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The Ball is in Our Court

133 OPPORTUNITIES TO INFLUENCE THE FEDERAL COURTS, AND THAT'S JUST THE BEGINNING

by Chelsey Youman, legal counsel for First Liberty Institute, a non-profit law firm dedicated to defending religious freedom for all.

The brilliance of the Founding Fathers' system of checks-and-balances is best illustrated when each of the co-equal branches asserts its influence upon the other two. A prime example is currently under way as President Trump nominates men and women to fill vacancies on federal benches throughout the country.



While his Supreme Court appointee, Neil Gorsuch, is showing early signs of great promise, the Trump administration has much more work ahead to reshape the federal courts — and the impact will last a lifetime.

A compelling issue in the 2016 presidential election was the vacancy on the Supreme Court. Americans intuitively understood that the very

make-up of our jurisprudence was at stake with this appointment for a lifetime term.

Justice Gorsuch's confirmation was a step in the right direction for American jurisprudence due to his adherence to originalism in applying the Constitution. This philosophy is more likely to yield rulings favorable to religious liberty consistent with the First Amendment. Based on his tenure so far, Gorsuch is already demonstrating fidelity and apt analysis in regards to the original intent and text of the U.S. Constitution.

Another Supreme Court nomination, perhaps multiple nominations, may come at any time. Since the Supreme Court hears less than one percent of cases appealed to it each year, the lower federal courts, often overlooked, provide an even greater opportunity to influence the judiciary. President Trump can have a huge influence on the entire judicial branch, not just the Supreme Court.

There are currently 133 federal court vacancies to be filled by President Trump — judges who will become part of the federal judiciary that hear 99 percent of all federal cases and hold immense power over the lives of

Americans, including over their religious freedoms. Each appointment will be a lifetime term on the bench. When Americans voted on Election Day, their choice impacted our constitutional rights for a generation.

By the Numbers: The Power of Federal Courts

As Texas Supreme Court Justice Don Willett noted, "The 13 federal courts of appeals handle about 35,000 [cases]." Meanwhile, the Supreme Court takes approximately 70 cases a year.

Then-Judge Gorsuch noted in his opening statement before the Senate Judiciary Committee that only five percent of federal lawsuits are decided at the Federal Court of Appeals level. That means 95 percent of federal lawsuits will never receive a written opinion by an appellate court, let alone the Supreme Court. These lower court judges, including the often-overlooked district court judges, are essential for protecting people's constitutional freedoms.

"Unoriginal": Eight Years of Impact

The last eight years are a prime example of the influence one president

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can have on the judicial branch of the federal government.

President Barack Obama inherited 54 vacancies when he took office. Unlike the Bush and Clinton administrations before him, the Obama administration did not place a high priority on filling these vacancies his first year in office. Nonetheless, President Obama nominated a total of 329 Article III judgeships during his eight-year tenure.

At the district court level, Congress confirmed 268 Obama nominees or nearly 40 percent of authorized district court judgeships. President Obama also successfully appointed 55 judges to the U.S. Court of Appeals, which constitutes approximately 30 percent of federal circuit court judges.

Additionally, the Obama administration successfully placed three judges on the Federal Circuit Court of Appeals in Washington, D.C. Seven out of the eleven active judges on that court were appointed by liberal administrations.

In only eight years, President Obama's judicial nominations significantly shifted the make-up of the

entire judicial branch. At the close of the Bush administration, judges considered to be "progressive" in ideology controlled only one of the thirteen circuit courts. As a result of President Obama's appointments, progressive judges now control nine of the thirteen circuit courts.

The Fourth Circuit, for example, was once considered a bastion of judicial conservatism and was previously populated with famous textualists such as Judge John Michael Luttig. Over the course of past administrations, presidents favoring progressive judges appointed nine of the fifteen judges on this court. As reported in the pages of *The Washington Post*,

"The U.S. Court of Appeals for the 4th Circuit, a Richmond-based venue the administration might once have found reliably hospitable, now has a higher proportion of judges tapped by Democrats than most of the nation's 13 circuit courts. That includes the pan-Western 9th Circuit with its long-standing reputation among conservatives as the "nutty 9th."

Left unchecked, these lifetime appointments will influence American jurisprudence away from originalism. These courts have already had a detrimental impact to longstanding religious liberty rights just in the last few years.

Reshaping the Judicial Branch for Freedom

The Trump administration has much work to do: there are 133 judgeships to fill, more than twice as many judicial vacancies than President Obama had when he came into office in 2009. Since the Republican-controlled Senate is eager to fill these vacancies, President Trump has an opportunity to swing the pendulum of our judiciary back into balance for a generation and shift the courts so that they protect the vital rights of Americans.

As with the first Supreme Court nomination of the Trump administration, First Liberty Institute attorneys will keep a watchful eye on these influential positions. It is vital to ensure that those nominated to serve as judges are dedicated to the principle of religious freedom in the First Amendment, the foundation of all other rights we hold so dear. 

OBERGEFELL: SILENCING RELIGIOUS DISSENTERS

By Keisha T. Russell, a 2017 graduate of Emory University School of Law

In one of the most politically polarizing decisions since *Roe v. Wade*, the Supreme Court in *Obergefell v. Hodges* decided that the Fourteenth Amendment requires states to license and recognize same-sex marriage. When the case was decided, I was finishing my first year at Emory University School of Law. I was also working in a policy internship to reform education in Atlanta. At my workplace, there were very few Bible-believing Christians — which is increasingly the norm in civil rights work. The leader of the

group praised the *Obergefell* decision and said that we were witnessing a historic moment. Although I was generally unconcerned about the practical consequences of the case, I was concerned about how the decision would heighten the hostility towards Christians who are as vocal as I am about their faith.

In 2012, Dan Cathy, the CEO of Atlanta-based Chick-fil-A, the family-owned fast-food chain known for operating according to Christian principles, made statements regarding the biblical view of marriage. Cathy be-

came the target of a relentless media onslaught with severe repercussions:

(1) colleges expelled Chick-fil-A food from campus; (2) Alderman Joe Moreno threatened to block the construction of a second Chicago store; (3) city council members tried to block a proposed franchise at Denver International Airport. Most strikingly, the outspokenly Christian CEO was being punished for simply stating



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