

# The Delray Democrat

## Why This Year is Different<sup>1</sup>

*Rob Resnick*

For as long as I have studied law and politics, I have consistently believed that in the grand scheme of things it didn't matter who appointed a judge, at least a federal judge.

Whether appointed by Reagan or Clinton (and all presidents prior to Donald Trump), the Senate screened federal judges to ensure they had the proper experience, education, temperament, judgment, and respect for the rule of law, avoiding the extremes.

Republican- and Democratic-appointed judges may follow different philosophies that lead them to different conclusions. However, all stayed reliably within the law and believed the law reinforced democracy. In other words, they might disagree on the outcome of a case, especially on controversial issues, but all based their decisions on the interests of the nation.

Enter Donald Trump to the White House and an unprecedented (hopefully never repeated) system of judicial appointments. While Trump nominated some judges with excellent credentials and who have performed to standard, that was not his main criteria or intent. Trump was not concerned with qualifications and certainly not with adherence to the rule of law or future of democracy. Instead, Trump was focused solely on personal fealty. He wanted to appoint as many judges as possible at all levels of the judiciary that would be primarily loyal to him, prepared to do his bidding in the face of any legal challenge or impediment he faced. He intended for these judges to put him above the law, to choose the MAGA agenda over the national interest, and to ignore their responsibilities to democracy when they conflicted with the Trump/MAGA push to autocracy. To them, the law was but an inconvenience, one they could cast aside as needed.

It is true that Republican appointed judges, including some Trump judges, dismissed his 2020 Election challenges. It is also true, however, that they had no choice because Trump's legal teams failed to produce an iota of evidence in any such case, which is why they were laughed out of court in every instance. The judges had no way to support those baseless, outrageous claims even if they were inclined to do so. Perhaps Trump seeking to steal the election was a step too far, even for sycophantic oriented judges he appointed. Let's hope their thresholds are much higher than that.

That brings us to Judge Aileen Cannon. Trump appointed this very young, under-experienced lawyer to the US District Court for the Southern District of Florida. After the search of Mar-a-Lago and after the Magistrate denied Trump much of the relief he sought, Trump's legal team forum shopped for a judge they believed would follow Trump's command of fealty over law and found their champion in Cannon. In multiple rulings concerning the search of Mar-a-Lago and DoJ review of the seized documents, Judge Cannon largely ignored the facts and ignored the law in favor of providing Trump what he wanted. It is possible that with her questionable credentials, she

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<sup>1</sup> *The Delray Democrat*, October 2022, page 6.

may not have understood the relevant law and procedure. It is just as likely she was being personally loyal to Trump.

However Cannon arose at her decisions in this case, respected jurists across the spectrum, liberal to conservative, even including some MAGA oriented commentators, soundly questioned the validity of the Cannon rulings. They all predicted that the 11th Circuit Court of Appeals, also dominated by conservative jurists and Trump appointees, would overturn her rulings because they were so obviously incorrect and legally unsound. Her rulings demonstrated ignorance or perhaps improper motivation. Judge Cannon epitomizes Trump judicial appointees. This is the danger posed to the nation and our judiciary from the dramatic change in appointments under the Trump presidency.

Let me again stress the point that previous presidents, while appointing judges with philosophies in line with their own, strove overall to appoint qualified judges and judges whose primary allegiance was to the rule of law and the future of our functioning democracy. There were certainly plenty of mistakes...

The Special Master Cannon appointed, and who was agreed to by DoJ, was a Reagan appointee, but who had an excellent reputation and judicial record. In the past, it was not important to begin an analysis of a judge's performance with the question of who appointed the judge. Once on the bench, they were supremely loyal to the law. That should be the standard for Biden and all future president's appointments. But not Trump.

The Republican Senate quickly confirmed record numbers of Trump judges for 4 years. They cared not that many had questionable experience or merit as federal judges. Elections have consequences and whoever wins the White House has the authority to appoint judges. We can only hope that every president would appoint the highest qualified individuals. Trump did not. Then Senate Majority Leader Mitch McConnell was all too happy to ignore the Senate's responsibilities in the confirmation process. Yes, the president appoints and the Senate confirms. However, the confirmation process holds the Senate responsible for vetting all nominees to ensure they have the proper experience, tend away from the extremes, etc. McConnell, et al, bypassed the normal process and prevented proper vetting.

When the president appoints underqualified, even unqualified nominees, and the Senate confounds the matter by by-passing proper confirmation processes, we have a significant crisis in the judiciary. Judges serve for life and wield immense power in their decisions. It is far too important to allow unqualified individuals on the bench. The damage they do can last for generations. When presidents look for very young nominees to extend their likely time in the judiciary, they risk appointing underqualified individuals. When they do it intentionally, so as to avoid accountability because they lack judicial records, and to get individuals confirmed for nefarious purposes, it is extremely dangerous. The Trump record...

The 2022 Midterms are critical to saving democracy for multiple reasons including the judiciary. If Republicans take control of the Senate, they will revert back to when they were in control during the Obama years and refuse to confirm any Democratic nominees, no matter how qualified. At a minimum, they will intentionally slow the process to delay these nominees from assuming responsibility and try to preserve as many vacancies as possible until after 2024, hoping they can

win the White House. The 2024 Election will be similarly critical. If Republicans, especially Trump, were to win back the White House, the plan to saturate the judiciary with less qualified jurists and jurists committed to Trump and the MAGA agenda, not the rule of law.

Republican rule, until and unless they jettison the MAGA menace, means an end to even more freedoms, weakening of democracy, campaigns of election stealing and voter suppression, and other outrageous harm to the nation. Elections have consequences. Many Republicans said they disagreed with Trump on certain issues, objected to the extremism, etc., but voted for him because they wanted Republican judicial appointments. In any case, Trump got to appoint record numbers of judges, many not properly vetted or qualified. The Senate must revert back to proper confirmation processes no matter who wins elections. We the people must ensure we only vote for presidential and congressional candidates who will be responsible with the sacred duty of appointing judges. The danger is too great.