

# Ryan J. Owens: Cast a wide net when filling federal judicial vacancies

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There are 118 empty seats in the federal judiciary today, including one Supreme Court vacancy and eighteen Courts of Appeals vacancies. These vacancies amount to just over 13% of the total federal judiciary. They must be filled soon. When appointing judges, President Trump and the Senate should cast a wide net. Their search should include nominees who fulfill their jurisprudential philosophies, whatever those may be. But the search also should focus on nominees who will be productive, high quality judges who can work effectively with their colleagues.

Predicting a nominee's productivity or excellence as a judge is no easy task, but empirical studies can provide useful guidance. One respected study shows that high quality judges on the circuits often come from academia. Judges who are former professors, such as Richard Posner, Frank Easterbrook, and Diane Wood, tend to be among the most prolific opinion writers. Indeed, all five of the most productive judges in the study were professors who were appointed to the federal courts of appeals. Judges who are former professors also appear to be cited favorably—and regularly—by other judges. Perhaps this should not be surprising. Professors make a career of researching and writing. They are used to having their ideas exposed to broader audiences. They must interact with their colleagues, many of whom challenge their ideas regularly. These skills translate well to appellate judging.

Former elected officials could also make good judges. Judges who once held elected political office may have a strong attachment to public mood and know how far the public is willing to move on legal issues. To be sure, a judge ought not to keep her finger to the wind when making decisions, but she should, as one Justice Ginsburg once said, understand “the climate of the era.” Private practitioners also can bring an abundance of unique experiences to the bench.

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It is important that the federal judiciary not turn into an upward-sucking institution consisting predominantly of professionalized judges. That can lead to tunnel vision and a cloistered judiciary. In 2001, then-Chief Justice Rehnquist lamented the growing trend toward appellate judges who had the same judicial track experiences. He was concerned that a judiciary composed of people working their way up the judicial ranks would create a judiciary that resembled the judiciaries of continental Europe. Those judiciaries, he argued, tend to be less respected and poorly connected to the people whose controversies they decide. Other scholars likewise have pointed out how an over-reliance on selecting sitting judges to fill judicial vacancies can have negative consequences for courts.

President Trump and the Senate should look for nominees whose judicial philosophies are satisfactory. They should seek judges who have the training to understand the complexities of modern law. And they should look for nominees who have the tools to be productive and well-regarded jurists. Scholars, as well as private practitioners, and even some elected officials may be good candidates for these judicial vacancies.

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