office on Jan. 20, 2017, Justice Ruth Bader Ginsburg will be 83 years old, Kennedy will be 80 years old, and Justice Stephen Breyer will be 78 years old. And while I wish them all continued good health, it is a fact that the average life expectancy in this country is 76.3 years for males and 81.3 years for females. Therefore, it is entirely possible that the next president will get to fill several vacancies on the court over the next four to eight years.

With lifetime appointments, all federal court judges, but most particularly Supreme Court justices, exert substantial influence on the development and application of the law over a long period, often for decades after the president who appointed them has left office.

As a colleague and I stated recently, few presidential elections have featured federal court judges among their top five issues. The Supreme Court's odious decision in the Dred Scott case was a central theme in the 1860 race between Abraham Lincoln and Stephen Douglas. And several controversial decisions by the Warren Court were front and center in the 1968 face-off between Richard Nixon and Hubert Humphrey.

This may well be another such year. The next president will

have the opportunity to leave a massive imprint on the federal courts for a generation or more. The stakes are high indeed.

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