

AFJ NOMINEE SNAPSHOT

MICHAEL SCUDDER

U.S. Court of Appeals for the Seventh Circuit

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INTRODUCTION

On February 15, 2018, President Trump [nominated](#) Michael Y. Scudder, Jr. to the United States Court of Appeals for the Seventh Circuit. Scudder is nominated to fill the seat previously held by Richard Posner, who [retired](#) on September 2, 2017.

Scudder [worked](#) for the Department of Justice and in the White House on national security issues during the George W. Bush presidency. His time there overlapped with the Bush Administration's concerning stances on executive power and civil liberties, including the rights of detainees. The Senate should carefully examine Scudder's record before confirming him to a seat on the Seventh Circuit Court of Appeals.

BIOGRAPHY

Michael Scudder [received](#) his B.B.A. from Saint Joseph's College in 1993, and his J.D. from Northwestern University Pritzker School of Law in 1998, where he served as editor-in-chief of the *Northwestern University Law Review*. While in law school, Scudder published a [Comment](#) in the *Northwestern University Law Review* titled, "The Implications of Market-Based Damages Caps in Securities Class Actions." The piece discussed in detail the Private Securities Litigation Reform Act of 1995.

Before attending law school, he worked as an auditor for Ernst & Young LLP. After law school, Scudder clerked for Judge Paul V. Niemeyer on the Fourth Circuit Court of Appeals, and for Justice Anthony Kennedy on the U.S. Supreme Court. From 2000 to 2002 Scudder worked as an associate at Jones Day in Cleveland, Ohio. He was an assistant United States attorney for the Southern District of New York from 2002 to 2006, and in 2006 joined the Department of Justice as counselor to the deputy attorney general. While at DOJ, Scudder's work [included](#) "serving as liaison to Iraq's court system, which was conducting the trial of Saddam Hussein."

From 2007 to 2009, Scudder served as associate White House counsel and then as general counsel of the National Security Council and senior associate counsel to the President. Scudder's responsibilities for the National Security Council [included](#) "help[ing] coordinate the legal aspects of policies involved with the war on terror, overhaul of intelligence operations, international treaties and trade agreements." A Chicago Tribune [article](#) noted that Scudder specifically "helped structure" the process for determining whether captured terrorists should be prosecuted before military commissions.

After leaving the White House, Scudder became a partner at Skadden Arps, specializing in litigation, accounting, government enforcement and white-collar crime. In 2014, Scudder began representing the University of North Carolina at Chapel Hill in several matters. He [defended](#) the university in a case challenging the school's admissions process, which permits consideration of

race and ethnicity in admissions decisions. While representing UNC, Scudder submitted an [amicus brief](#) in [Fisher v. University of Texas](#) supporting the University of Texas's race-conscious admissions policy. In 2017, Scudder [defended](#) the former chief executive officer of Chicago Public Schools, Barbara Byrd-Bennett, during a corruption scandal. Byrd-Bennett eventually pled guilty to federal bribery and kickback charges for steering Chicago Public School District contracts to a former employer.

In 2009, Scudder began [teaching](#) as an adjunct professor of law at Northwestern University Pritzker School of Law, and since 2013 has been a lecturer in law at the University of Chicago Law School.

LEGAL AND OTHER VIEWS

I. U.S. ATTORNEY SCANDAL

From 2007 to 2009, Scudder [worked](#) at the Bush White House. During that time, Scudder was tasked with conducting an internal investigation into the firings of U.S. attorneys from the Department of Justice due to their perceived progressive political leanings. One journalist [reported](#) on the Bush administration's "active involvement" in the firings of the attorneys, which were described as falling into two main categories:

First, its role in initiating and promoting the overall plan to remove an unspecified number of

U.S. attorneys — traditionally treated as apolitical prosecutors who operate independently from the political agenda of the administration — deemed insufficiently committed to the Bush agenda. And second, its apparent work in pushing specifically for several of the most high-profile dismissals.

Reasons for the U.S. attorneys' dismissals [reportedly](#) included convicting a Republican member of Congress for corruption and failing to find voter fraud in an extremely close governor's election won by a Democrat. In one case, a U.S. attorney's dismissal was apparently motivated by the desire to [clear](#) a position so that a Republican political operative could take the job.

In March 2007, following Scudder's internal investigation, he wrote an eponymous memo that included interviews with key figures and a detailed timeline of events around the firings. The memo is not publicly available. The Department of Justice Office of the Inspector General (OIG), in its September 2008 [report](#) on the firings of the nine U.S. attorneys, requested to review the memo, expressing interest in Scudder's "chronology of events related to the U.S. Attorney removals... [and] interview[s] [with] several people in the Department and within the White House, including Karl Rove." However, OIG was denied access to everything but select portions of the memo:

[W]e requested that OLC produce a complete copy of the final Scudder

memorandum and all drafts of the memorandum. OLC declined to produce the document, stating that the White House Counsel's Office directed it not to do so.... The White House Counsel's Office declined to provide to us a full copy of the memorandum, stating that it has a "very strong confidentiality interest" in not providing documents that were prepared to advise and assist the President and his advisors "in response to a public, ongoing, and significant controversy."

The White House Counsel's Office eventually provided to us a heavily redacted version of the document, but the redactions made the document virtually worthless as an investigative tool.

Though members of the House Judiciary Committee were permitted to review the Scudder memo in 2009, it has not otherwise been made public. Members of the Senate Judiciary Committee should be granted access to the memo so that they can thoroughly review Scudder's record before voting to send his nomination to the Senate floor.

II. NATIONAL SECURITY

Scudder later worked as general counsel for the National Security Council under President George W. Bush. The Chicago Tribune [reported](#) that Scudder was deeply involved in structuring the prosecution of alleged terrorists by military commissions.

When later asked about his national security work for the Bush Administration, Scudder [said](#), "I think that history will look

favorably upon what President Bush did for the country following 9/11, including up through the end of his administration. What I would emphasize ... is just the extraordinary difficulty of these questions."

Scudder continued:

There's no historic analogue for the type of war we're fighting. You're not fighting against people in uniforms. It's all novel. It's all unprecedented. So if you were shouldering the responsibility of being the commander in chief, you're going to want all the different options ... You're going to realize that you have an extraordinary responsibility of having to protect the country. And you're going to make the best decisions that you can in the circumstances without a playbook to draw upon

The Senate should question Scudder on his involvement with the Bush Administration, as well as his current stance on the intersection of national security issues and civil liberties.

III. CYBERSECURITY – GOVERNMENT NOTIFICATION

In September 2015, when [interviewed](#) by LawDragon as part of a cybersecurity roundtable, Scudder was asked "what the obligations are in terms of public reporting, government notification and how you advise your clients to handle them[?]" Scudder replied:

As far as the government goes, most companies in regulated industries will want to think through whether to self-report the [data security] incident to the regulatory authority that has

jurisdiction over them. They'll also want to consider reporting the incident to law enforcement.

We don't advise clients to reflexively report or not report an incident. Sometimes that surprises people. There are a lot of occasions in which you would choose to report an incident to law enforcement in the very earliest phases. There are other times when you may not. You've got to run through a calculus about what is in the company's best interest at a particular point in time. You can always defer reporting. You can always choose to not report it and allow the government to come to you, and hope things work out fine. So much depends on your capacity to deal with law enforcement at a particular moment in time and what information you feel comfortable providing on a voluntary basis.

Often clients will say, "Why wouldn't you just instantly pick up the phone and let the government know? How does that harm you?" It may set you back some operationally.

confirming him to a lifetime appointment on the Seventh Circuit Court of Appeals.

CONCLUSION

The Senate Judiciary Committee should carefully examine Scudder's record before