



Trump's First Year Was a Rocky One for the Justice System

Donald Trump's first year in office has been marked by many troubling and even astonishing events. But in few areas has he been able to wreak havoc so quickly as on the justice front, where a parade of extreme and unqualified judicial nominees, retrograde policy reversals, and even explicit malice toward the judiciary have unquestionably made their mark.

At the Department of Justice, Trump has repeatedly compromised the independence of our central law enforcement agency, damaging the public's faith in one of our most important civic institutions. Trump himself has [said](#) "I have the absolute right to do what I want to do with the Justice Department." His desire to keep the Department under his thumb has been borne out in his interactions with officials who are tasked with investigating his personal and campaign ties to Russia. He has inappropriately, and perhaps illegal, [pressured](#) the FBI, where he, in his own words, fired the Director, James Comey, because of "this Russia thing." Trump also [admitted](#) that "regardless of recommendation[s] [he] was going to fire Comey." He has further shown a troubling proclivity for autocratic behavior by [ordering](#) the Department to investigate his political opponents.

Attorney General Jeff Sessions, leading the Department wherever the President steers him, has also wasted no time in demonstrating his lifelong opposition to civil rights and civil liberties. The hostility of Sessions's DOJ to LGBTQ rights is especially notable. Under Sessions, the DOJ has [rescinded](#) protections for transgender students from discrimination at school, and [argued](#) that civil rights laws don't protect individuals from discrimination based on sexual orientation or gender identity. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, under Sessions's leadership, the Justice Department [announced](#) its support of Masterpiece Cakeshop and issued an amicus brief supporting a baker's right to refuse to bake a wedding cake for a same-sex couple.

Additionally, Attorney General Sessions has reversed the Department's position in voting rights cases. In February 2017, the Justice Department took the extraordinary step of switching sides in litigation involving a Texas voter ID law. The Campaign Legal Center, which represents some of the plaintiffs in the Texas case, [expressed](#) that it was "appalled and disgusted that DOJ would abandon their claims, that they have advocated for the last six years, that TX's photo ID law was enacted with a racially discriminatory purpose." A few months later, in August 2017, the Justice

Department [announced](#) that it was similarly switching sides in a case involving Ohio's purge of voter rolls, a case that is now before the Supreme Court. Sessions's actions in both of these cases demonstrates a radical change in the Justice Department's philosophy, which had previously [championed](#) voting rights and sued a number of states for enacting voting laws that discriminated against minorities. Justice Sotomayor called the Department to task on this disturbing trend, [noting](#) during the Ohio case that it "[s]eems quite unusual that your office would change its position so dramatically. I might accept it if you thought the Help America Vote Act, in fact, clarified something that was ambiguous, but you're taking a very different position. You're saying even before that Act, it was clear you could do it this way."

It doesn't end there. Sessions has [reversed](#) the Obama Administration's policy of phasing out private prisons, [ended](#) reforms on civil asset forfeiture guidance meant to stop law enforcement from seizing Americans' property without first bringing charges, [dropped](#) an appeal of a lawsuit to enforce the Americans with Disabilities Act, [rescinded](#) guidance protecting poor defendants from fines in a move the Brennan Center called "criminalizing poverty", and [announced](#) his intent to end oversight of local police forces that have shown a pattern of unconstitutional practices. He has [turned](#) affirmative action on its head, devoting the Justice Department's resources toward investigating Harvard University Admissions for discrimination against white applicants. Meanwhile, as Congress continues to debate the fate of 800,000 American DREAMers, it is worth remembering that Sessions [rescinded](#) the DACA program that allowed these young people, raised as Americans for most of their lives, to remain in the United States.

Another area where Trump and the GOP can agree they have made historic changes? Judicial nominations.

When Senate Majority Leader Mitch McConnell was asked about the "greatest achievement of his career," he [responded](#) that, "[f]or me personally, it would be Neil Gorsuch and the changes we're making in the circuit courts[.]"

In December, Senate Judiciary Chairman Chuck Grassley [tweeted](#) in celebration: "Proud to say the judiciary committee + the senate made history 2day by confirming the 12th circuit judge this year. the MOST in the 1st yr of any president in the 228 yr history of our country."

And in a self-congratulatory press conference with McConnell, Trump [bragged](#), "[t]he judge story is an untold story; nobody wants to talk about it...But when you think about it, Mitch and I were saying, that has consequences 40 years out, depending on the age of the judge — but 40 years out."

Senator Grassley laid out the extraordinary pace at which he rubber-stamped 12 judicial nominees to the federal courts of appeals. Previously, Mitch McConnell led an unprecedented obstruction effort against many of President Obama's nominees to the federal courts. Most notably, McConnell blocked the Senate from even considering Obama's nominee to the Supreme Court, Merrick Garland, in order to maintain a Republican Supreme Court majority that had

prevailed since 1971. McConnell's obstruction then allowed for the confirmation of one of the most conservative Justices of the modern age, [Neil Gorsuch](#). These men's efforts, while almost incomprehensibly cynical, were inarguably successful.

These victories came at the expense of shortsighted changes to Senate rules and customs – specifically in place to protect the Senate's constitutional advice and consent function at the expense of efficiency. When Republicans contended with a Democratic President, they embraced the rules and practices; now, under President Trump, they have discarded them. To illustrate:

- Under Obama, Republicans vigorously fought for the rights of home state senators and extensively used the blue slip to block nominees; under Trump, Grassley quickly discarded the 100-year-old tradition.
- Under Obama, Grassley held hearings on a total of only five circuit court nominees over a two-year period; under Trump, Grassley held hearings on five circuit nominees, in stacked hearings, in one month alone.
- Under Obama, Grassley insisted on viewing nominee-written Office of Legal Counsel opinions before confirmation; under Trump, Grassley has dismissed requests to see relevant opinions.
- Under Obama, Grassley would not permit nominees to proceed if they had used marijuana; under Trump, Grassley announced a change of policy.
- Under Obama, Republicans insisted on new hearings for certain nominees, such as Goodwin Liu; under Trump, Grassley rejected requests for a new hearing for Thomas Farr, despite credible evidence that he made misrepresentations in his answers to Committee Democrats.
- Under Obama, Republicans insisted on blue slip rights for newly elected senators facing pending nominees. Under Trump, Grassley did not give blue slips to Senators Smith and Jones.

As a result, the Republican Senate has allowed Donald Trump to remake the judiciary in both demographics and ideology. Among the 23 conservative individuals Trump has put on the bench since taking office, 83% of them of male. 91% are white. To put these numbers in perspective, George H.W. Bush, who left office a quarter-century ago, and every president since, had a more diverse set of judges [confirmed](#) to the courts.

Waiting in the wings are 43 more [nominees](#) to the federal district courts and courts of appeal. Who are these individuals, and what impact will they have on the federal courts in the years to come? The reality is that Donald Trump has nominated an unprecedented number of ideological, young zealots to the federal bench. Republican leaders understand, and gleefully [celebrate](#) the fact that their Faustian bargain with Trump is paying off, so the GOP-controlled Senate will undoubtedly remain committed to confirming them at a record pace.

[One](#) nominee called Justice Anthony Kennedy a “judicial prostitute,” and wrote a blog post comparing an anti-bullying initiative to “[t]eaching ‘gayness’ in public schools[.]” [Another](#) has

worked as Trump's attorney in the White House Counsel's office, and admitted to having a hand in Trump's Muslim ban, the decision to roll back DACA, the creation of the sham 'election integrity' commission, and Trump's business conflicts of interest. [Another](#) fought to protect a racial gerrymandering effort that the Fourth Circuit found "target[ed] African-Americans with almost surgical precision," and has been accused of participating in a scheme by the Jesse Helms campaign that intimidated black voters. [One](#), now sitting as a lifetime judge on the Sixth Circuit Court of Appeals, wrote racist, sexist, and homophobic commentary anonymously on the internet, most notably perpetuating birther conspiracy theories. [Another](#), as Sen. John Kennedy put it, "blogged in support of the KKK." [Another](#) keeps a portrait of Confederate President Jefferson Davis hanging in his office.

Want more? [One](#) nominee proposed legalizing corporal punishment and electric shock in our prisons. [Some](#) have spent their careers targeting the reproductive rights of women, while [others](#) have fought Muslim immigrants and worked to prohibit cities from taking down monuments honoring the Confederacy. Still [others](#) have advocated discrimination toward LGBTQ persons, for example, arguing that a gay judge could not hear a same-sex marriage case. [One](#) went so far as to call transgender children part of "Satan's plan." The list goes on.

Here is what is at stake: There are currently almost 160 more vacancies for Trump to fill on the federal district courts and courts of appeal. More vacancies will inevitably come up as sitting judges retire, take senior status, or pass away unexpectedly. Over the course of Trump's presidency, even if restricted to four years, he will likely have the opportunity to fill hundreds of judgeships on the lower federal courts.

For the vast majority of litigants who appear there, courts below the Supreme Court are the courts of last resort. These lower court judges play a critical role in safeguarding our democracy and the rule of law, and ensuring the proper application of important constitutional rights and essential legal protections. Are the states attempting to prevent African Americans, Latinos, the elderly and students from voting? Are persons of color who are fired, or not hired, because of their race able to hold employers accountable? Are women who face sexual harassment in the workplace able to take legal action? Are women able to exercise their constitutional rights to decide whether to have an abortion? Are our laws that ensure clean air and clean water properly enforced? Are criminal suspects given their Constitutional Rights? Are immigrants facing deportation given due process of law? Are laws protecting workers' rights to unionize, receive fair wages, and have safe working conditions properly enforced? Are consumers who are defrauded by banks able to hold corporations accountable?

Two federal courts of appeal are especially at risk of taking a sharp right turn during the remainder of Trump's presidency. The Second Circuit, with two current vacancies and two Clinton-appointed active judges over 75 years old, could undergo an abrupt ideological shift under the Trump regime. If Trump appoints nominees to those potential seats, he will have changed the Second Circuit from a majority-Democrat appointed court to one with a decidedly conservative tilt. The Third Circuit is in a similar position. Of the twelve active judges, seven

were appointed by Democrats and five by Republicans. There are currently two vacancies. Trump has already successfully confirmed [one](#) judge to this court. If he fills the two vacancies, the Third Circuit will be split. If another vacancy emerges over the next three years, it will flip.

Meanwhile, the Sixth Circuit, even now a conservative court, will become a court overwhelmingly dominated by Trump appointees. Trump has already had [three judges confirmed](#) to the Sixth Circuit (President Obama only had three nominees confirmed to the courts of appeal in his first year, total). Another vacancy on the Sixth Circuit has already been announced.

Just this year, we have witnessed firsthand the power of the courts, and courageous judges, in upholding our most critical rights and values. In 2017, federal judges blocked President Trump's discriminatory travel ban, invalidated President Trump's efforts to force cities and states to assist in the deportation of non-violent undocumented immigrants, hindered President Trump's efforts to reverse President Obama's protections for undocumented children, and stopped President Trump's ban on transgender persons serving their country in the military. The U.S. Court of Appeals for the District of Columbia, in an opinion that included Chief Judge Merrick Garland, blocked a Trump policy that kept pregnant minors in federal custody from being able to exercise their constitutional right to decide whether to have an abortion.

These examples are glimmers of hope that our system of justice, which has survived intact – if imperfect – for hundreds of years, will yet survive the onslaught that is the Trump Administration. Not only that, but the systematic outrages against it over the last year have served as a series of alarm bells rousing us all to action. There is growing energy among advocates and activists who care about the courts, and also on the Hill - where we've witnessed a renewed willingness to push back against extreme and unqualified nominees. These are all good signs, but with a possible three years left in the Trump presidency, the struggle is just beginning. And the stakes could not be higher.