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Lessons From President Trump's Failed Judicial Nominations

By **Arun Rao** (January 23, 2018, 5:40 PM EST)


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On Tuesday, the Trump administration announced 12 new judicial nominations. In the coming weeks, we will discover whether these candidates learned from the mistakes made by the three judicial nominees who were forced to withdraw in December after serious bipartisan concerns arose regarding their qualifications (or lack thereof).

Matthew Petersen, then chairman of the Federal Election Commission, withdrew his nomination to serve as a federal district judge in Washington, D.C., following an awkward exchange with Sen. John Kennedy, R-La., during which Petersen struggled to answer basic questions about federal practice and procedure. Brett Talley, a U.S. Department of Justice official nominated to serve as a federal district judge in Alabama, withdrew after failing to disclose both controversial message board posts and his wife's position as chief of staff to White House Counsel Donald McGahn. And Jeff Mateer, who was nominated by President Trump to serve as a federal district judge in Texas, withdrew after failing to disclose to the panel of lawyers responsible for screening candidates the fact that he had previously referred to the rights of transgender children as part of "Satan's plan."

What lessons about the selection and vetting process can potential nominees learn from these three high-profile failures? Having previously served on the vetting team in the White House during the Obama administration, I offer three important points that come to mind.

First, think carefully before accepting a nomination — there is no substitute for basic qualifications.

No amount of vetting can compensate for a grossly unqualified nominee. While the official website for the federal court system notes that "[t]he Constitution sets forth no specific requirements" regarding the qualifications for becoming a federal judge, a consensus appears to have emerged (even in a highly partisan environment) that — at a bare minimum — nominees ought to have *some* experience with federal practice. Yet neither Petersen nor Talley had ever tried a case — a significant concern for a lifetime appointment to the U.S. district courts, with the primary function of overseeing trials.

Although a federal judgeship can be an enticing prospect, potential candidates should think carefully about seeking and accepting a nomination too soon in their careers. Talley, for example, could have first pursued opportunities in the Department of Justice that would have allowed him to gain courtroom experience before seeking a district court judgeship. And Petersen, who had substantial experience with election law, might have been better served further developing his expertise in that area. Now, the substantial reputational damage these nominees have sustained as a result of their highly publicized withdrawals could be difficult for them to overcome and may limit their future opportunities. Simply put, it can be difficult for potential candidates to candidly assess their own credentials. Consultation with a trusted (and frank) adviser may help identify areas for improvement and thereby strengthen a *future* nomination.

Second, disclose early and disclose broadly.

While their dearth of qualifications placed Talley and Petersen at a significant disadvantage, their inexperience alone did not immediately sink their nominations. Understanding that these two nominees likely would be targeted by Democrats due to their inexperience, the nominees and their advisers in the Trump administration could have taken steps to ensure that their paperwork was accurate and complete — even potentially erring on the side of overdisclosure.

For example, although the controversial message board comments that played a part in ultimately sinking Talley's nomination may not have technically qualified as "publications" requiring disclosure on the Senate Judiciary Committee questionnaire, the prudent course — recognizing that these message board comments likely would be discovered by diligent opposition researchers — would have been to include them in the initial submission to the committee and prepare Talley to respond to them. Instead, Talley's already weak nomination was not able to absorb the subsequent blows inflicted by the belated discovery of the message board posts (and the perception that Talley had hidden them) and the later revelation that he *also* had not disclosed his wife's position in the Trump administration. A nomination that begins on the defensive has little room for error.

In Mateer's case, controversy arose after the media reported that during the initial screening process established by Sens. John Cornyn, R-Texas, and Ted Cruz, R-Texas, Mateer had failed to disclose a pair of speeches in 2015 in which he reportedly referred to the rights of transgender children as part of "Satan's plan" and defended the controversial practice of "conversion therapy" for gays. Sen. Cornyn quickly distanced himself from Mateer, claiming that he was "surprised" by these revelations. Sen. Cornyn's comments signaled his unwillingness to expend political capital defending the nomination and sent Mateer's candidacy into its death spiral. Mateer seems to have understood that his remarks would be widely perceived as abhorrent — and thus apparently tried to hide them. But he failed to appreciate that, given the rigor of the modern confirmation process, they would eventually be discovered. Mateer's apparent lack of candor during the selection process provided Sen. Cornyn with a convenient excuse to abandon him when difficulties arose. A controversial nominee who also lacks the full-fledged support of a home state senator of the same party is unlikely to survive.

Third, understand your weaknesses and be prepared to respond.

Finally, nominees should be aware of their own weaknesses and potential areas of criticism and be prepared to respond to them. Although Petersen has been the subject of ridicule on the internet for his inability to answer seemingly simple legal questions posed to him, some of the questions he was asked — for example, about Younger and Pullman abstention — involve legitimately complex doctrines, and his lack of fluency in those areas might have been overlooked had his presentation been otherwise commanding. Indeed, Preet Bharara, former U.S. attorney for the Southern District of New York and the host of the podcast "Stay Tuned with Preet," observed in a recent episode that "it was not crazy that he did not have ... deep facility in how to answer" some of the questions. What was more disturbing was Petersen's apparent unfamiliarity with basic aspects of trial practice, such as motions in limine.

Petersen's stumbling and disjointed response ultimately proved fatal. Given that the basic function of a district judge is to exercise command over the courtroom and to make difficult decisions confidently, quickly and correctly, Petersen's weak performance was devastating and plainly demonstrated his unfitness for the position he was seeking. In addition, the fact that he did not appear to have anticipated the general line of questioning and crafted a response in advance suggests a woeful lack of preparation — both by the nominee and the Trump administration vetting team.

As the midterm elections approach, the challenges faced by Trump administration judicial nominees will only increase. Potential candidates who fail to heed the lessons provided by the recent spate of failed nominations risk meeting similar fates. Consulting a trusted adviser *before* accepting a nomination may help potential candidates realistically assess their strengths and weaknesses, ensure that all relevant information is immediately disclosed, and prepare thoughtful responses to potential objections.

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