BOLD NEW BENCH

HOW TRUMP'S JUDGES ARE CHANGING THE LAW

BY JIMMY HOOVER | SEPTEMBER 10, 2019

When attorney Ryan Parsons saw which judges would be on the Seventh Circuit panel that would hear his client's pension case, he knew what his strategy was going to be.

Parsons had drawn two of President Donald Trump's newest appointees to the federal appeals court in Chicago — Judge Amy J. St. Eve and Judge Amy Coney Barrett — and quickly understood that his arguments would have to focus on the plain wording of the contract.

"I knew that those judges would be receptive to that argument," Parsons, a partner at Foley & Lardner LLP, said in an interview.

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Like most of Trump's appointees to the federal circuit courts, Judge St. Eve and Judge Barrett have demonstrated a penchant for "textualism," a method of judicial interpretation where judges look primarily to the precise wording of a disputed statute or contract before considering other factors.

Heading into oral arguments, Parsons said he "wanted to focus my comments on the plain text of the contract. You don't want to get any outside evidence in there."

It was a winning strategy. The three-judge panel, which also included Circuit Judge William J. Bauer, unanimously affirmed the lower court's dismissal of the lawsuit Parsons was defending against. The suit came from a daughter seeking the pension benefits that her mother earned working for decades for the Children's Hospital of Wisconsin.

The mother died of bladder cancer just days before her pension began. She had designated her daughter as her beneficiary, but, under the contract, when an unmarried retiree dies before the plan begins, the pension is not available to the beneficiary.

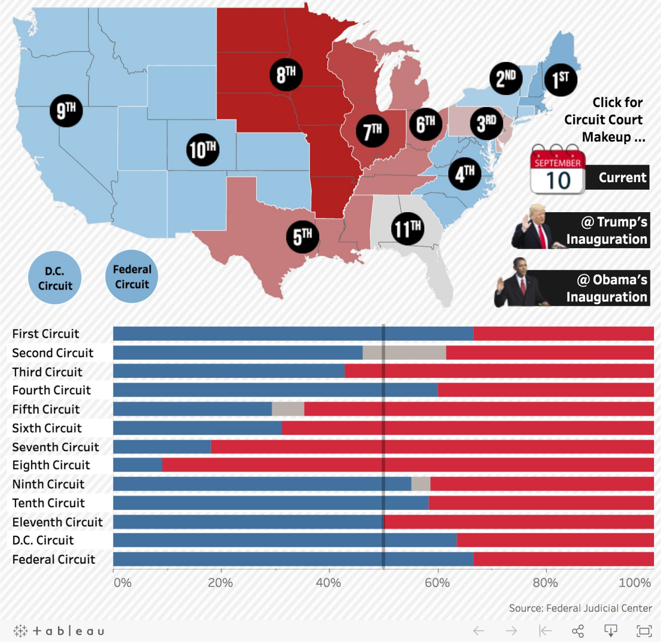
In her first published opinion in June 2018, Judge St. Eve admitted that "the facts of this case are undoubtedly unfortunate," but said that the plan's administrative committee had a "reasonable reading" of the contract.

Textualism, or some variation of it, appears to have triumphed in the Seventh Circuit, thanks to President Trump's success at appointing federal judges there. Not only has the president helped create an even larger gap between the number of Republican appointees versus Democratic ones — from 6-3 when he took office to 9-2 today — but he has done so with judges with a stronger commitment to conservative jurisprudence than their predecessors.

"It's definitely true that there is a reasonable amount of methodological consistency across a lot of the new appellate judges and certainly an emphasis on text is part of it," said Jonathan Adler, a law professor at Case Western Reserve University School of Law.

The Trump Effect

President Donald Trump has flipped one circuit court and put Republican-appointed appellate judges in the majority since he took office.



Source: Federal Judicial Center

Judge St. Eve, for instance, replaced Clinton-appointed Judge Ann Claire Williams and has already written, or joined, a number of opinions that can be considered "textualist," including one issued in late March when she took Bush-appointed Seventh Circuit Judge Diane Sykes to task for relying on the "legislative history" to support her reading of the law in a case involving the Milwaukee Public School District's busing policies.

Another of Trump's appointees, Judge Michael Scudder, replaced Judge Richard Posner, who despite being a Reagan appointee, became one of the bench's leading critics of famous textualists like the late Justice Antonin Scalia.

"I don't think there's any doubt that to have President Trump be able to nominate and confirm four judges who all look to be solid textualists, within nine months maybe, is going to transform the court for a generation," Parsons said.

Perhaps the clearest example of this new reality came earlier this year in the case Kleber v. CareFusion Corp., involving the federal age discrimination statute.

In an 8-4 opinion, **the full appeals court ruled** the Age Discrimination in Employment Act does not protect job applicants alleging that certain hiring practices have a disparate impact on older workers; only current employees can make such disparate-impact claims.

Writing for the court's conservative majority and joined by his three fellow Trump appointees, Judge Scudder delivered a ringing endorsement of textualism over other forms of statutory interpretation.

"[Our] role is to interpret the words Congress enacts into law without altering a statute's clear limits," Judge Scudder said.

He first looked to the "plain language" of the ADEA's disparate-impact provision, which makes it unlawful for an employer "to limit, segregate, or classify his employees" in a way that would harm older workers.

The section, by its terms, "limits its protection to employees," Judge Scudder said. That conclusion becomes "ironclad" when considering that Congress clearly distinguished employees from applicants in other parts of the law, he said.

The dissenters, on the other hand, objected to that limited reading of the ADEA provision, accusing Judge Scudder and the majority of putting on "blinders" and ignoring "precedent, legislative history, and practical consequences to offer one cramped reading for the scope of [the law]."

To Parsons, who followed the case closely, it was a classic collision between two schools of statutory interpretation. The court's textualists focused on the plain language of the statute, which only referred to "employees." The so-called purposivists looked to other factors, including Congress' intent in passing the law. In the end, the textualists won out.

CIRCUIT SWITCH

With help from his Senate allies, Trump has appointed circuit judges at a faster clip than any president in recent history. Here are the courts he is influencing the most.

3rd Circuit

With the March confirmation of Judge Paul Matey, Trump successfully flipped his first circuit court to a majority of Republican appointees. The 3rd Circuit had a 7-5 Democratic advantage when he took office. It now stands 8-6 the other way.

11th Circuit

Two upcoming vacancies on the 11th Circuit give Trump the opportunity to change a second federal appeals court to a majority of Republican-named judges. Still, it would seem more of a symbolic victory on the already solidly conservative circuit.

2nd Circuit

If confirmed, Trump's latest 2nd Circuit nominees, William J. Nardini and Steven Menashi, would create a conservative majority on another influential appeals court, which sits in Manhattan and hears a high proportion of complex white collar cases. Menashi's nomination has become the subject of controversy over a law journal article he wrote titled "Ethnonationalism and Liberal Democracy."

9th Circuit

Of the 29 authorized judges in the nation's largest circuit, only 7 were Republican appointees when Trump took office. That number is now 12, and his sixth 9th Circuit nominee is currently pending. The West Coast appeals court has been a top priority of the Trump administration, which has experienced several unfavorable rulings there.

Curiously, Seventh Circuit Judge Frank Easterbrook — the conservative Reagan appointee who, along with Justice Scalia, brought textualism into the mainstream of American law in the 1980s — dissented to his freshman colleague's majority opinion in Kleber.

Progressive groups say Judge Easterbrook's dissent is an example of how radically conservative the new Trump appointees are — not even he would sign onto their view of the age discrimination statute — but Parsons considers it a "good faith" disagreement over how to apply the same textualist methodology.

"I think he agrees with the methodology to start with the text of the statute," he said. "In his view, however, the statute itself isn't susceptible to a plain meaning."

Kleber v. CareFusion Corp. has become an early bellwether of President Donald Trump's influence on the lower courts in his more than 2½ years in office.

"They're now able to affect the appellate courts as a whole in the sense that they can be deciding votes in en banc decisions," said Elliot Mincberg of the group People for the American Way, who has been closely following the decisions of the president's appointees since they took the bench.

"I think they have had a significant impact on the state of the law in a number of circuits," he said. "I think it will grow even more significant as more of them are confirmed."

Changing Bench, Changing Law

With 43 circuit court appointees so far, Trump has outpaced any president in recent history in putting judges on the influential appeals courts around the country. At the same point in his first term, President Barack Obama had only appointed 20; President George W. Bush fared slightly better with 28.

When Trump took office, Democratic appointees outnumbered Republican ones on the nation's 13 federal circuits 90-72. Republican appointees now enjoy a 93-82 seat advantage.

Trump has already succeeded in "flipping" the Philadelphia-based Third Circuit from a majority of judges appointed by Democratic presidents to a majority appointed by Republicans, and he appears close to doing the same for the Second and Eleventh Circuits.

Trump's appointees to the circuit courts are already pulling the law in a more conservative direction, and sometimes over the objections of their fellow Republican appointees.

Take the Fifth Circuit's 2-1 decision in Inclusive Communities Project v. Lincoln Property Co. on April 9, in which Trump appointee Judge Kurt Engelhardt cast the deciding vote throwing out a Fair Housing Act lawsuit from an affordable housing nonprofit against various Dallas-area property owners for alleged discrimination.

In his majority opinion, Judge Engelhardt said that the Inclusive Communities Project's lawsuit failed to meet the pleading standards of the Federal Rules of Civil Procedure. The ICP's complaint, the judge explained, could not show how the property owners' policy of refusing to rent to housing voucher recipients has caused racial segregation in the Dallas area.

In a dissent, Senior Circuit Judge W. Eugene Davis — himself a Republican appointee — said that the Fifth Circuit majority created a higher pleading standard for disparate-impact claims than other circuits. The Fourth Circuit, for instance, "supports ICP's traditional disparate-impact claim here," he said.

Judge Davis' disapproval was shared by other Fifth Circuit members when the full circuit, including Trump's five additions to the appeals court, refused to rehear the case en banc in a 9-7 decision in July.

Circuit Judge Catharina Haynes, another Republican appointee, said that the Fifth Circuit's 2014 decision recognizing disparate impact claims under the FHA is "almost meaningless" now that Judge Engelhardt's opinion has created "an almost impossible pleading standard."

Citing Bell Atlantic Corp. v. Twombly, the Supreme Court's landmark opinion on pleading standards, Judge Haynes said that the decision "makes a plaintiff's burden nearly insurmountable at the initial pleading stage in litigation by requiring immutable proof rather than plausible allegations."

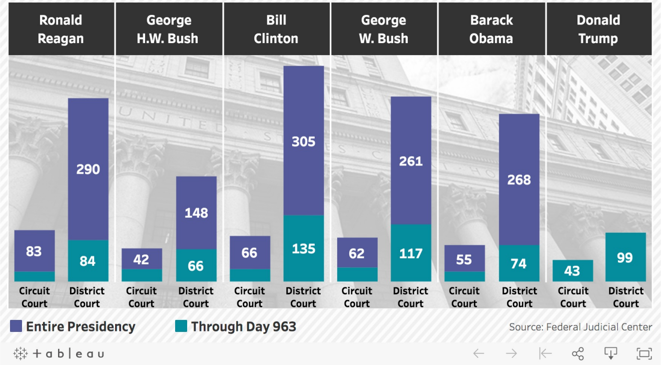
The case illustrates how crucial the circuit courts are to the direction of American law.

While it's true that the president's appointment of Justice Neil Gorsuch and Justice Brett Kavanaugh to the Supreme Court has swung the balance of the highest court in the land, it is the federal appeals court that has the last say in the vast majority of cases; the Supreme Court only agrees to consider a handful of the thousands of appeals that are filed there each year from the lower courts.

Key to the White House's judicial campaign is the fact that judges can now be confirmed by the Senate with a simple majority vote in light of a rule change made by Democrats in 2013 that abolished the filibuster for lower court nominees; filibusters required 60 votes to defeat in a process known as invoking cloture.

How The White House Fared

Trump has appointed more circuit court judges than any recent president by this point in his first term.



Source: Federal Judicial Center

Senate Republicans, who control the chamber, have taken full advantage of the Democratic rule change, confirming Trump's nominees in tight, party-line votes with virtually no support from the minority.

The result, progressives say, is an army of new judges groomed by outside groups like **the Federalist Society** who are even more conservative than previous Republican appointees.

"It's extraordinarily troubling for the rights, liberties and welfare of all Americans," said People For The American Way's Mincberg.

Mike Davis, who worked on judicial nominations for former Senate Judiciary Chairman Chuck Grassley, R-Iowa, doesn't see it that way.

"To the extent that the two new Supreme Court justices and the lower court judges are in the mold of Justice Scalia, that's exactly what President Trump said he would do, so I hope that's the case," said Davis, who now runs an outside group called the Article III Project to help support the president's nominees through the confirmation process.

Indeed, like Justice Scalia, many of Trump's appointees have drawn attention for their bold writing styles and strong jurisprudential views. Perhaps the most well-known among these is Justice Gorsuch, who wasted no time making his presence known in his first term with a host of dissents, concurrences and folksy opinions.

But those aren't the only characteristics that unite this new class of conservative jurists.

Adler said he has observed that Trump's nominees seem to be engaged with academic literature "more than prior generations of Republican appointees."

"It's not just a question of stronger views. It's a question of intellectual engagement," he said.

A New Generation

Trump's first Supreme Court appointee, Justice Gorsuch, has become somewhat of a symbol of this new wave of "intellectually engaged" conservative jurists. A recent study by the Empirical SCOTUS blog found that he had cited more law articles than any other justice in the most recent term. But Trump's lower court appointees are similarly plugged in.

Sixth Circuit Judge Amul Thapar, Trump's first appointee to a U.S. circuit court and a possible Supreme Court contender, invoked the latest scholarship from the conservative academy when he criticized the "questionable" doctrine of Chevron deference, which instructs courts to defer to agency interpretations of ambiguous statutes.

Chevron, Judge Thapar wrote, is "not a free pass" and declined to give discretion to the Board of Immigration Appeals in a ruling last December.

He did the same in a dissenting opinion in late August when the full circuit declined to rehear a challenge to IRS regulatory taxes.

A panel had thrown out the challenge in light of the founding-era Anti-Injunction Act, which bars lawsuits trying to block the collection of taxes. Judge Thapar, hoping for an en banc hearing, said the panel's decision misunderstood the original meaning of the law, in which it was Congress' job to levy taxes.

Nowadays, the IRS "exercises the power to tax and to destroy, in ways that the Founders never would have envisioned," he said.

The opinion drew a swift rebuke from Judge Thapar's Clinton-appointed colleague, Judge Eric Clay, who blasted his "latest attempt to inflict death by distorted originalism on the modern administrative state." Judge Thapar may take issue with the IRS' broad power in modern American life, but it is "textbook judicial activism" to use that as a basis to ignore the Anti-Injunction Act, Judge Clay said.

Growing Disagreements

These "strong jurisprudential commitments," as Adler calls them, have produced some stark divisions among Trump appointees themselves.

As in the frequent clashes last term between the more libertarian-minded Justice Gorsuch and Justice Kavanaugh, Trump's lower court appointees have found themselves at odds in recent cases.

On Aug. 20, for instance, President Trump's five additions to the Fifth Circuit fractured in a case involving a police officer shooting. Judge Engelhardt voted with the majority to deny qualified immunity to the officers who shot a teenager who was holding a gun to his head and force a trial on whether the teenager posed an immediate threat.

Judge Don Willett — another of the five — dissented. In his view, the Fifth Circuit is bound by the Supreme Court's qualified immunity cases giving law enforcement officers a powerful shield from liability in all but the most egregious circumstances. Under the high court's precedent, therefore, the lawsuit should be dismissed, he said.

At the same time, Judge Willett used his dissent to argue that the Supreme Court should reconsider its qualified immunity jurisprudence, which he argued tips the scales too much in favor of the government.

"By insulating incaution, the doctrine formalizes a rights-remedies gap through which untold constitutional violations slip unchecked," Judge Willett said. "The real-world functioning of modern immunity practice — essentially 'heads government wins, tails plaintiff loses' — leaves many victims violated but not vindicated."

Judge James Ho, confirmed just a day after Willett, took his colleague to task in a dissent of his own.

"If his concerns are based on practical and not originalist considerations, then he should address them to the Legislature, rather than attack the Supreme Court as 'one-sided,'" wrote Ho, a staunch conservative.

For his part, Judge Willett called Judge Ho's attack "a pyromaniac in a field of straw men."

To Adler, the case is an example of how Trump's new appointees, by "grounding their decisions in a principled jurisprudence," don't always reach results that align with conservative politics. Here, Willett's hostility to "judge-invented" legal doctrines with little basis in statutory or constitutional law saw him take what could be described as a rather progressive position: Police departments should be accountable for violating people's rights.

There's a lesson there for lawyers as well: Know your audience. Trump's appointees will only grow in numbers, and influence, as his presidency progresses. And as recent cases have demonstrated, it pays to be in tune with how they think.

"Insofar as there is fervent debate on the academic right about a particular question that's relevant to your case, you probably want to be aware of it because there's a good chance these judges are going to be aware of it," Adler said.

Jimmy Hoover is Law360's senior U.S. Supreme Court reporter. ***Follow him*** *on Twitter.*
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