

NEWS ANALYSIS

Trump, Bashing the Federalist Society, Asserts Autonomy on Judge Picks

The president has grown increasingly angry at court rulings blocking parts of his agenda, including by judges he appointed.



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President Trump appears to be declaring independence from outside constraints on how he nominates judges, signaling that he is looking for loyalists who will uphold his agenda and denouncing the conservative legal network that helped him remake the federal judiciary in his first term.

Late Thursday, after a ruling struck down his tariffs on most imported goods, Mr. Trump attacked the Federalist Society, leaders of which heavily influenced his selection of judges during his first presidency.

“I am so disappointed in The Federalist Society because of the bad advice they gave me on numerous Judicial Nominations,” Mr. Trump asserted on social media. “This is something that cannot be forgotten!”

Hours earlier Thursday, the Justice Department severely undercut the traditional role of the American Bar Association in vetting judicial nominees. A day before, Mr. Trump picked a loyalist who has no deep ties to the conservative legal movement for a life-tenured appeals court seat, explaining that his pick could be counted on to rule in ways aligned with his agenda.

Together, the moves suggest that Mr. Trump may be pivoting toward greater personal involvement and a more idiosyncratic process for selecting future nominees. Such a shift would fit with his second-term pattern of steamrolling the guardrails that sometimes constrained how he exercised power during his first presidency.

But it could also give pause to judges who may be weighing taking senior status, giving Mr. Trump an opportunity to fill their seats. Conservatives have been eyeing in particular the seats of the Supreme Court justices Clarence Thomas, who will turn 77 next month, and Samuel A. Alito, 75.

Conservatives are eyeing the seats of Justices Clarence Thomas and Samuel Alito, both in their 70s. Erin Schaff/The New York Times

“Conservative judges are going to be much more open to stepping down if they’re confident that their replacements will be high quality,” said Ed Whelan, a conservative legal commentator and former lawyer for the Bush administration. “Trump’s bizarre attack on his judicial appointments in his first term doesn’t inspire confidence.”

Mr. Trump and his allies have expressed increasing anger at the federal judiciary as courts have blocked his actions, including his aggressive claim to wartime powers to deport migrants without due process and his efforts to freeze grants and dismantle agencies without going through Congress.

On Thursday, the U.S. Court of International Trade handed Mr. Trump his latest defeat. A three-judge panel unanimously struck down his invocation of emergency powers to impose import taxes on goods imported from nearly every country in the world. Two of the three judges were Republican appointees, one named to the bench by Mr. Trump. (A higher court has temporarily paused the ruling.)

Notably, the Trump appointee on the trade court was not a Federalist Society archetype. Congress structured the court to require a partisan balance, so presidents make sets of nominees from both parties. The judge had worked for a Democratic lawmaker before becoming an aide to one of Mr. Trump’s first-term trade officials.

Yet Mr. Trump lashed out at the Federalist Society, blaming it for bad advice on whom to appoint to judgeships. He singled out Leonard Leo, a former longtime leader of the Federalist Society who helped recommend his first-

term nominees and who exemplifies the conservative legal movement.

“I was new to Washington, and it was suggested that I use the Federalist Society as a recommending source on judges,” the president wrote. “I did so, openly and freely, but then realized that they were under the thumb of a real ‘sleazebag’ named Leonard Leo, a bad person who, in his own way, probably hates America, and obviously has his own separate ambitions.”

Leonard Leo of the Federalist Society at the Capitol in 2018. Erin Schaff for The New York Times

Mr. Leo and Mr. Trump had a falling out in 2020, but the personal attack was a sharp escalation. In a statement, Mr. Leo said, “I’m very grateful for President Trump transforming the federal courts, and it was a privilege being involved.”

Still, Mr. Trump's tirade strained an already uneasy relationship with traditional legal conservatives.

Many share the president's goals of strengthening border security, curbing the administrative state and ending "diversity, equity and inclusion" programs, said John Yoo, a conservative law professor. But, he added, they dislike some of Mr. Trump's methods, whether that is prolifically invoking emergency powers or insulting judges who rule against his administration.

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And Professor Yoo, who wrote memos advancing sweeping theories of presidential power as a Bush administration lawyer, said Mr. Trump's attacks on Mr. Leo were "outrageous."

"Calling for the impeachment of judges, attacking Leonard Leo personally and basically calling him as traitor as far as I can tell — Trump is basically turning his back on one of his biggest achievements of his first term," he added, referring to the reshaping of the federal judiciary.

Earlier on Thursday, Attorney General Pam Bondi notified the American Bar Association that the administration would impede its traditional role in vetting judicial nominees. That work involves interviewing their colleagues, reviewing their cases and writings, and rating them for integrity, professional competence and judicial temperament.

The bar group says it does not consider politics in such vetting, but conservatives have long accused it of liberal bias. (It rated all three of Mr. Trump's Supreme Court nominees as well qualified, and deemed only three of his 54 appeals court nominees to be not qualified for the positions.)

Attorney General Pam Bondi at the White House last month. Haiyun Jiang for The New York Times

In 2017, the first Trump administration stopped the bar group from assessing potential nominees before any final decision. But it permitted the group to vet them after their names went to the Senate. Nominees signed waivers so the group could have access to nonpublic bar information, filled out A.B.A. questionnaires and sat for interviews.

In a significant escalation, Ms. Bondi said in her letter that Mr. Trump's second-term nominees would not be instructed to sign waivers, nor would they fill out questionnaires or sit for interviews. The A.B.A. declined to comment on the move.

While Mr. Trump was out of power, a schism emerged between traditional legal conservatives and MAGA-style lawyers. The latter decided that politically appointed executive branch lawyers had constrained Mr. Trump in his first term, and began making plans to appoint a more aggressive breed of lawyer. But that conversation was largely about selecting executive branch lawyers, not judges.

During the 2016 campaign, Mr. Trump had essentially made a deal with the conservative legal movement. In exchange for its support, he would outsource his judicial selections, like the Supreme Court seat left vacant by the death of Justice Antonin Scalia, to movement adherents.

Throughout his first term, Mr. Trump nominated appellate judges and Supreme Court justices cut from the mold of the conservative legal movement. He accepted the recommendations of his first White House counsel, Donald F. McGahn II, a Federalist Society stalwart, with significant input from Mr. Leo.

This month, Mr. Trump announced the first appellate nomination of his second term, Whitney Hermandorfer, a lawyer in the Tennessee attorney general's office, for the U.S. Court of Appeals for the Sixth Circuit. A former Supreme Court clerk to Justices Alito and Amy Coney Barrett, she appeared cut from the same cloth as his first-term selections.

According to people briefed on the selection process, Trump officials including Stephen Kenny, a lawyer working for the White House counsel; Stephen Miller, Mr. Trump's deputy chief of staff; and Sergio Gor, the

director of the White House personnel office, were involved in those deliberations. Mr. McGahn, now in private practice, is also said to have weighed in on Ms. Hermandorfer.

But Mr. Trump's second appellate pick, announced on Wednesday as the nominee to the U.S. Court of Appeals for the Third Circuit, was different: Emil Bove III, a Justice Department official and former criminal defense lawyer for Mr. Trump.

Mr. Bove does not fit the mold of the sort of lawyer who has spent years frequenting Federalist Society conventions to discuss judicial restraint and originalism. But he has shown a willingness to aggressively use power in ways that Mr. Trump likes, including carrying out politically charged purges.

Mr. Bove also forced out an interim U.S. attorney after she balked at his demand to drop a corruption case against New York's mayor, Eric Adams, when the administration wanted his help for mass deportations. The prosecutor, Danielle Sassoon, a Federalist Society member who had clerked for Justice Scalia, portrayed the request as unethical.

In naming Mr. Bove, the president put forward an openly politicized and outcome-based rationale. His nominee, he said on social media, would "do anything else that is necessary to, MAKE AMERICA GREAT AGAIN. Emil Bove will never let you down!"

The choice has set off a debate among conservative legal circles.

Mr. Whelan said a "very conservative appellate judge" had told him that he would not retire because of concerns over whom Mr. Trump would pick as a successor. In *National Review*, he warned of the "danger that Bove, if

confirmed, would leap to the top of Trump's list for the next Supreme Court vacancy."

But Mike Davis, a former Republican nominations counsel for the Senate Judiciary Committee, predicted and welcomed similar picks ahead.

"President Trump will pick even more bold and fearless judges in his second term," he wrote on social media. "And Emil Bove is one of the most bold and fearless of them all."

Michael A. Fragoso, a former nominations counsel to Senator Mitch McConnell, defended Mr. Bove's credentials. But he also said that "regardless of what Mr. Trump is saying, the pool of candidates that he is picking from, and should be picking from, is still Federalist Society people."

Professor Yoo said the purpose of the conservative legal movement was to get presidents to stop treating judicial appointments as patronage and instead advance ideological goals. If Mr. Trump deviated from that path, he cautioned, the president risked the revolt President George W. Bush faced when he tried to appoint his friend and the White House counsel Harriet Miers to the Supreme Court two decades ago. Mr. Bush ultimately backed down.

No matter the shared goals of the conservative legal movement, Professor Yoo added, its members had a limit.

He said they would not support "him calling for the impeachment of judges or wanting to appoint judges who are not the best and the brightest, but instead are people getting personal rewards from the president — which is how it was before the Federalist Society."

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