

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2016

PHILADELPHIA, FRIDAY, NOVEMBER 11, 2016

VOL 254 • NO. 94 \$5.00 An **ALM** Publication

## Trump's Pa. Fed. Judges May Break With Centrist Tradition

BY P.J. D'ANNUNZIO  
*Of the Legal Staff*

With the election of controversial businessman and reality television star Donald Trump to the presidency, the nation has experienced a seismic and unexpected political shift.

It is unclear if Trump, an unorthodox and "nontraditional" political figure, will conform to more traditional methods when it comes to the appointment of federal judges. Consensus in making judicial picks may matter less now, given the Republican-dominated Congress.

Observers speculate that Trump will appoint more conservative judges—especially in the U.S. Court of Appeals for the Third Circuit—than his predecessor, President Barack Obama, who went with moderate judges in both the circuit and district courts. In Pennsylvania, that occurred because both a Republican and



TOBIAS

Democratic senator met in the middle for appointments.

Additionally, with Republican domination of the White House and Congress, Obama's four pending nominees for Pennsylvania's federal courts and one for the Third Circuit have little chance of confirmation.

Pat Toomey, the state's recently re-elected Republican senator, is especially unlikely to budge on Third Circuit candidate Rebecca Ross Haywood, a federal prosecutor in Pittsburgh, who he felt was unqualified

*Judges continues on 9*



KLINE

## Judges

*continued from 1*

to begin with and who Obama endorsed without Toomey's support.

With Trump and Toomey, the door is open to more right-leaning nominees to sit on the Third Circuit bench, according to University of Richmond Law School professor Carl Tobias. If there's a chance that Trump's district court nominees will be more "mainstream," Tobias said, "the circuit level will be a different story."

Thomas R. Kline, a longtime federal practitioner and 21-year member of the state's Federal Judicial Nominating Commission, said the unlikelihood of Obama's nominees

achieving confirmation is not a scenario unique to a Trump presidency.

"This situation is not unprecedented," he said. "When there have been pending nominees and a change of party, as a general proposition, the nominations of the pending selections are unlikely to be revived."

Kline added, "Under the current circumstances, I would not expect the candidates who were the selections of either the White House or Pennsylvania's Democratic senator, Bob Casey, to be sustainable."

Additionally, law professor Tobias said Pennsylvanians can expect to see fewer diverse picks for their federal courts than they have during the Obama years.

"Obama broke all the records in terms of diversity," Tobias said. "I'd be surprised if

we'd see anything like that with Trump." He added, however, "Bush named many Latinos to the federal bench, so we'll just have to see."

It also remains to be seen whether Trump will honor the century-old judicial nominating practice of "blue slips." The so-called blue slip is part of a Senate procedure established more by tradition than formal rule and holds that a nominee won't get a hearing in front of the Judiciary Committee until both of the home-state senators return a blue slip giving their OK to the committee chair.

Presidents have traditionally consulted with home-state senators about nominees in order to avoid having a senator withhold a blue slip in protest, thereby sparing

the nominee an arduous and drawn-out confirmation process. But will Trump embrace this tradition?

Tobias said there is no downside to consultation with the senators, and not doing so can put the president in a bad spot.

"The real leverage the senators have is the blue slip," Tobias said. "You get embroiled in these long stalemates with the home senators, and there's just no incentive for that. The president would be crazy to fight that."

And the blue slip tradition is one that is not likely to be abandoned by the Senate, according to Glenn Sugameli, a Washington, D.C.-based lawyer who tracks judicial vacancies.

*Judges continues on 11*

## Judges

*continued from 9*

"It's a matter of senatorial power and senators do not want to give up power," Sugameli said.

He added that without the senators' blue slips, Trump's nominees would go

nowhere. The only reason a president would make a nomination without expecting senatorial support would be to make a point, say over judicial vacancies, Sugameli said.

According to Kline, Casey could have some leverage in the traditional practice of giving the opposing party one pick to the administration's three. Additionally,

Casey could force a stalemate in not submitting his blue slip if he finds Trump's candidates unacceptable; but that is presupposing that Trump honors the blue slip tradition.

"We don't know if any of the conventional rules we have, such as blue slips, will remain standing," Kline said.

What can be counted on is an increasingly

conservative bench, Kline said. "There will be a sea change in the philosophical bent of the appointees. I'd expect them to be young and conservative and leaning toward the federalist society judicial philosophy."

P.J. D'Annunzio can be contacted at 215-557-2315 or [pdannunzio@alm.com](mailto:pdannunzio@alm.com). Follow him on Twitter @PJAnnunzioTLL.