

## FEDERAL JUDICIAL SELECTION AFTER THE 2024 ELECTION

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As Associate Counsel to the President of the United States during the Trump administration, I had the unique opportunity to be at the forefront of the judicial selection process. Based on that experience, I would like to share some thoughts on what I call “judicial fortitude.” This is an important and under-covered quality that is necessary in effective judges. Since President Trump’s impact on the federal judiciary, a relentless assault on the courts has proceeded with the goal of eroding the public’s confidence in their legitimacy. Delegitimization is the end game—and this game is dangerous. But those of us involved in judicial selection during the Trump Administration knew these attacks would come, so we emphasized the quality of judicial fortitude in our nominees. And the results speak for themselves.

So, how do you know if a candidate has what it takes? Everyone around you is going to tell you that their candidate “has what it takes.” For starters, we looked closely at candidates’ records. And I don’t just mean legal work—their entire body of work. When did you stand for principles and pay the price? When someone asked for help, to what lengths did you go to promote the principles we share? Unfortunately, candidates told us they lost clients or even their jobs for representing certain clients or advancing positions in litigation that offended the beltway elite.

We coupled our full-body record review with an even more rigorous judicial interview that was impossible for candidates to fake their way through. Our Circuit interview was modeled after the Justice Scalia clerkship interview. For about an hour, a very hot bench of around ten White House and DOJ lawyers would ask substantive questions about originalism, textualism, and the separation of powers—(of course, we never asked about specific issues, pending cases, or how they would rule in a case). Some people who went through both the Justice Scalia clerkship interview and our interview said ours was more rigorous. I’m sure Justice Scalia would disagree. We insisted on in-person interviews. We wanted to see if a candidate could handle the pressure, look us in the eye, and convince us. Why did that matter so much? Because we were looking for leaders; judges who would not be intimidated by the press, their colleagues, or even some Stanford Law students. We were looking for candidates with fortitude.

But fortitude isn’t only important in judicial nominees. It’s also an important quality in the team of lawyers who pick them. The press will seek to undermine you. Senators will disagree

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with you. Your friends will pressure you. I want to take this opportunity today, for the first time, to lay out my blueprint for judicial selection in 2024, so that whoever ends up in the role I occupied under President Trump may build on our successes.

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As we look ahead to 2024, we need to keep judicial fortitude front of mind. Hopefully, 2024 will look a lot like 2016. A Republican president will follow a Democrat president. Republicans will control the Senate. And judicial nominations will be a priority.

The biggest obstacle any Administration faces when filling judicial vacancies is not the opposition party—it's time. There is a natural inclination to think that filling judicial vacancies is a "reactive" process because a vacancy is required first; but that's the wrong way to conceptualize this landscape. It's more accurate to envision an hour glass slowly draining. When the sand runs out, the window of opportunity closes forever.

- Goal. The goal is self-evident: fill every vacancy with a solid originalist and textualist candidate that time and politics will permit and who will interpret text consistent with its original public meaning.
- Points about the Core Selection Team. First—and this is important—make clear the person in charge will not become a judge. The person leading the charge in the administration needs to be focused on other people's judicial ambitions—not their own. To do the job well, you often need to push back on the Senators and their staffs. If the person in charge is concerned with their own judicial prospects, that creates a tension—or a conflict of interest. For that reason, the President or the White House Counsel needs to make clear to the person in charge that they will not be nominated for a judgeship. The job itself is its own reward. Second, once you've made clear to the person in charge that they will not be a judge, make sure that person keeps the selection team small. There is an inverse relationship between how many people are involved in judicial selection and how good the judges that the team picks will actually be.
- Call Any New Senators ASAP. Senior White House leadership should call any new Senators to discuss how they will handle judicial nominations. New Senators—especially those who are not lawyers—may not know a lot about this process. For District Court vacancies, our process involved asking Senators of both parties to send three names. We interviewed each of them and chose the best candidate to fill the seat. On a handful of occasions, the White House may even suggest certain candidates for Senators to consider. For Circuit vacancies, the White House selected the nominees and Senators are expected to go along with that candidate absent some extreme objection. Opening a line of communication at this early stage is a great way to ensure a successful relationship moving forward.

- Prepare for a Supreme Court vacancy and dual track the replacement with lower court nominations. Recent experience teaches us that every new administration should be ready for a Supreme Court vacancy. It happened within the first two years of the last three presidencies: Obama, Trump, and Biden. But don't let that slow down your lower court selection process. If an opening on the Supreme Court materializes, you'll need two different teams to work simultaneously.
- Be Aggressive. White House Counsel's Office nominations staff should approach the job as if they are litigating "advice and consent." When you speak to Senators or their staff, you are speaking with the office of the Presidency — the most powerful office in the world — behind you. Start your negotiation from this position of strength. Once a Circuit vacancy is announced or the Senators recommend a district court candidate, be aggressive about scheduling interviews, making preliminary selections, and promptly entering prospective nominees into the FBI background process. Time is running out, and every day counts.
- Talking to the Press. In the past, nobody was permitted to speak to the press on the record about nominations. Occasionally, we worked with a few fair-minded journalists on background by supplying them the list of candidates who would be nominated 24 hours in advance to help them write a story. White House nominations staff authorized to speak on background did so only about this limited information. If the White House Counsel wishes to continue or amend this policy, they should do so directly and make clear who on the nominations staff is authorized to speak to the press and on what topics.
- Press Releases. After the White House selects a nominee, it issues a Press Release. The judicial nominations Press Releases matter a great deal. They follow a specific format, and that's no accident. These biographies are important to the nominees and the nominations project because the administration must make clear it is only nominating the best candidates. One must be conscious of the political optics of these Press Releases as they are often the only information the media will read about a nominee until the days before their hearing.
- The Politics Behind Nominating as Many Candidates as Possible. The public narrative around judges is a politically powerful tool. The purpose of nominating as many candidates as possible isn't simply to fill the seats, but to keep judicial nominations in the news and to make the political case to the American people that judges are important and that the Senate needs to

promptly send candidates to the White House and aggressively confirm judges on the Senate floor. There is also safety in numbers. If there are a bunch of pending nominees, it's harder for opposition groups to focus on specific individuals.

Last but not least:

- Never Compromise on Circuit Nominees. These are the President's picks, and blue slips no longer exist for the Circuits. If you compromise, you will weaken the negotiating posture for the White House in the future. If the White House yields to one Senator, it will lose all of its leverage. It's better to leave the seat open and move on to other vacancies than to nominate someone who is not the preferred candidate of the White House.

I want to close with some thoughts on the next White House Counsel. It's one of those jobs where most people who want it aren't smart enough to do it, and most people who can do it are smart enough not to want it. I was fortunate in the last administration to see up close someone who was willing to do the job and did it particularly well, to the great benefit of the courts and the country.

My time working with Don McGahn left me with the firm conviction that the White House Counsel has the hardest legal job in the federal government. It represents the institution of the Presidency—the faces in the history books—the ghosts in the room. It's the hardest job because it requires so many skills that can only be learned through experience, and the margin for error is basically zero on the biggest stage in the world.

At its core, an effective White House Counsel must possess a deep moral conviction to do what's right under pressure, exceptional judgment, and a laser-like focus on what's important in the long run. That's the thing about politics—there are so few opportunities to make an impact that endures. But judges are the closest thing to permanency in politics. We are reminded of their impact every day. A small group of people can make a huge impact on this country by shaping the courts—but only if the right people are handling judicial selection in the White House Counsel's Office.