

REMARKS

TWO YEARS OF JUDICIAL SELECTION IN THE TRUMP ADMINISTRATION

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REMARKS

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Robert Luther III**

During the course of Don McGahn's tenure as White House Counsel, I had the opportunity of a lifetime to work with him identifying, interviewing, and vetting President Trump's judicial candidates.

The seat Judge Porter has filled is particularly special to me because I am from Pittsburgh and have known his predecessor, Judge Mike Fisher, for many years. Now that Judge Fisher has assumed senior status, I would like to thank him for his many years of public service in all three branches of government here in Pennsylvania.

A judicial investiture is a cause for celebration; it is an occasion to recognize a lifetime of achievement and one's rise through the ranks to the peak of the profession. But these occasions are also opportunities for us to reflect upon the nature of the judiciary as an institution, why it is important to ordered liberty, and what our expectations are of it as judges, lawyers, and members of the public.

So, today seems like an appropriate occasion to ask—what can a litigant expect from a judge appointed by President Trump? A number of specific qualities come to mind.

First, she can expect a judge with an outstanding reputation in his or her community.

* Remarks at the Investiture of Judge David J. Porter of the U.S. Court of Appeals for the Third Circuit, Joseph F. Weis, Jr. U.S. Courthouse, Pittsburgh, Pennsylvania, December 18, 2018.

** Associate Counsel to the President (2017–18).

- We know Judge Porter has that in spades because his nomination was supported by a broad coalition of organizations—organizations forming the soul of this city such as: the Pittsburgh Fire Fighters Local No. 1, the Fraternal Order of Police Fort Pitt Lodge No. 1, the International Union of Elevator Constructors Local 6, the National Organization of Black Law Enforcement Executives (Pittsburgh Chapter), as well as a number of other prominent attorneys and business leaders in the area.

Second, she can expect a judge who is familiar with our Founding documents, who is an originalist and a textualist, and, who like the Founders, harbors a healthy skepticism of government.

- We know Judge Porter holds those views from his published writings on originalism, property rights, federalism and the Commerce Power, and from his service on the Board of Trustees of Grove City College, which is well-known for its principled refusal to accept any federal funds in order to maintain its independence.

Third, she can expect a judge who, in her personal or professional life, has stood for principles and paid the price.

- That is certainly the case with Judge Porter. As many of us know, he was in the mix for a judgeship a number of years ago. During that period, he was subjected to and sustained a barrage of unfounded criticism leveled by opponents of his nomination. Yet that experience did not deter him from answering the call to service for this judgeship.

As Judge Porter's record evidences, we find in him the kind of judge the American people want in the federal courts—one who believes in the rule of law, who reveres the Constitution, and whose sense of fairness and justice is above reproach. For these reasons, we were pleased to recommend him to the President.

* * *

No White House Counsel's Office in history has put the care and effort into judicial selection that Don McGahn's office has invested. As far as I know, no alumnus of Administrations past has claimed differently. In prior Administrations, judicial candidates were often interviewed by phone, by one Associate Counsel in a fifteen minute *pro-forma* interview, or not at all. In this Administration, the hundreds of judicial candidates that we have considered were personally interviewed at the White House by White House Counsel's Office and Department of Justice Office of Legal Policy staff. Every candidate who walks through the White House gates for an interview is taken seriously and has a real chance to be nominated if the politics permit it and the background check comes back clean. Why do we do this? While it may be old-fashioned, we think it is important to be able to look a candidate in the

eye to be sure that he or she has the fire, poise, temperament, and knowledge required to do this job as well as the President and the members of our office demand.

As of this morning, the President has nominated forty-three judicial candidates to the United States Courts of Appeals. Thirty have been confirmed by the Senate, including two to this Court. These are the President's legacy picks. Each one of them was subjected to a lengthy interview conducted by about ten lawyers, nearly all of whom have clerked for Judges of the U.S. Courts of Appeals and practiced in federal courts.

- In Judge Porter's case, seven individuals participated in his interview including former White House Counsel Don McGahn, former Deputy White House Counsel Greg Katsas, now a Judge of the U.S. Court of Appeals for the D.C. Circuit, and five other individuals including me. The Court of Appeals interview is modeled after the Justice Scalia law clerk interview, although the Scalia law clerk alums in my former office have said that our interviews are even more intense. I am sure Justice Scalia would disagree.

The lawyers who conduct these judicial interviews are precisely the sort of public-service oriented individuals you would want to entrust with this responsibility. They have volunteered to take on judicial interviews in addition to their substantive agency portfolios—so the hours they spend reviewing candidate materials and participating in interviews are in addition to, rather than in lieu of, other responsibilities. Nearly all of these lawyers turned down higher paying and more senior positions in agencies throughout the Administration to work in the White House Counsel's Office because they wanted to participate in the judicial selection process. Because they wanted to be a part of President Trump's judicial legacy.

Judge Porter is an integral part of that legacy. It will now be my privilege to read the commission that President Trump signed appointing Judge Porter to this most distinguished Court:

Donald J. Trump President of the United States of America

To all who shall see these Presents, Greeting: Know Ye: That reposing special trust and confidence in the Wisdom, Uprightness and Learning of David J. Porter of Pennsylvania, I have nominated, and by, and with the advice and consent of the Senate, do appoint him to be United States Circuit Judge and do authorize and empower him to execute and fulfill the duties of that Office, according to the Constitution, and Laws of the said United States, and to Have and to Hold the said Office with all the powers, privileges, and emoluments to the same of right appertaining unto him, the said David J. Porter during his good behavior.

In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington, this 15th day of October in the year of our Lord two thousand and eighteen, and the Independence of the United States of America, the two hundred and forty-third.

Judge Porter—Congratulations.