



Written by [Bob Adelman](#) on February 15, 2017

Trump Has Great Opportunity to Influence U.S. Jurisprudence

In his acceptance speech at the Republican National Convention after becoming the Republican nominee for president, then-candidate Donald Trump reiterated the importance of the replacement of deceased Supreme Court Judge Antonin Scalia, stating, “The replacement of our beloved Justice Scalia will be a person of similar views, principles and judicial philosophies. Very important. This will be one of the most important issues decided by this election.”



Following Trump’s election victory in November, liberals voiced shock and consternation, especially in light of the Republican Party maintaining its majority in the branch of the legislature tasked with confirming Scalia’s replacement — the Senate. Nina Totenberg of National Public Radio declared that “Democrats likely will have no input” during the selection process, and added that there could be more than one Supreme Court vacancy Trump would need to fill during his first term. Justice Ruth Bader Ginsburg, a reliable liberal vote, is 83. Justice Anthony Kennedy, a middle-of-the-road vote, is 80. And Justice Stephen Breyer, another firm liberal vote, is 78.

On January 20, President Donald Trump inherited far more than just one vacancy on the Supreme Court. According to CNN, he also inherited the opportunity to fill more than 100 federal court vacancies, which, said Russell Wheeler of the left-leaning Brookings Institution, would allow the new president to “put a different face on the Supreme Court and the Courts of Appeals.... He could substantially change the course of federal jurisprudence.”

Trump’s opportunity could be significantly even larger, [according to the *New York Times*](#), which just released a study of the 870 present judgeships and how many of them might, over time, become open. Using a “survival model” that accounts not only for mortality but also for the particular court, the party of the president who made the appointment, and when he or she becomes eligible for “senior status,” Trump could have the privilege and responsibility of naming replacements for nearly half of those present positions by 2020.

The number is larger than usual for several reasons: The Senate deliberately refused to confirm a number of former President Obama’s nominations, while nearly a quarter of those currently sitting on the bench are over age 70 and eligible for “senior status” — a form of semi-retirement that would open up those seats. There’s the median age of 62.6 years for all those present judges — higher than any average in recent years.

Trump’s selections, if confirmed, could have at least as significant an impact as did former President Obama’s 323 appointments. John Malcolm, director of the Heritage Foundation’s Center for Legal and Judicial Studies, noted that Obama’s appointments resulted in “a large ideological shift on the circuit courts.” When Obama entered his first term, Republican-appointed judges held majorities on nine of the 12 regional appeals courts. At the end of his second term, eight of them had shifted, creating majorities



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of Democrat-appointed judges. Obama's efforts resulted not only in the appointment of far more female and minority judges than any other president in history, but also in the appointment of 11 openly gay or lesbian judges, whereas before he took office there was only one.

The nominating process is far more complicated than President Trump just doing his own private vetting of individuals remaining on the lists of people he considered acceptable, which he made public during his campaign. Malcolm described it as more like a "three-legged stool," with guidance and suggestions coming from senators, the White House's legal counsel, and the Department of Justice's Office of Legal Policy. Then comes a vote over a nominee by the Senate Judiciary Committee, where Chairman Senator Chuck Grassley (R-Iowa) has said he will continue to honor the Senate tradition of the "blue slip" policy. That policy grants any member of his committee veto power over an individual nominated to serve the districts in his state. Finally comes the floor vote, where the Republicans hold a slim four-vote majority.

Observers are expecting the Senate's full attention to be focused on Scalia's proposed replacement, Judge Neil Gorsuch, following which filling the 38 "emergency vacancies" in the lower courts will top that body's agenda. In other words, it could be months before President Trump will be able to fill those 100-plus judgeships.

The issues that are likely to be litigated in the future include right to life/abortion, the Second Amendment/gun control, environmental regulations, transgender issues, regulation of Wall Street, "anti-discrimination" laws/religious freedoms, voter rights, and immigration.

What will Trump's nominees look like, ideologically speaking? If his nomination of Judge Neil Gorsuch is any indication, they will likely be "originalists," holding that the Constitution should be understood as the Founders intended when it was crafted. Comforting to conservatives were Gorsuch's rulings in favor of religious liberties in high-profile cases such as *Hobby Lobby* and *Little Sisters of the Poor*, and his dissent in a 2016 ruling that favored Planned Parenthood.

But, according to Samuel Smith, writing for the *Christian Post*, Gorsuch is a flawed candidate because he "attends a very liberal Episcopal church in Colorado." This means, according to Andy Schlafly, the son of the late pro-life leader Phyllis Schlafly, that Gorsuch "probably would NOT be pro-life on the Supreme Court," placing his name on his list of "unacceptable nominees."

And then there's Trump's older sister, Maryanne Trump Barry, a senior judge first appointed to the federal bench by President Ronald Reagan and then elevated to the U.S. Court of Appeals for the 3rd Circuit by President Bill Clinton. She has spoken against women's claims of sexual harassment, and also struck down as unconstitutional a New Jersey law banning late-term abortions.

Finally, even if Trump and his advisors are able to find and nominate candidates with impeccable credentials — an abiding belief in the rule of law and the Constitution as originally intended, a firm foundation shown by previous decisions in favor of government limitations spelled out by Article I, Section 8's enumerations of federal powers, a strong commitment to the Bill of Rights including especially the First, Second, Fourth and Fifth Amendments — there's always the chance that he or she will waver over time or wander away from those constitutional expectations.

Nevertheless, President Donald Trump has a once-in-a-generation opportunity to redress constitutional abrogations with his nominees and begin the process of restoring the Republic.



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