

## Biden wants to fill federal court seats – but he needs to win the Senate first

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During the disastrous first presidential debate in September, Donald Trump mocked Barack Obama, and Joe Biden by extension, for leaving office with so many federal court seats unfilled.

“I’ll have so many judges because President Obama and him left me 128 judges to fill,” Trump said, slightly inflating the 105 vacancies he inherited. “When you leave office, you don’t leave any judges. That’s like, you just don’t do that ... If you left us 128 openings, you can’t be a good president.

But as is often the case with Trump’s attacks, there is much more to the story than that. It is true that Trump inherited nearly twice as many federal court vacancies as Obama did in 2009. However, Democrats blamed the high number of vacancies on what they described as an unprecedented level of obstruction from Republicans after they took control of the Senate in 2015.

Over Trump’s lone term as president, he and the Senate majority leader, Mitch McConnell, have successfully remade the federal judiciary, and Democrats are anxious to confirm liberal judges once Biden takes office. But some Democratic lawmakers are already voicing concern that Republicans will once again obstruct judicial nominations if they keep the Senate by winning at least one of the Georgia runoff races next month.

Dick Durbin, who is seeking to become the top Democrat on the Senate judiciary committee, raised that concern in late November, predicting Biden would have “very little” impact on the federal judiciary if Republicans maintain control of the chamber.

“If the last two years of the Obama administration were any indication, they’ll freeze them out,” Durbin told Politico. “Hope springs eternal, but I believe in history.”

Daniel Goldberg, the legal director of the progressive Alliance for Justice, said Durbin’s comments underscored the importance of the Georgia Senate elections. If Democrats were to win both of the 5 January runoff races, the Senate would be 50-50, and Vice-President-elect Kamala Harris could provide a tie-breaking 51st vote.

“I think Senator Durbin just made clear how important the Georgia elections are. The stakes could not be higher,” Goldberg said.

If Republicans were to win at least one of the Georgia races and keep control of the Senate, Chuck Grassley is expected to chair the judiciary committee, and the Iowa senator would have the ability to block Biden’s nominees from receiving hearings.

“If Grassley decides to play hardball, he could just not bring them up for hearings, and there’s nothing the other side can do,” said Josh Blackman, a professor at South Texas College of Law Houston and an adjunct scholar at the libertarian Cato Institute.

That possibility is distressing to Democrats, who have watched with dismay as the Senate has approved more than 200 of Trump’s judicial nominees since 2017. While Obama was able to have 55 of his nominees to the federal appeals courts approved over eight years, 54 of Trump’s nominees have been confirmed over just four years. Roughly a quarter of all trial-level federal judges are now Trump appointees.

### **Risk for Republicans**

Josh Blackman also warned there could be potential consequences for Republicans if they choose to “play hardball” with Biden’s nominees. “If the Democrats take the Senate in 2022, they could just fill the vacancies then, so you may get more moderate nominees now to fill the void,” Blackman said. “If you wait two more years, they might become less moderate.”

That calculus may be part of why some Democrats are more optimistic than Durbin about the likelihood of Biden’s judicial nominees being confirmed.

“I think the dynamic is very different than the dynamic with Donald Trump as president,” said Russ Feingold, a former Democratic senator from Wisconsin. “Having served in the Senate for 18 years, 16 years on the judiciary committee, I can tell you people back home want those seats filled. And there is pressure from newspapers, from the legal community when that doesn’t happen.”

Feingold, the president of the American Constitution Society (ACS), argued Biden’s team has also prioritized judicial nominations in a way that the Obama administration didn’t.

“Because of the economic situation and the need to pass healthcare, this didn’t get the attention it deserved” during Obama’s presidency, Feingold said. “I believe the Biden transition and the Biden administration will give it the attention it deserves and make it a higher priority.”

The ACS has already provided Biden’s team with extensive lists of potential nominees, in the hope of ensuring a smooth nomination process once a seat on the federal judiciary opens up.

“It’s not just getting past McConnell,” Feingold said. “It’s being ready and getting those names moving and being ready when there are vacancies.”

Legal experts argue that, if McConnell were to blockade Biden’s judicial nominees, the repercussions for the country would be severe. Not only would courts probably struggle to handle their caseloads with vacancies piling up, but the potential standoff could jeopardize the reputation of both the federal judiciary and the Senate.

“The American people just repudiated Donald Trump, and they elected Joe Biden to the presidency, and one of the critical roles of the presidency is nominating individuals to sit on our federal courts,” Goldberg said. “I think what the American people expect is the Senate to not have one set of rules for Donald Trump and one set of rules for Joe Biden.”

Although Feingold is more optimistic than Durbin about Biden’s judicial nominees receiving hearings, he acknowledged it was likely to be a hard-fought fight. If Democrats lose the Senate, Feingold said, they should not wallow but instead prepare for battle.

“I understand it will be a challenge, a tremendous challenge that will involve a lot of negotiating, should the Democrats not be able to control the Senate,” Feingold said. “But it’s a challenge that I think can be met ... We shouldn’t despair. We should be ready for the fight.”