THE THIRD CIRCUIT IN THE ERA OF TRUMP

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LECTURE**

It is great to be here today and thank you for that kind introduction. As a native of New Jersey and as a graduate of Widener Law School here in the Commonwealth, I have always followed the Third Circuit a little more closely than others.

Today, I am going to talk about the landscape of the Third Circuit as it existed on day one of the Trump Administration, about the process of filling four seats on this court over the last two and a half years, and the specific reasons we recommended those four individuals to the President. Finally, I am going to discuss the impact of these four new judges, what we have seen already, and what we might expect to see more of moving forward.

But first, I will start with some general observations about the White House's judicial selection process—at least during my time as White House Counsel. I have said this in a number of venues before—the President ran on judges. He ran on filling Justice Scalia's seat with a like-minded jurist—like Judge Tom Hardiman of this circuit. And he ran on filling the one-hundred plus judicial vacancies that he inherited with similar-minded people to the extent the politics would permit it. On this one topic there seems to be bipartisan agreement—he has delivered.

What qualities did we look for in our judges? In one sense, you know it when you see it. Take a look at how I staffed the White House Counsel's Office. One of my deputies, Greg Katsas, now a judge of the D.C. Circuit, had tremendous litigation experience. He clerked for Justice Thomas, was the Assistant

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Attorney General of the Civil Division and Acting Associate Attorney General in the Bush Department of Justice (DOJ), and argued 75 appeals while at DOJ and Jones Day. My team of Associate Counsels all had about 10 years of practice experience under their belts. Nearly all had clerked on the Federal Courts of Appeals and about half clerked on the U.S. Supreme Court. Most of them were federal court litigators for some period of time in different courts across the country. So when you have those experiences, you can usually sense if someone will be a good judge. Still, that's only a part of it. Ultimately, the candidate's interview and record were the factors that weighed the heaviest in our decision-making process. These were all merit-based decisions.

One of the lawyers on my staff, Rob Luther, recently published an essay in the University of Pittsburgh Law Review[1] where he broke down the qualities we looked for in judges into a three-part test. First, they must have an outstanding reputation. Second, they must be familiar with our founding documents, be originalists and textualists, and harbor a healthy skepticism of government. Third, they must have stood for principles and paid the price.

All of that is true, but it begs the question: what is different about this group of judges compared to judges from prior Republican Administrations? Three things come to mind.

First, the selection process was run entirely out of my office with support from the Department of Justice's Office of Legal Policy—but free from interference from other offices throughout the Administration that—from what I understand—bogged down the process in past Administrations. Too many cooks in the kitchen makes for a bad meal. That doesn't mean we didn't listen to anybody. We took input and recommendations from as many credible people as possible—particularly Senators. But judgeships are not patronage jobs and when it came down to decision-time my office made the recommendations to the President.

Second, my team was particularly concerned with the growing size of the administrative state. Generally speaking, Republican administrations of yesteryear may have talked big on shrinking the size of government, but they picked judges that were clearly

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[1] Robert Luther III, *Two Years of Judicial Selection in the Trump Administration*, 80 U. PITT. L. REV. 775 (2019).

comfortable navigating that environment. They tended to pick judges who were occasionally comfortable wielding government power and who were very deferential to those wielding governmental power. Generally speaking, we did not.

Third, this is the first Republican Administration since former Democrat Senate Majority Leader Harry Reid changed the rules, requiring only a majority of the Senate (rather than 60 votes) to secure non-Supreme Court judicial confirmations. So rather than searching exhaustively for candidates who did not have much of a record so as not to offend anyone, a public record—the so-called "paper trail"—was exactly what we based our decisions on. Robust paper trails are precisely why the President nominated Neil Gorsuch, Brett Kavanaugh, and the 40-plus Court of Appeals nominees made during my tenure as White House Counsel.

So how did we apply these principles to the selection process for judges of the Third Circuit? Federal law, 28 U.S.C. § 44(a), states that the Third Circuit shall consist of 14 active judgeships—although the law does not require that seats be attached to any certain state within the circuit so long as each state has at least one active circuit judge. When we took office in January 2017, there were two Third Circuit vacancies: Judge Rendell of Philadelphia assumed senior status in 2015, and Judge Fuentes of Newark assumed senior status in 2016.

Although Judge Rendell assumed senior status first, I will start with the seat held by Judge Fuentes of Newark because I am also from New Jersey. Trivia question: who was the first Court of Appeals nominee that the White House Counsel's Office interviewed? Answer: Judge Paul Matey. We received his resume from Governor Christie the day we entered the White House (maybe even before that) and we interviewed him a few days later. It was immediately clear that he was the candidate we had in mind.

Judge Matey has an outstanding resume but it's the kind of resume that has become fairly standard for a Trump Court of Appeals nominee:

- 47 years old on nomination—actually, that's a little old
- Top of his law school class and editor-in-chief of his law review

- Clerked for a U.S. District Judge
- Clerked for a U.S. Court of Appeals Judge
- Worked in private practice at an elite law firm
- Served in the federal government for a short period of time
- Served as a high-level counselor in state government
- Accomplished all of this in about 15 years

So, if Judge Matey was the first candidate we interviewed, why did it take over a year for the President to nominate him? Who gets to be a federal judge is not a decision that the President makes alone—it must be done with, per the Constitution, the advice and consent of the Senate. Today, it is not enough that "the Senate" as a whole support a nominee. Today, the home state Senators have a significant say in who the President selects, and consultation with them occurs long before a nomination is made. I tried hard—harder than anywhere else—to reach an agreement with the Senators from New Jersey regarding the numerous U.S. District Court seats, the U.S. Attorney, and the U.S. Marshal appointments. But unfortunately, we could not get it done despite a personal visit from me to their offices and significant efforts by my staff. And sadly, nothing has changed since I left. I am sincerely disappointed that 6 of 18—or a third—of New Jersey's U.S. District Court seats—some vacant since 2015—remain unfilled. This is not fair to litigants.

Compare New Jersey with fellow Third Circuit state Delaware. Although both states have two Democrat Senators, the way they each handled filling District Court vacancies could not have been more different. There were two District Court vacancies in Delaware. We sent the Senators the resumes of a few candidates we thought to be qualified. They came back with three recommended candidates for two seats—including one of the candidates we sent them. We selected the candidate we recommended and one of the two additional candidates the Senators submitted. Both candidates were nominated and confirmed

without opposition. It is unfortunate that more Democratic Senators have not followed this example.

As to the Third Circuit seat vacated by Judge Rendell of Philadelphia, we engaged in significant pre-nomination consultation with both Pennsylvania Senators. Our initial preference was to move forward with David Porter of Pittsburgh, but Pennsylvania had a supposed tradition of replacing circuit judges with nominees from the same part of the state as the retiring judge. This holdup was brief though, because ten days into the Administration, Judge Mike Fisher of Pittsburgh assumed senior status, and so to avoid disturbing any real or imagined traditions, we shifted Porter into Judge Fisher's seat and then proceeded to search for a candidate from the eastern part of the state to fill Judge Rendell's seat.

I want to briefly comment on this supposed Pennsylvania tradition of replacing circuit judges with nominees from the same part of the state. During my time as White House Counsel, I never heard of this occurring in any other state and upon further investigation, at least three examples of Third Circuit appointees in Pennsylvania made by Presidents of both parties (Reagan, Obama, and Trump) prove that this is not something that can be properly categorized as a tradition:

- President Reagan nominated Judge Anthony Scirica to the Third Circuit when he was a sitting U.S. District Judge for the Eastern District of Pennsylvania to fill the seat vacated by Judge Ruggero J. Aldisert, whose chambers were across the Commonwealth in Pittsburgh.

- President Obama nominated Judge Thomas I. Vanaskie to the Third Circuit when he was a sitting U.S. District Judge for the Middle District of Pennsylvania to fill the seat vacated by Judge Franklin S. Van Antwerpen, who was a Third Circuit judge with chambers in Easton (eastern Pennsylvania) and who was previously a U.S. District Judge for the Eastern District of Pennsylvania.

- Based on these two precedents, President Trump nominated Judge Peter J. Phipps to the Third Circuit as a sitting judge of the U.S. District Court for the Western

> District of Pennsylvania to fill the seat vacated by Judge Thomas I. Vanaskie of the Middle District of Pennsylvania.

Even if there was such a tradition, there is no constitutional basis for it.

So why did the President choose Judge Porter? For starters, he fit the general mold of the quality of candidate we sought. He clerked for now-Chief Judge D. Brooks Smith of the Third Circuit and practiced civil and constitutional litigation in Pittsburgh for about 20 years, where he has an outstanding reputation for constitutional law matters in the western part of the state. But there was also another reason we nominated him.

I mentioned earlier that we actively sought out candidates who had "stood for principles and paid the price." As a lawyer in private practice, Porter occasionally wrote op-eds on the controversial legal issues of the day like John Ashcroft's nomination to be Attorney General and the suspect constitutionality of the Affordable Care Act. He also wrote on originalism, property rights, federalism and the Commerce Power, and has served on the Board of Trustees of Grove City College, which is well-known for its principled refusal to accept any federal funds in order to maintain its independence. In other words, he is not shy.

Unlike the so-called tradition of replacing circuit judges with nominees from the same part of the state, Pennsylvania has a real tradition when it comes to the selection of U.S. District Judges. When the Commonwealth's two U.S. Senators are from opposing parties (as they have been for a long time now), the Senator whose party holds the White House may choose three of every four vacancies, while the Senator whose party is not in the White House may choose one.

As I understand it, during the Obama Administration, Porter was Senator Toomey's selection in one of those four-judge packages. Although Senator Casey may have ultimately given his consent, the Obama White House vetoed the idea and declined to nominate Porter. So much for "tradition."

We thought it was important to "right" that "wrong" and to send a message that we would not shy away from candidates who respectfully advocated positions on controversial public policy questions of the day. On the contrary, we welcomed those

candidates. The President wanted judges who are energetic, smart, and tough. Judge Porter demonstrated his toughness in the face of unfair media characterizations of his views, and that was a principal reason that the President chose to nominate him.

Turning back to filling the vacancy created by Judge Rendell's assumption of senior status, one of the lawyers in my office had attended a lecture delivered by Professor Stephanos Bibas of the University of Pennsylvania Law School on the disproportionate power held by federal prosecutors in plea negotiations, and suggested that we give him a look. I referenced Judge Matey's resume at the outset, and I am going to reference resumes just once more just because Judge Bibas has the kind of resume that's in a league of its own even among his Court of Appeals peers:

- At 15, he graduated from high school
- At 19, he graduated *summa cum laude* from Columbia University
- He then went on to Oxford University, where he earned a master's degree, and won first place in the World Debate Championships
- While at Yale Law School, he was an editor of the *Yale Law Journal* and a member of the moot court team and won awards as the best oralist
- He served as a law clerk on the Fifth Circuit and to Justice Kennedy on the U.S. Supreme Court
- He practiced briefly at Covington & Burling and as an Assistant U.S. Attorney in the Southern District of New York

But he made his mark as a law professor, most recently at the University of Pennsylvania Law School, where he argued six cases in front of the U.S. Supreme Court while serving as the Director of its Supreme Court Clinic. He has published books and dozens of law review articles on criminal law, and is one of the most cited scholars of all time in his field.

But Judge Bibas is not only a leading expert in criminal law—he is *the* leading expert on the original meaning of the Constitution's Fourth, Fifth, and Sixth Amendments. Like I said earlier, we were looking for originalists, so it should not surprise you that the President appointed one of the world's leading scholars of originalism to the bench.

Finally, we have Judge Peter Phipps. He graduated from Stanford Law School, clerked for a Judge of the Sixth Circuit, and started his career at Jones Day before joining the U.S. Department of Justice. Judge Phipps came to my office's attention as a Third Circuit candidate early in the Administration from people that had worked with him at DOJ, where he had a reputation as the lawyer Administrations of both parties could count on to volunteer for the hardest and most sensitive cases. During this Administration, he served as counsel of record against an ACLU lawsuit that challenged the Department of Health and Human Services' refusal to permit grants that helped unaccompanied alien children from being used for abortion or contraception. Based on his reputation for excellence in the face of adversity, we recommended him to the Pennsylvania Senators for one of the U.S. District Court vacancies on the Western District of Pennsylvania. After earning the highest score from the Senators' District Court commission, the President agreed to nominate him, and he was confirmed by voice vote. I made it fairly clear at that time that Phipps probably was not going to be sitting on the District Court for long. That turned out to be true—he was there just about a year. At 46, he is the President's youngest appointee to the Third Circuit.

So now that we know who President Trump appointed, the question becomes "how will these four appointments impact the law in the Third Circuit?" Effects of judicial appointments can be measured in two ways: in raw votes and by interpretive methodologies. Because 28 percent of the active judges on this court are now Trump appointees, this change in personnel is going to change the outcome in a certain percentage of cases. For example, in September of 2019, the Third Circuit decided *Northeastern Pennsylvania Freethought Society v. County of*

Lackawanna Transit System.[2] In this case, a group of atheists brought a civil rights action against the county, alleging that its policy prohibiting religious or atheistic advertisements on public buses constituted viewpoint discrimination in violation of the First Amendment. The Third Circuit agreed, and in a 2-1 opinion by Judge Hardiman, joined by Judge Porter, the panel reversed the district court. The third judge on the panel dissented. Had Judge Porter not served on this panel, the court may have reached a different outcome.

Referring back to what I said earlier about methodologies—originalism and textualism are interpretive methods, and we took candidates' commitments to these methods seriously. I just referenced Judge Hardiman. He is one judge of the Third Circuit who has historically shown a strong commitment to originalism. We have seen this in two of his prominent opinions on the Second Amendment. First, in his dissent in *Drake v. Filko*,[3] he concluded that a New Jersey law conditioning the issuance of a permit to carry a handgun in public on a showing of "justifiable need" violated the Second Amendment.[4] And second, most recently, in his concurrence in *Binderup v. Attorney General*,[5] he concluded that the application of a federal law banning the possession of firearms was unconstitutional as applied to two individuals who had been convicted of nonviolent state misdemeanor offenses many years earlier.[6]

A similar commitment to originalism in the Second Amendment context was displayed by Judge Bibas in the recent case of *Association of New Jersey Rifle and Pistol Clubs, Inc. v. Attorney General New Jersey*.[7] There, the Third Circuit rejected a Second Amendment challenge to a New Jersey state law limiting

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[2] Ne. Pa. Freethought Soc'y v. Cty. of Lackawanna Transit Sys., 938 F.3d 424 (3d Cir. 2019).

[3] Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013) (Hardiman, J., dissenting).

[4] *See id.* at 458.

[5] Binderup v. Att'y Gen. of United States of America, 836 F.3d 336, 357 (3d Cir. 2016) (Hardiman, J., concurring in part and concurring in the judgments).

[6] *See id.* at 380.

[7] Ass'n of N.J. Rifle and Pistol Clubs, Inc. v. Att'y Gen. N.J., 910 F.3d 106, 126 (3d Cir. 2018) (Bibas, J., dissenting).

the amount of ammunition that may be held in a single firearm magazine to no more than ten rounds. In dissent, Judge Bibas writes that "[t]he Second Amendment is an equal part of the Bill of Rights. We must treat the right to keep and bear arms like other enumerated rights, as the Supreme Court insisted in *Heller*."[8] So, while President Trump's appointees have only recently taken their seats on the Third Circuit, their opinions are already demonstrating a serious commitment to originalism and textualism as interpretive methodologies.

To recap, what qualities do these four new judges have in common? They are energetic. Their average age was about 48.5 on the date of their nominations. They are smart. They all clerked for federal court of appeals judges and practiced at the highest levels of the profession. And they are tough. They are committed to originalism and textualism and their histories demonstrate that they are principled individuals who are not afraid to take unpopular or controversial positions.

So what does the future hold for this court? If you count votes by the party of the President that appointed the judge—certainly a ham-handed way of predicting how judges will judge in actual cases—the *en banc* Third Circuit is now 8-6, with Republican appointees in the majority. As characterized by the media, this is the first Federal Court of Appeals that President Trump "flipped"—but these numbers are deceptive. Although there are currently no vacancies, five of the ten active judges of this court that President Trump did not appoint (Chief Judge Smith, Judge McKee, Judge Ambro, Judge Jordan, and Judge Greenaway) could assume senior status today or at some point during the Presidency that will be decided by the 2020 election. Two are appointed by Republicans and are fairly conservative. Three are appointed by Democrats and are reliably liberal. Of course, nothing compels any judge to assume senior status, but if a hypothetical future President picks potential successors, the Third Circuit can easily un-flip.

In short, elections have consequences and the next one will have consequences for this court, just like the last one. President Clinton appointed six judges to the Third Circuit, and four are still

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[8] *Ass'n of N.J. Rifle and Pistol Clubs*, 910 F.3d at 126 (Bibas, J., dissenting).

serving. President George W. Bush appointed seven, and five are still serving. President Obama appointed five, and four are still serving. While it is true that this Administration's four appointees have made the Third Circuit more conservative than it has been in a long time, the outcome of the next Presidential election is more likely to solidify its ideological direction for decades in a way that neither party has had the opportunity to do in a generation. Thank you.