

Exactly how conservative are the judges on Trump's short list for the Supreme Court? Take a look at this one chart.

By Kevin Cope

July 7, 2018

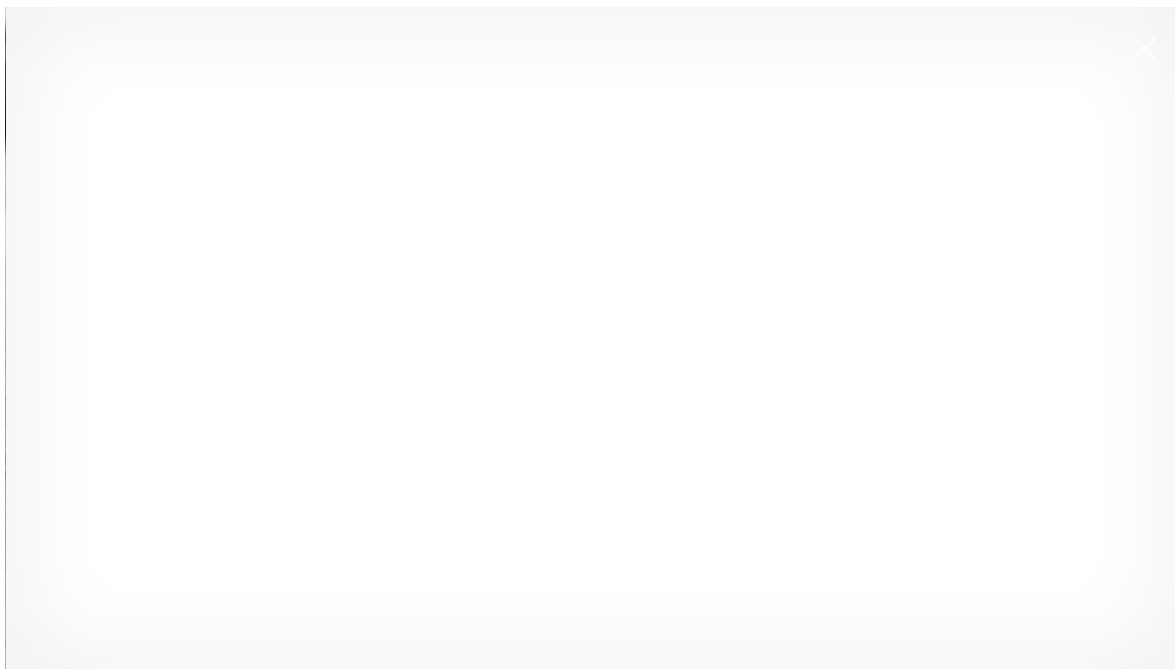
How will President Trump's replacement for Justice Anthony M. Kennedy on the Supreme Court influence the Court's jurisprudence? The court impacts not just the most-talked-about issues like **abortion, same-sex marriage, and affirmative action** but also issues like **voting rights, pleading standards, immigration rules, equal pay, gun rights, the death penalty, campaign finance and sentencing**. Recent close decisions on these topics and others have collectively affected millions of people.

We probably won't learn much from the Senate confirmation hearings; most nominees have learned to keep from disclosing their views on specific legal questions. Luckily, most of the candidates on Trump's shortlist to replace Kennedy have previously served on the federal bench. For those, we can get some sense of what they'd do on the court by evaluating their performances as federal judges. Not surprisingly, nearly all the leading candidates appear to be reliable conservatives — some even more so than Justice Neil M. Gorsuch was when he served on the Court of Appeals for the 10th Circuit. But two possible exceptions exist.

This is how we did our research

Based on what?

ADVERTISING



By relying on the **observations of attorneys who have worked most closely with federal judges**, **blogger Adam Feldman** and I are developing **estimates of the ideological views of the roughly 4,500 life-tenured federal**

judges who have served since 1985. Our source of these observations is the [Almanac of the Federal Judiciary](#), which has been interviewing lawyers about their views of judges for the last 33 years.

Here's how the almanac gets its information. First, it selects a representative sample of attorneys who practice before the federal trial and appellate courts and thus are uniquely positioned to provide insight into particular judges. It asks them for their views about the judges with whom they're familiar, and they give their opinions based largely on their knowledge of the judges: for example, their written orders and opinions, settlement discussions in chambers, and comments made from the bench. Each record is fully updated every few years.

Using a combination of hand and computer-aided text analysis, we transform the attorneys' perceptions into ideological scores for all lifetime-appointed federal judges who have served at any point since 1985. The scores are sensitive to minor variations between judges as well as changes over time, and we estimate margins of error for our estimates of each judge's ideology. Because of the evaluations' breadth, our scores can also provide information on judicial traits other than political ideology: ability, temperament, trial practice or oral argument style, settlement style and opinion quality.

Of course, scores based on lower-court behavior will not perfectly predict how a judge will behave if elevated to the Supreme Court. The court's docket is different, and the justices have more latitude in making their decisions. But I believe our method improves in some ways upon a leading congressional-vote-based approach, which pegs some conservative judges such as the 9th Circuit's Richard Tallman as liberal (or liberal judges as conservative) — and on a recent, innovative method that uses clerks' political contributions as a proxy for their judge's ideology but must exclude many judges for insufficient data.

Comparing Trump's potential candidates

Using this method, we can estimate the ideologies of the candidates most likely to replace Kennedy — taken from the White House list — who have served as a federal judge for at least one year. That unfortunately excludes some of the names on Trump's list who just recently joined the federal bench: Amy Coney Barrett, Allison Eid, Joan Larsen and David Stras.

The eight potential Trump nominees in our dataset — from right to left, Steven Colloton, William Pryor, Raymond Gruender, Brett Kavanaugh, Diane Sykes, Raymond Kethledge, Timothy Tymkovich and Thomas Hardiman — are tightly clustered, largely statistically indistinguishable from each other. That's hardly surprising, since the Federalist Society, a conservative legal organization, heavily influenced the list.

What's more interesting is that all of them may be less conservative than Justice Samuel Alito was when he served on the 3rd Circuit. And Kethledge, Tymkovich, and Hardiman are all similar ideologically to Gorsuch when he served on the 10th Circuit. Some conservatives oppose Kavanaugh, concerned that his opinions on abortion and health care weren't conservative enough. As noted above, it's difficult to predict with certainty how a candidate would decide these cases, were he elevated. But the scores suggest that conservatives have little to worry about Kavanaugh. He is fourth most conservative in our list. Almanac respondents note that he

“tries to be fair.” But others insist that Kavanaugh is “a pro-police, right wing activist. If you are up against the government you have a real problem” and that “[h]e has a super strong conservative leaning. Defendants have little chance with him.”

Two in the pool served primarily as district court judges: Federico Moreno and Amul Thapar, appointed to the 6th Circuit just last year. Both of them lie just right of center on our scale. But they are considerably more moderate than all the other candidates except Hardiman. In the Almanac, many lawyers noted that Moreno and Thapar had little or no “leanings” or “bias,” at least in civil cases.

Still, take these two scores with a grain of salt. Many district court judges are notoriously conservative. But district court records are less reliable in predicting Supreme Court behavior than are circuit court records. Although appellate judges consider many of the same substantive questions as Supreme Court justices, broad questions of judicial deference, federalism, constitutional law, and civil rights cross district judges’ desk less often. Their discretion lies more in procedural rulings and sentencing decisions, issues that occupy only a small part of a justice’s docket. So it’s possible that Moreno and Thapar — the latter **favored** by Senate Majority Leader Mitch McConnell (R-Ky.) — could be quite conservative or fairly moderate. We just don’t have enough information.

Comparing different judges’ ideology is no easy task, especially since the very notion that judicial ideology can be measured effectively is controversial. That’s especially true where, as with Supreme Court candidates, they serve on different courts. But the best insight into how judges would decide high-court cases as justices is arguably the collective observations of what they’ve already done as judges.

Kevin Cope (@KevinLynnCope) is a research assistant professor of law and faculty affiliate at the Woodrow Wilson Department of Politics at the University of Virginia.



Reporting the facts for over 140 years.

Try 1 month for ~~\$40~~ \$1

Send me this offer

Already a subscriber? **Sign in**