

Courts at the Crossroads:

The Quality and Diversity of President Trump's Nominees to the Federal Judiciary

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i n t e g r i t y

F L O R I D A

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Executive Summary

This report analyzes the quality and diversity of federal judicial nominees under President Donald Trump, contrasting his selections with previous administrations both Democratic and Republican.

Since President Trump took office in 2017 there has been a dramatic increase in the number of judicial nominations made as well as the pace of the confirmation process. This stands in stark contrast to the previous administration where obstruction by the U.S. Senate slowed the process to a crawl.¹

The Trump administration has said that instead of focusing on diversity when nominating candidates for federal judgeships, they will prioritize “qualifications.” Yet, in December one nominee was withdrawn after being unable to answer basic questions about the courtroom process and federal trial rules during his confirmation hearing. Additionally, four of Trump’s nominees have been rated as “Not Qualified” by the American Bar Association (ABA), an unprecedented number so soon in a president’s term when compared to the past four presidents. At this point in his first congress, President Trump has put forth a lower percentage of “Well Qualified” nominees, as rated by the ABA, than each of his four predecessors.

In addition to analyzing the quality of President Trump’s judicial nominees, this report analyzes the diversity of nominees in terms of race and gender. Diversity is important at every level of the judiciary but especially in the lower courts that have the final word on thousands of cases spanning hundreds of issues.

Key Findings

- As of July 1, 2018, President Trump has nominated 140 individuals to serve as judges on the federal courts in 141 different positions. One individual was nominated for two different posts.
- With six months remaining in his first two years in office, President Trump has already nominated more federal judicial nominees than three of his four predecessors did in their entire first two years.
- The American Bar Association’s Standing Committee on the Federal Judiciary has rated more of President Trump’s judicial nominees as “Not Qualified” than they have for his last four predecessors. The number could increase as his first Congress concludes.
- Most of President Trump’s nominees for federal judgeships have been white (91%) compared to 57% of President Obama’s nominees and 80% of President George W. Bush’s nominees who were white.
- Only 1% of President Trump’s nominees for federal judgeships have been African American and only 4% have been Hispanic.

- President Trump’s nominees for federal judges have been 77% male. In contrast, President Obama’s nominees were 55% male and President George W. Bush’s nominees were 80% male.
- President Trump has nominated eight judges for positions in Florida. Five of them are white, two Hispanic and one African American. Of the Florida nominations, seven are male, and one is female. None of them has been confirmed yet by the U.S. Senate.

Introduction

As a member of the Florida Why Courts Matter Coalition, Progress Florida Education Institute has asked Integrity Florida to do a research report on judicial nominations under the Trump administration. In response, Integrity Florida has prepared a report that examines how the quality and diversity of judicial nominations has changed under the Trump administration and what those changes mean for the country and for Floridians who rely on the courts for the fair administration of justice in criminal and civil cases.

Questions have arisen in news sources including the New York Times² concerning the quality of President Trump’s federal judicial nominees. The lack of diversity among judicial nominees under the Trump administration has also been widely reported in mainstream news sources such as AP, Washington Post, USA Today, and others.^{3 4 5}

During the last two years of the Obama administration, there were only 22 federal judges confirmed by the U.S. Senate, by far the lowest number since 1993.⁶ With an unusually high number of judicial slots to fill due to the two years of Senate obstruction, the current president has an opportunity to shape the face of the federal courts for decades to come. This has the potential to be the president’s longest lasting and most far reaching legacy impacting issues like gun safety, access to abortion, voting rights, anti-discrimination measures and immigration.

According to the U.S. Courts website,⁷ 42 of President Trump’s federal judicial nominees have been confirmed by the U.S. Senate as of July 1, 2018. The number includes Supreme Court Justice Neil Gorsuch who was confirmed in April 2017. Now, with the announced retirement of Justice Anthony Kennedy, President Trump has a second opportunity to make a lasting mark on the Supreme Court.⁸ On July 9th, 2018, the President nominated Brett Kavanaugh who currently serves on the U.S. Court of Appeals for the D.C. Circuit to fill the seat.⁹

In response to criticism about the lack of diversity among nominees, the current administration has defended their selections by pointing to their emphasis on selecting the most qualified judges.¹⁰ The report tests that assertion by comparing the quality of judicial nominees under the current administration with the nominees of previous administrations, based on the ratings given to the nominees by the American Bar Association’s Standing Committee on the Federal Judiciary.

With six months remaining in President Trump’s first congress, this report compares the quality and diversity of President Trump’s judicial nominees with those made by previous administrations during their first Congress (two years).

Analysis

As of July 1, 2018, there were 153 vacancies¹¹ in the nation’s “Article III” courts, including 129 district court judges, 15 courts of appeal judges and 2 Court of International Trade judges. Seventy-five of those vacancies have been termed “judicial emergencies” by the Judicial Conference, the policy-making body for the federal courts.¹² That means that the “weighted filings” for each judge in those districts exceeds 600 filings per judge.

Article III courts include the Supreme Court; 12 geographic-based courts of appeal and one for the federal circuit, which hears appeals in specialized cases such as patent law;¹³ 94 district courts in the 50 states, District of Columbia and Puerto Rico and their subordinate bankruptcy courts; and the Court of International Trade.¹⁴

Florida, Georgia and Alabama constitute the 11th Circuit Court of Appeals, which has courts in Atlanta, Miami, Jacksonville and Montgomery, Alabama.¹⁵ Three federal district courts serve Florida: the Northern District, with four judges authorized; the Middle District, with 15; and the Southern District, with 18.¹⁶

Also, as of July 1, there were 70 pending nominations with 44 pending in Senate committee and 26 pending on the Senate floor. Since the 115th Congress took office there have been 42 total federal judges confirmed.¹⁷

In Florida, there are ten federal judiciary vacancies and eight nominees to fill those vacancies.¹⁸

The “Quality” of Federal Judicial Nominees

For more than 60 years, The American Bar Association’s Standing Committee on the Federal Judiciary has evaluated the professional qualifications of nominees to the Supreme Court and to the federal district and appellate courts.¹⁹ The Committee conducts extensive peer reviews of each nominee’s “integrity, professional competence and judicial temperament.” In conducting the evaluation, the Standing Committee focuses solely on the nominee’s professional qualifications. It does not consider the nominee’s philosophy, political affiliation or ideology.

President Dwight Eisenhower first invited the ABA into the nomination process in 1953.²⁰ Since then, the Standing Committee has provided nominee evaluations to nine administrations, Democratic and Republican alike, as well as to the U.S. Senate Judiciary Committee and the public.

The ABA’s Standing Committee on the Federal Judiciary is composed of 15 members, two members from the 9th Circuit, one member from each of the other federal judicial circuits and the

Chair of the Committee.²¹ The President of the ABA appoints the members for staggered three-year terms and no member can serve more than two terms. There are strict guidelines in place to ensure the Standing Committee's impartiality and independence.

There are three possible ratings that a nominee or potential nominee can receive from the Standing Committee: "Well Qualified," "Qualified," and "Not Qualified." When a nominee is found to be "Not Qualified," it means the Committee has determined that the nominee does not meet the Committee's standards with respect to one or more of its evaluation criteria – integrity, professional competence or temperament.

Each voting member of the Standing Committee independently reviews the report on the nominee and brings to the chair his or her vote on the nominee's rating. The vote can be a unanimous vote or a split vote among the committee members with the majority vote representing the official rating given to the nominee.

While most presidents since President Eisenhower have relied on the Standing Committee's evaluations of potential candidates for the federal court, two presidents have not. In March 2001, President George W. Bush decided that his administration would not give the ABA the names of people the White House was considering for the U.S. courts before forwarding them to the Senate for confirmation.²²

At the time, the Bush administration expressed concern that the ABA had too much influence in the judicial selection process. Then President of the ABA Martha Barnett, a prominent Florida attorney, responded saying "We are concerned politics may be taking the place of competence in the review" of potential judges. The ABA's Standing Committee on the Federal Judiciary continued to conduct peer reviews and evaluate the judicial nominees during the Bush administration, but the evaluations only informed the confirmation decisions made by the Senate after the nominations were made.

In 2009, the administration of President Barack Obama resumed the more common practice of asking the ABA to evaluate potential federal court nominees before they are officially nominated. In a statement at the time,²³ American Bar Association President H. Thomas Wells Jr. said, "Our goal is always to assist both the administration and the Senate Judiciary Committee as they deem appropriate in this process." The pre-nomination evaluation of federal judiciary candidates by the ABA continued throughout the eight years of the Obama administration.

Soon after President Trump was elected, the administration told the ABA it would return to the Bush administration's practice of nominating federal judges without seeking the evaluation of the ABA's Standing Committee.²⁴ Instead, it has been reported that the Trump administration is relying on The Federalist Society, a conservative Washington D.C. based special interest group, to "vet" potential nominees for judgeships.²⁵ The ABA has pledged to continue to conduct its evaluations of the professional qualifications of federal judicial nominees on a post-nomination basis during the Trump administration.

The Trump administration has said that instead of focusing on diversity when nominating candidates for federal judgeships, it will prioritize "qualifications." In a November 2017

Associated Press report,²⁶ White House spokesperson Hogan Gidley was quoted as saying, “The president has delivered on his promise to nominate the best, most-qualified judges.”

In December 2017, the New York Times reported that one of President Trump’s judicial nominees had withdrawn after being unable to answer basic questions from Republican Senator John Neely Kennedy of Louisiana during his confirmation hearing about the courtroom process and federal trial rules.²⁷ It was also reported that Matthew Petersen’s withdrawal was the third nomination by President Trump to “collapse in recent days.”

The White House had pulled back two other District Court nominees, Jeff Mateer and Brett Talley, after their nominations became controversial. The New York times report included a statement from Democratic Senator Dianne Feinstein of California who said, “This is a clear signal that the White House isn’t properly vetting nominees but instead counting on Senate Republicans to jam them through with minimal review.”²⁸

Comparison of the Quality of Nominees to the Federal Courts

As of July 1, 2018, President Trump has made 140 nominations of judges to fill 141 vacancies on the federal courts.²⁹ The ABA’s Standing Committee on the Federal Judiciary has issued ratings on all but 39 of those nominations. The 39 unrated nominations were made in April, May and June of 2018.

On its website,³⁰ the ABA’s Standing Committee on the Federal Judiciary lists their ratings of federal judicial nominees during each Congress going back to the 101st Congress (1989-1990) through to the present 115th Congress (2017-2018). The chart below shows the total number of nominations as well as the number of “well qualified” ratings and the number of “not qualified” ratings for the first Congress of every president going back to President George H.W. Bush.

Presidents	Nominations in First Congress	“Well Qualified”	“Not Qualified”
President George H.W. Bush	75	47 (62 %)	0 (0.0 %)
President Bill Clinton	143	89 (62 %)	3 (0.2 %)
President George W. Bush	131	83 (63 %)	1 (0.8%)
President Barack Obama	113	81 (72 %)	0 (0.0 %)
President Donald Trump (as of July 1, 2018)	137	63 (46 %)	4 (3.0%)

With six months remaining in his first Congress, President Trump has already nominated more federal judicial nominees than three of his four predecessors did in their entire first two years.

President Trump’s percentage of “Well Qualified” nominees is lower than those of his last four Predecessors. That percentage may change once the ABA completes its ratings of the 39 pending nominations along with ratings for any new nominees. The percentage of “Not Qualified” rated

nominations by President Trump already exceeds each of his last four predecessors and also could change as his first Congress concludes.

Both Democratic and Republican Presidents in the past have nominated federal judges deemed “Not Qualified” by the ABA’s Standing Committee on the Federal Judiciary.³¹ During his entire eight-year term, President George W. Bush nominated nine judges rated “Not Qualified” by the ABA including three who were rated “NQ” by a unanimous vote of the 15-member committee. During his eight-year administration, President Bill Clinton nominated four judges rated “Not Qualified” but none was by a unanimous vote of the Standing Committee.

President George H.W. Bush nominated only “Well Qualified” or “Qualified” judges during his four-year administration as did President Barack Obama during his eight-year term. Both President Obama and President George H.W. Bush submitted potential nominees to the ABA on a pre-nomination basis as did President Clinton.

Clearly, not seeking a rating from the ABA’s Standing Committee before making a nomination, as was the case with President George W. Bush and now with President Trump, increases the chances that a nominee will be rated “Not Qualified.”

The Diversity of Federal Judicial Nominees

Every day, public schools throughout Florida begin with these words; “I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all.”³²

According to The Heritage Foundation, this sentence is a daily reaffirmation of our dedication to the fundamental principles of our democracy.³³ We are given a warranty when we become citizens, at birth or otherwise, which guarantees us “the right to due process, and equal treatment under the law, regardless of our race, color, sex, religion, or national origin.”³⁴

The Brennan Center for Justice describes the last three words, “justice for all”, as a promise to treat everyone the same, to administer laws fairly and to provide justice.³⁵ Judicial diversity plays an important role in the ability of the courts to live up to that promise.

Why Judicial Diversity is Important

Three arguments came up consistently as we reviewed existing research on judicial diversity. First, it is important to have diversity in perspectives among judges because it improves jurisprudence. Second, diversity is important in the courts because the public must perceive the courts as being a fair arbiter. This is essential if the court is to have any legitimacy. Third, diversity in the courts is important because judges should be seen as role models for all.

Diversity of Perspectives

Some contend that the most important argument for diversity in the judiciary is that it benefits judicial decision-making and improves jurisprudence.³⁶ Every judge brings their unique set of life experiences into the courtroom. Appointing judges from different backgrounds with a diversity of experiences can help to guard against the possibility of narrow decision-making.

Others argue that a diverse judiciary should reflect the demographic characteristic of the population it serves.³⁷ Having diverse perspectives among judges may foster decision-making that reflects the lived experience of the whole population, not just certain segments. This leads to better jurisprudence.³⁸

The Perception of Fairness

The perception that the court system is fair, and objective, is vital. The legitimacy of the courts rests in the public's perception of the court as a fair arbiter. A non-diverse bench may be perceived as a biased bench, thus, undermining the public's faith in the system.³⁹ It is important for the public to have confidence in the system and to support the process even if they disagree with the result when an opinion is unpopular. It is critical that no one feels like the deck is stacked against them or that it is biased against people who look like them or who share a similar background.⁴⁰

Judges Are Role Models

Diversity on the bench has the added benefit of establishing role models for all groups by showing that individuals from diverse backgrounds can obtain judicial positions.⁴¹ This also contradicts stereotypes or myths that individuals from certain groups are inherently incapable of doing various things like obtaining judicial positions.⁴²

Diversity in the lower courts

While diversity is important at every level of the court system, it is particularly important in the lower courts. The term "lower courts" encompasses 94 federal district courts and the 13 appellate courts that make up the federal judiciary. This includes 12 regional or circuit courts that hear challenges to decisions made by the district courts in their jurisdiction and to decisions of federal administrative agencies along with the 13th Court of Appeals for the federal circuit.

Every year the Supreme Court receives thousands of requests to hear cases but will only hear about 80 of them. This means the lower federal courts have the final word on thousands of cases (99.9% of federal cases heard) spanning hundreds of issues.⁴³ Decisions on issues ranging from education to voting rights, immigration, health care, environmental protection, equality and corporate responsibility, are made by the lower courts.⁴⁴

Race and Gender Diversity of Judicial Nominees

Judicial diversity was a clear priority for the Obama administration. One news outlet reported on how the President was “quickly reshaping the lower ranks of the federal judiciary by nominating an unprecedented number of minorities and women,” during his first term.⁴⁵

In a 2011 White House blog post, the administration stated that, “creating a judicial pool for the 21st Century, one with intellect, fair-mindedness and integrity that resembles the nation that it serves, is a top priority for President Obama. They went on to say that the, “President’s nominations for federal judges embody an unprecedented commitment to expanding the racial, gender and experiential diversity of the men and women who enforce our laws and deliver justice.”⁴⁶

Obama’s push for diversity on the bench was met with fierce opposition. In his first term, Jeff Sessions, then ranking Republican Senator on the Judiciary Committee, described the President’s push for diversity as “disturbing” and accused the President of using the goal of diversity to place judges on the bench who would have a bias.⁴⁷ Republicans then took control of the Senate in 2014, and confirmed very few of Obama’s nominees during his last two years in office.⁴⁸

“Blue slips” traditionally used by senators to indicate support for nominees in their home states were instead used to kill Obama’s nominations. Senators in the majority party simply refused to return the slips leaving nominees in limbo.⁴⁹ This led to a large backlog of more than 100 vacancies for President Trump to fill when he entered office along with an aging population of judges.⁵⁰ Last year, Senator Chuck Grassley of Iowa, Republican Chairman of the Senate Judiciary Committee, said he would no longer require the return of blue slips as a condition for considering circuit-court nominees.⁵¹

President Trump moved aggressively to make nominations when he entered office. A Los Angeles Times analysis on judicial appointments earlier this year found that Trump ranked 6th among the last 19 presidents in appointing the highest number of federal judges during their first year.⁵² The analysis found that this was due to the President’s party holding a slim majority in the Senate and the fact that Republicans had blocked so many of President Obama’s appointments.⁵³

An AP analysis found that Trump had nominated more than twice as many judges as Obama had at a similar point in his presidency and credited it partly to the fact that Republican Majority Leader Mitch McConnell had signaled that he was committed to moving judicial nominees through.⁵⁴

The difference in approach to judicial nominations between President Obama and President Trump is striking. Where the Obama administration made judicial diversity a top priority, and to a lesser extent the Bush administration, the Trump administration has made it clear that it will not consider diversity and will instead base nominations on qualifications and judicial philosophy. The Trump administration contends that considering diversity would bring politics to the bench.⁵⁵

Diversity in Judicial Nominations by President Trump

To analyze the diversity of judicial nominations we relied on USCourts.gov data⁵⁶ to identify nominees. We then used Alliance for Justice data⁵⁷ and various web sources to identify the race and gender of each nominee.

So far, during the 115th Congress, President Trump has named 140 nominees: 127 out of 140 are white, with 97 being white males.; 13 nominees are minorities, with five being Hispanic, two being African American, one Indian American, one Armenian-American, and four Asian-American nominees.; 108 of those named are male while only 32 are female.

President Trump has nominated eight judges for positions in Florida so far. Five of them are white, two Hispanic and one African American. Of the nominations, seven are male, and one is female.

Trump's Florida Nominees as of July 1, 2018

Court	Nominated	Name	Race	Gender
11-FL-M	December 21, 2017	William Jung	White	Male
11-FL-M	April 10, 2018	Wendy Williams Berger	White	Female
11-FL-N	April 10, 2018	Allen Cothrel Winsor	White	Male
11-FL-M	May 7, 2018	Thomas P. Barber	White	Male
11-FL-N	May 7, 2018	T. Kent Wetherell	White	Male
11-FL-S	May 7, 2018	Roy Kalman Altman	Hispanic	Male
11-FL-S	May 7, 2018	Rodolfo Armando Ruiz II	Hispanic	Male
11-FL-S	May 7, 2018	Rodney Smith	African-American	Male

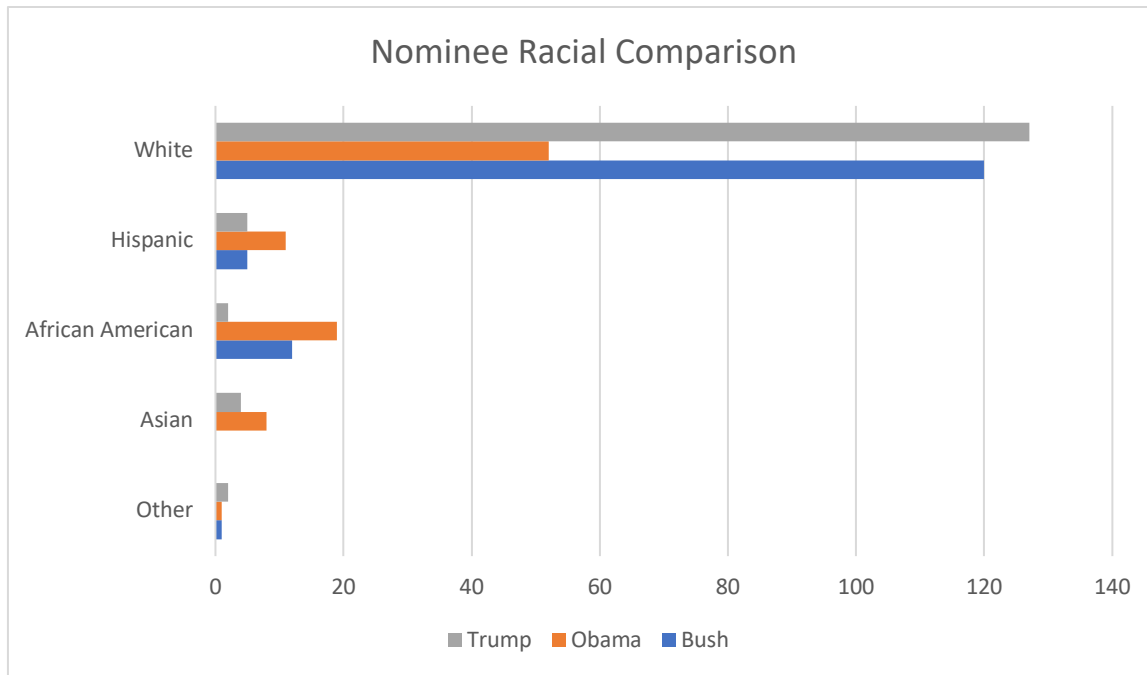
A Comparison of Diversity of Nominees with Previous Administrations

For perspective on the diversity of nominees by the current administration, we compared the racial and gender breakdown of President Trump's nominations, during the 115th Congress, with those made by President Obama, during the 111th Congress, and President George W. Bush, during the 107th Congress. Since the first Congress under President Trump is still underway we only looked at nominees named during the first Congress of each of the presidents' first terms.

When looking at the racial breakdown of nominees, the contrast between Presidents Trump and Obama are dramatic. The vast majority of President Trump's nominees are white (91%) while closer to half of President Obama's nominees were white (57%). The contrast between Presidents Trump and Bush are not as dramatic, with 80% of Bush's nominees being white.

President Obama nominated significantly more African American (21%) and Hispanic (12%) judges than both of the other presidents. Only 1% of President Trump's nominees have been African American and 4% Hispanic, while 9% of President Bush's nominees were African American and 4% were Hispanic.

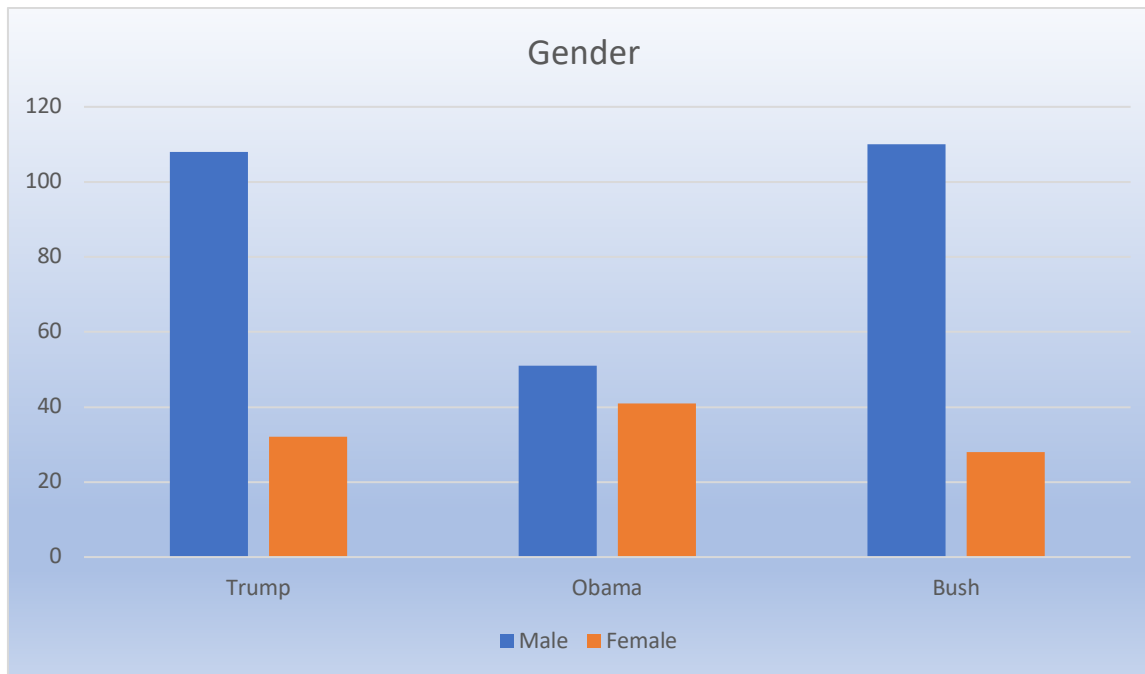
The chart illustrates the racial breakdown of nominees by each of the three presidents. While all three of the presidents we looked at primarily nominated white judges, Trump has appointed the most, while nominating fewer African American judges than the other two. Trump and Bush were fairly similar in their number of Hispanic nominees. President Obama appointed more African American, Hispanic and Asian American judges than the other two.



Both Obama and Bush nominated three judges for Florida positions during the first Congress of their first terms. Obama nominated one African American female judge, a white female and a white male while Bush nominated three men, two white and one African American.

In terms of gender diversity, Trump’s nominees are fairly similar to President Bush’s nominees. Trump nominees have been 77% male, with 108 male and 32 female nominees. President Bush’s nominees were 80% male, with 110 male and 28 female nominees. President Obama had far fewer nominees overall than the other two but more of a balance between male and female nominees. Obama’s nominees were 55% male, with 51 male and 41 female nominees.

The chart below illustrates how President Trump’s nominees have been predominantly male as well as how similar his nominees have been to President Bush in terms of gender. The chart also illustrates how President Obama, while nominating fewer justices, had a more balanced ratio of male to female nominees.



Earlier this year, the PEW Research Center released an analysis of judicial diversity comparing appointed judges by previous presidents dating from President Truman to President Trump. PEW found that as of March 20, 2018, only 10% of Trump’s appointed nominees were nonwhite, while 36 percent of president Obama’s appointees had been nonwhite.

President Obama’s share of nonwhite judges reflected the highest number and share of nonwhite judges of any president to date. PEW’s findings regarding gender are similar with Trump trailing Obama in the share of female judges he had appointed.⁵⁸

Conclusion

With six months remaining in his first two years in office, President Trump has already nominated more federal judicial nominees than three of his four predecessors did in their entire first two years. The American Bar Association’s Standing Committee on the Federal Judiciary has rated more of President Trump’s judicial nominees as “Not Qualified” than they have for his last four predecessors. The number could increase as his first Congress concludes. President Trump has put forth a lower percentage of “Well Qualified” nominees than each of his four predecessors.

Most of President Trump’s nominees for federal judgeships have been white (91%) while closer to half of President Obama’s nominees were white (57%). Only 1% of President Trump’s nominees for federal judgeships have been African American and only 4% have been Hispanic.

President Trump’s nominees for federal judges have been 77% male. In contrast, President Obama’s nominees were 55% male.

President Trump has nominated eight judges for positions in Florida. Five of them are white, two Hispanic and one is African American. Of the Florida nominations, seven are male, and one is female.

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