



United States Senate
WASHINGTON, DC 20510-0504
<http://feinstein.senate.gov>

November 17, 2017

Brett J. Talley
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Mr. Talley:

Earlier this week, after the Committee discharged your nomination, the press reported several items about your background that had not been previously disclosed to the Committee – either in your Senate Questionnaire or at your hearing. Specifically, it was reported that you may have additional conflicts of interest based on your wife’s current role at the White House and that you appear to have authored inflammatory online commentary on important issues that was previously undisclosed to the Committee. Based on these reports, we are asking you provide additional information to the Committee.

As you know, Question 24 on the Senate Judiciary Questionnaire asks judicial nominees to identify family members who present potential conflicts of interest. This is because occasions can arise where nominees will need to recuse themselves from cases in which a family member is involved. On Monday, the *New York Times* reported that your wife, Ann Donaldson, serves as Deputy Assistant to the President and Chief of Staff for the White House Counsel, Don McGahn. The article states that “Ms. Donaldson has emerged in recent weeks as a witness in the special counsel’s investigation into whether Mr. Trump obstructed justice” (*attached*). This fact was not disclosed in your questionnaire submitted to the Committee.

Federal district courts around the country, such as the one you are nominated to, are hearing cases involving President Trump’s executive actions. For example, federal district courts in Hawaii, Maryland, and several others, heard cases challenging President Trump’s travel ban. Please answer the following questions:

1. Do you believe your wife's role as an attorney in the White House does not present a potential conflict of interest, if you are confirmed?
2. What issues has your wife worked on in the White House Counsel's Office?
3. Is the reporting accurate that your wife has been interviewed by Special Counsel Mueller? If so, do you commit to recusing yourself from any case arising from Mr. Mueller's investigation?
4. Do you commit to recusing from any case involving President Trump's actions or executive authority for the duration that your wife serves in the White House Counsel's Office?

Additionally, this week, *BuzzFeed News* reported there were more online political comments written by you under a pseudonym, "BamainBoston", on a University of Alabama sports fan website called TideFans.com. Subsequently, *Slate.com* published articles discussing other online comments you wrote under the same pseudonym (*attached*). These posts had not been provided to the Committee prior to your hearing. Please answer the following questions:

1. *BuzzFeed News* reported that after the Sandy Hook Elementary tragedy when a gunman took the lives of 20 children, you wrote, "My solution would be to stop being a nation of pansies and man up. . . . Everyone should know that part of their social responsibility is to learn how to use a firearm effectively and carry one with them at all times."
 - a. Did you author this post?
 - b. Why was this not provided to the Committee as part of your questionnaire?
 - c. What did you mean by the phrase "man up"?
 - d. Do you still believe that it is everyone's "social responsibility" to carry a firearm with them "at all times"?
2. *Slate.com* reported that you wrote a comment (also under the "BamainBoston" pseudonym) regarding Nathan Bedford Forrest, a

Confederate Army general during the Civil War and early leader of the Ku Klux Klan. The post stated that “It was only after the perceived depredations of the Union army during reconstruction that Forrest joined (it is highly unlikely that he founded or acted as Grand Wizard) the first KKK, which was entirely different from the KKK of the early 19th Century.”

- a. Did you author this post?
 - b. Why was this not provided to the Committee as part of your questionnaire?
 - c. What led you to defend Nathan Bedford Forrest and his membership in the KKK?
 - d. Please explain your understanding of the views that the “first KKK” held regarding African Americans, and how these views were “entirely different from the KKK of the early 19th Century.”
 - e. Please explain whether your online comment accounted for enactment of the Enforcement Acts in 1870 and 1871 passed by the United States Congress and signed by President Ulysses S. Grant.¹
 - f. Please detail what sources of information you relied upon to inform your views.
3. *Slate.com* also reported that you wrote a comment (under the “BamainBoston” pseudonym) regarding *Roe v. Wade* and *Miranda v. Arizona*, describing them as “indefensible.” The post stated that while you considered “very few” U.S. Supreme Court decisions to be “indefensible when it comes to an interpretation of the Constitution,” you believed that “*Roe v. Wade* and *Miranda* are probably the worst offenders,” and further stated, “but that court is long gone, thank God.”

¹ See, e.g., *Landmark Legislation: The Enforcement Acts of 1870 and 1871*, United States Senate, available at <https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm> (“The adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution extended civil and legal protections to former slaves and prohibited states from disenfranchising voters ‘on account of race, color, or previous condition of servitude.’ Forces in some states were at work, however, to deny black citizens their legal rights. Members of the Ku Klux Klan, for example, terrorized black citizens for exercising their right to vote, running for public office, and serving on juries. In response, Congress passed a series of Enforcement Acts in 1870 and 1871 (also known as the Force Acts) to end such violence and empower the president to use military force to protect African Americans.”).

- a. Did you author this post?
 - b. Why was this not provided to the Committee as part of your questionnaire?
 - c. Do you stand by your comment that *Roe* and *Miranda* are “indefensible”?
 - d. Do you commit to recusing in any case involving women’s right to access abortion or a criminal suspect’s right to be informed of her rights to remain silent and be provided an attorney?
4. Have you posted online about any other legal, political, or social issues on any other website, blog, or social media platform that was not provided to the Committee? If yes, please provide copies of each post.
 5. What other names or pseudonyms, if any, have you used to post comments online about any legal, political, or social issue?
 6. *BuzzFeed* also suggests that two posts written under the pseudonym “BamainBoston” in 2012 were edited on June 28, 2017—the same day that, according to your Questionnaire, you met with Senators Shelby and Strange about a potential district court nomination.
 - a. Did you edit those posts on June 28? If so, what edits did you make and why?
 - b. Once you decided to seek a judicial nomination or became aware that you were under consideration for a federal judgeship, have you taken any steps to delete, edit, or restrict access to any statements previously available on the Internet or otherwise available to the public? If so, please provide the Committee with your original comments and indicate what edits were made.
 7. As the Deputy Assistant Attorney General responsible for judicial nominations in the Office of Legal Policy, you have been responsible for advising President Trump’s judicial nominees on what information they must disclose to the Committee. During the last Administration, for example, Stephen Bough, a nominee to the Western District of Missouri, disclosed not only his own blog posts but also his commentary on other

authors' blog posts and on other websites, because Question 12a asks nominees to disclose material they have authored, including "material published only on the Internet." (Stephen Bough Senate Judiciary Questionnaire, pg. 10).

- a. What have you told other judicial nominees in terms of what online commentary they need to disclose to the Committee?
- b. Specifically, have you advised other nominees not to disclose online posts or comments they have authored regarding legal, political, or social issues? If so, please disclose the names of the nominees you have so advised.

The Senate must consider carefully each nominee's record and reflect on whether they are able to be fair, independent, and impartial. Information about your potential conflicts of interest and your public political commentary are critical to that inquiry. Please respond to these questions as soon as possible. We believe the Senate should not move forward on your confirmation until this information has been provided and Senators have an opportunity to evaluate and review it.

Sincerely,



Dianne Feinstein

Attachments

DF/ph

The New York Times

Trump Judicial Pick Did Not Disclose He Is Married to a White House Lawyer

By Matt Apuzzo and Michael S. Schmidt | Nov. 13, 2017

WASHINGTON — One of President Trump's most controversial judicial nominees did not disclose on publicly available congressional documents that he is married to a senior lawyer in the White House Counsel's Office.

The nominee, Brett J. Talley, is awaiting a Senate confirmation vote that could come as early as Monday to become a federal district judge in Alabama. He is married to Ann Donaldson, the chief of staff to the White House counsel, Donald F. McGahn II.

Mr. Talley was asked on his publicly released Senate questionnaire to identify family members and others who are "likely to present potential conflicts of interest." He did not mention his wife.

District judges often provide the first ruling when laws are called into question, decisions that can put them at odds with the White House and its lawyers. Last month, for example, judges in Hawaii and Maryland temporarily blocked Mr. Trump's travel ban.

Mr. Talley also did not mention his wife when he described his frequent contact with White House lawyers during the nomination process.

Democrats have strongly criticized the nomination of Mr. Talley, a 36-year-old who has never tried a case and who received a rare "not qualified" rating from the American Bar Association. His nomination advanced through the Senate Judiciary Committee on Thursday on a party-line vote.

The White House counsel, Donald F. McGahn II, in January. Credit Stephen Crowley/The New York Times "Mr. Talley served as deputy solicitor general for the state of Alabama, currently serves in the Department of Justice's Office of Legal Policy and was recommended by Alabama's U.S. senators," said Sarah Huckabee Sanders, the White House press secretary. "He is more than qualified to serve in the federal judiciary."

Mr. McGahn has played a key role in helping Mr. Trump transform the federal bench by filling vacancies with young, deeply conservative judges. But a White House official said Ms. Donaldson was not involved in that process.

Ms. Donaldson has emerged in recent weeks as a witness in the special counsel's investigation into whether Mr. Trump obstructed justice. She was interviewed by investigators recently about her detailed notes about conversations with Mr. McGahn on topics including the firing of the former F.B.I. director James B. Comey, according to two people briefed on the matter, who spoke on the condition of anonymity because they were not authorized to discuss the investigation with reporters.

The special counsel, Robert S. Mueller III, is investigating Russian interference in last year's presidential election and whether Mr. Trump tried to obstruct the Justice Department's inquiry. He has denied any obstruction.

Mr. Trump nominated Mr. Talley in September to the Federal District Court based in Montgomery, Ala. Weeks later, Mr. Mueller's investigators notified the White House that they wanted to interview Ms. Donaldson, but there is no indication that anyone anticipated that at the time of her husband's nomination.

Ms. Donaldson has not had much direct contact with Mr. Trump, but as Mr. McGahn's top aide, she often spoke with him after he met with the president. Ms. Donaldson took notes, which the White House provided to the special counsel's office.

Mr. Talley, who graduated from Harvard Law School in 2007 and is a deputy assistant attorney general at the Justice Department, is the fourth judicial nominee under Mr. Trump to receive a "not qualified" rating from the American Bar Association and the second to receive the rating unanimously. Since 1989, the group has unanimously rated only two other judicial nominees not qualified.

A Trump Judicial Nominee Appears To Have Written About Politics On A Sports Website And Didn't Disclose It

Zoe Tillman | November 13, 2017

One of President Donald Trump's federal court nominees appears to have written posts for years on a University of Alabama sports fan website — including posts about gun control and immigration — and didn't disclose the writings on his Senate questionnaire.

The messages on TideFans.com were posted by the user "BamainBoston." In a Dec. 8, 2014, post, the user identified himself as Brett Talley, linking to a Washington Post article about Talley under the subject line "Washington Post Did A Feature On Me."

Talley has been nominated for a seat on the US District Court for the Middle District of Alabama, and is already facing criticism this week for a disclosure-related issue: The New York Times reported on Monday that Talley failed to include in his Senate questionnaire that he is married to a lawyer in the White House counsel's office, Ann Donaldson. The questionnaire asks nominees to disclose family members who are "likely to present potential conflicts of interest."

The questionnaire also asks nominees to list "published material you have written or edited, including material published only on the Internet." Talley listed posts he wrote for the blog Government in Exile and noted that he had also blogged on his personal website about horror writing. His posts on Government in Exile included pieces about the US political response to mass shootings — he called gun control efforts at the time "wrongheaded" — and pledging support to the National Rifle Association. There are no entries about posts on TideFans.com.

In an email to BuzzFeed News, White House spokesperson Hogan Gidley disputed that posts on a message board had to be disclosed to the Senate Judiciary Committee.

"The Senate Judiciary Committee questionnaire asks for published writings and public statements — not everything that's ever been typed on a keyboard. Alabama football fans' internet message board conversations are not deemed 'published writings', 'public statements', or 'published material'; nor are they deemed the equivalent of 'books', 'articles', or 'reports,'" Gidley wrote.

Talley is a senior official in the Justice Department's Office of Legal Policy. A Justice Department spokesman declined to comment on Talley's behalf. A White House spokesperson did not immediately return a request for comment.

Many of BamainBoston's posts are about sports. But some address politics and other nonsports subjects. On Dec. 17, 2012, a few days after the mass shooting at Sandy Hook Elementary School, BamainBoston posted, "My solution would be to stop being a society of pansies and man up."

BamainBoston continued: "We shouldn't depend on the government to protect us. We should be ready to protect ourselves. Everyone should know that part of their social responsibility is to learn how to use a firearm effectively and carry one with them at all times. I know some of you will freak out at that suggestion, but the only law I can imagine that would have stopped what happened in Connecticut is if every one of the teachers was armed with a gun and trained in how to use it."

BamainBoston appears to have edited at least two posts this year. On Jan. 24, 2012, BamainBoston published a post about a book the user had written being nominated for a Bram Stoker Award. That year, Talley was nominated for a Bram Stoker Award for one of his novels. The Jan. 24, 2012, post, and another one published by BamainBoston in the same thread two days later, were edited on June 28, 2017, by BamainBoston, according to the website — the same day Talley indicated in his Senate questionnaire that he met with Alabama Sens. Richard Shelby and Luther Strange about his potential nomination to the federal court.

According to TideFans.com, user BamainBoston joined the site in March 2005, and has published 16,381 posts. The user's most recent activity was on Monday at 2:58 p.m. The user indicated on a profile page that they were born in 1981, graduated from the University of Alabama, and were located in Boston. Talley was born in 1981, earned his undergraduate degree from the University of Alabama, and got his law degree from Harvard Law School in Boston. In 2012, Talley worked in Beverly, Massachusetts, about an hour's drive from Boston, for Mitt Romney's campaign.

Although the page says that BamainBoston's location is Boston, it also lists the zip code 36117, which is in Montgomery, Alabama. From 2015 until he joined the Justice Department in January, Talley worked in Montgomery in the Alabama attorney general's office as the deputy solicitor general.

In 2011, BamainBoston posted in a thread about immigration. Responding to another poster who wrote, "can we all agree that wasserman is a complete moron, even if you agree with the overall agenda she is peddling?" — an apparent reference to Rep. Debbie Wasserman Schultz, the former chair of the Democratic National Committee — BamainBoston wrote, "Agreed. It is hard to reform something if we can't even agree on what it is."

Later in the thread, BamainBoston wrote on the subject of how the US government should handle undocumented immigrants: "As for those people who are already here, yes, they violated the law. Great. That tells us nothing. The debate is how to punish that violation of the law. Go ahead. Punish them. Fine them. Whatever. Then give them a path to citizenship. The last thing we want here is a permanent underclass of people. And the thought of the police breaking down the doors of otherwise law abiding citizens and dragging them out to be deported is horrible and un-American. The crime most of these people committed is wanting a better life."

The Senate Judiciary Committee voted along party lines on Nov. 9 to approve Talley's nomination and send him to the full Senate for consideration. Democrats have criticized Talley for his professional record, saying he lacks experience and pointing to the rare "not qualified" rating that he received from the American Bar Association. Talley indicated in his questionnaire that although he had worked at a private law firm and in the Alabama attorney general's office in the years since he earned his law degree in 2007, he had never tried a case in court. He did clerk for a federal district judge as well as a federal appeals court judge.

Trump Judicial Nominee Brett Talley Appears to Have Defended “the First KKK” in Message Board Post

By *Mark Joseph Stern* | NOV. 15 2017

NOV. 15 2017

Brett Talley, the Alabama lawyer Donald Trump has nominated to be a federal district judge, is a 36-year-old ghosthunter who has never tried a case and who failed to disclose to the Senate that he is married to the chief of staff to the White House counsel. He also seems to have written 16,381 posts—more than 3½ per day—on the University of Alabama fan message board TideFans.com. As BuzzFeed has reported, a user who is almost certainly Talley posted for years under the handle BamainBoston. (BuzzFeed managed to identify him because BamainBoston wrote a message headlined “Washington Post Did A Feature On Me,” linking to a 2014 Ben Terris profile of Talley. BuzzFeed reported that a “Justice Department spokesman declined to comment on Talley's behalf.”)

A search of TideFans.com reveals that BamainBoston often opined on controversial issues, including race, abortion, perceived federal overreach, and Southern heritage. In one post from February 2011, he defended the honor of the early Ku Klux Klan.

That morning at 9:17 a.m., a user with the handle Bamaro posted a story about a Mississippi proposal “to honor Nathan Bedford Forrest” by placing his image on a license plate. “Who comes up with these ideas?” the user asked. “Honor someone who served as the first KKK Grand Wizard.”

BamainBoston responded an hour later:

Heaven forbid we let the facts get in the way of your righteous indignation, but Forrest, when he decommissioned his men, told them to make peace with the men they had fought and live as good citizens of the United States. It was only after the perceived depredations of the Union army during reconstruction that Forrest joined (it is highly unlikely that he founded or acted as the Grand Wizard) the first KKK, which was entirely different than the KKK of the early 19th Century. When the Klan turned to racial violence, he distanced himself from the organization as he had long supported the reconciliation of the races. In fact, he often spoke to black organizations.

BamainBoston is correct that, following the Confederacy's surrender, Forrest urged his troops to “obey the laws” of the Union. The remainder of his statement, however, is factually dubious.

First, he omits the 1864 Fort Pillow massacre, when Forrest led his troops to a mass slaughter of black soldiers. It is unclear whether Forrest explicitly permitted the indiscriminate killing, but he later celebrated it, declaring his hope “that these facts will demonstrate to the Northern people that negro soldiers cannot cope with Southerners.”

Second, the allegation that “the first KKK” was “entirely different” from that of “the early 19th Century” does not withstand scrutiny. (BamainBoston almost certainly means “the early 20th century,” since there was no KKK in the early 1800s, and the organization experienced a revival in the early 1900s.) From its inception, the KKK promoted white supremacy and opposed federal efforts to protect the civil rights of freed blacks. The group employed intimidation and violence, including murder, to thwart Reconstruction. It was so effective at disenfranchising black voters through acts of racial terror that, in 1870, Congress passed the Ku Klux Klan Act to enforce the 15th Amendment, which bars race-based voting discrimination. When that proved insufficient, Congress passed a second law permitting the president to suspend habeas corpus to fight the Klan, and allowing individuals to sue state officials who interfered with their constitutional rights.

Contrary to BamainBoston’s assertion, Forrest did likely serve as the KKK’s first leader, or “Grand Wizard,” though the group’s secretive nature makes this charge difficult to prove definitively. In 1868, he described the Klan as “a protective, political, military organization.” He also asserted that he had “no powder to burn killing negroes,” and intended only “to kill the radicals”—that is, Republicans, especially from the North, who supported Reconstruction. However, by this point, the Klan had become notorious for its relentless brutality against freed blacks. Forrest did not disavow the KKK’s terrorism until several years later, when he finally condemned its tactics and expressed more enlightened views.

BamainBoston’s account, then, whitewashes the reality that Forrest’s leadership of the Klan coincided with its early forays into racial violence. It also falsely differentiates “the first KKK” from its later iteration, perpetuating a pernicious myth that the nascent Klan was noble and benevolent.

At the time that BamainBoston wrote this post about Forrest and the KKK, Talley was clerking for Judge Joel Dubina of the U.S. Court of Appeals for the 11th Circuit. Assuming he wrote the post, which seems exceedingly likely, Talley does not seem to have a basic grasp on the history of Reconstruction, which is fundamentally intertwined with the 13th, 14th, and 15th amendments’ expansion of equal rights and suffrage.

Talley has already been voted out of the Senate Judiciary Committee on a party-line vote. If confirmed, he will enjoy a lifetime appointment to interpret a Constitution whose history he does not appear to understand.

Trump Judicial Nominee Brett Talley Appears to Have Called Roe v. Wade “Indefensible”

By Mark Joseph Stern | NOV. 16 2017

Brett Talley, Donald Trump’s controversial 36-year-old judicial nominee, appears to have written prolifically on the University of Alabama fan message board TideFans.com. As BuzzFeed has reported, Talley likely wrote 16,381 posts under the username BamainBoston, many of which involve politics and law. Earlier, I highlighted a post in which BamainBoston defended “the first KKK.” In another post, BamainBoston wrote that both *Roe v. Wade* and *Miranda v. Arizona*, two pillars of modern constitutional law, are “indefensible.”

BamainBoston expressed this view in December 2011, in response to Newt Gingrich’s claim that the president should send federal law enforcement officers to arrest judges who issue contentious decisions. According to Gingrich, these judges should be forced to defend their rulings before Congress. To his credit, BamainBoston firmly rejected this proposal. But in doing so, he noted that a “very few” decisions “are indefensible when it comes to an interpretation of the Constitution.”

“*Roe v. Wade* and *Miranda* are probably the worst offenders,” BamainBoston continued, “but that court is long gone, thank God.” (*Roe* protects abortion access; *Miranda* requires police officers to inform suspects of their right to remain silent and be provided an attorney.) BamainBoston elaborated that “the ideal of separation of powers goes even beyond those cases. Better to have bad law than have judges who make decisions based not on their interpretation of the Constitution but rather on fear that they will be hauled before Congress and threatened with impeachment if they do the unpopular thing or go against the government.”

In case anyone doubted his expertise, BamainBoston added: “Now, the simple fact of the matter is I do have inside information. I have worked for judges and I have worked for the Department of Justice. In my mind, those are good things that I bring to the board.” In December 2011, Talley was clerking for Judge Joel Dubina of the U.S. Court of Appeals for the 11th Circuit. According to the questionnaire Talley recently filled out for the Senate Judiciary Committee, he worked for the Department of Justice’s Office of Legal Policy in 2005 and 2006, while he was a student at Harvard Law School.

BamainBoston criticized both abortion providers and *Miranda* in additional posts on TideFans.com. Following the indictment of anti-abortion activists for making secret videos that falsely purported to show Planned Parenthood selling fetal tissue, he wrote:

I watched the videos for the first time recently. I was stunned. I expected them to be bad, but they are stunningly so. And the whole “they were edited” thing is a lie. You can watch the entire videos without any problem. As for the indictments, if these were Leftists doing the same thing with pro-life groups, I have a feeling the feelings here would be different.

And in the wake of a Supreme Court decision limiting *Miranda*, BamainBoston declared:

OK, the “right to remain silent” as we know it is a wholly judicial creation promulgated by the Supreme Court in *Miranda*. It is not a constitutional rule. The constitution only prevents you from having to actually testify in court when you are accused of a crime. The Supreme Court created a non-constitutional “prophylactic rule” in *Miranda* to bolster that constitutional protection. Because it’s just a precautionary rule that the court just made up, they have expanded and contracted the right depending who is on the court. The most “conservative” position is that *Miranda* should be overturned and your right to remain silent returned to the courtroom whence it began.

That’s not actually true. The Fifth Amendment’s guarantee against self-incrimination certainly prevents the government from compelling a criminal defendant to testify at his own trial. But it also bars the government from introducing at trial prior statements obtained from a criminal defendant through coercion. The right to remain silent, both at your own criminal trial and during police interrogation, is thus explicitly protected by the Fifth Amendment. *Miranda* added another rule, requiring police to inform suspects of their right to remain silent (and their right to have an attorney). *BamainBoston* appears to have conflated this extra-textual command with the Constitution itself. And so, in his zeal to condemn *Miranda*, he accidentally denounced the Fifth Amendment.

Talley did not disclose his constitutional musings on *TideFans.com* to the Senate Judiciary Committee. White House spokesman Hogan Gidley defended this omission, telling BuzzFeed:

The Senate Judiciary Committee questionnaire asks for published writings and public statements—not everything that’s ever been typed on a keyboard. Alabama football fans’ internet message board conversations are not deemed “published writings”, “public statements”, or “published material;” nor are they deemed the equivalent of “books”, “articles”, or “reports.”

Gidley’s comment is incomplete and disingenuous. *BamainBoston* and other “Alabama football fans” ventured far beyond sports in their wide-ranging discussions. While Talley did disclose a wide range of his writings to the committee, including his horror-themed fiction, he made no mention of his *TideFans.com* posts about *Roe v. Wade* and *Miranda v. Arizona*. It’s important for nominees to be candid about their view of precedent, particularly precedent whose legitimacy they reject. Senators can and should evaluate nominees’ preconceptions in determining whether they will apply settled law faithfully.

If confirmed, Talley will oversee criminal trials, and will rule on the constitutionality of various abortion restrictions. He may also hear challenges to Alabama’s ongoing efforts to defund Planned Parenthood. *BamainBoston*’s posts—published writing that the Senate Judiciary Committee was not told about—call into question Talley’s ability to rule on these issues with accuracy and objectivity.