



Trump is chipping away at Obama's remade federal courts

Walter Olson

February 11, 2019

“President Donald Trump and Senate Republicans are remaking the federal courts in their own image,” declared NPR’s Nina Totenberg recently. Others agree: The administration’s lower-court selections will change America “for generations.”

Exciting, no? Unless you take the view that it happens with pretty much every White House. Barack Obama, too, remade the lower courts with effects that will last for generations. Federal judges have life tenure and decide big issues. Same with George W. Bush and Bill Clinton. All came in with a Senate majority and definite views on judges they wanted to appoint.

Yes, judicial appointments are a core accomplishment of Trump’s presidency. But keep in perspective just how slowly and incrementally these things change. For the 851 seats in the federal judiciary overall — which collectively make final decisions for all but the 70 or so cases the US Supreme Court agrees to hear — four or even eight years just isn’t enough to chisel final triumphs or dash recurring hopes.

What Trump did do was stop what would otherwise have been a 12- or 16-year stretch of straight liberal appointments — a true generational shift — if a Hillary Clinton presidency had succeeded Obama’s.

Consider that when Obama took office, 10 of the 13 federal circuits had majority Republican-appointed judges. By January 2017, only four circuits had GOP-appointed majorities, while nine were Democratic-appointed majorities. Quite the shift.

When Trump came in, thanks in part to Senate Majority Leader Mitch McConnell, there were a lot of vacancies. His 167 nominations as of Jan. 29, representing about 20 percent of the 851 seats, exceed those of his three predecessors, who had between 111 and 140 by this point. When it comes to actual confirmations, Trump is around the middle of the pack with 85, ahead of Obama (62) but behind Bush (100) and Clinton (128).

That’s despite what is advertised as “unprecedented” norm-busting on both sides, from the downgrading of senatorial “blue slips” to the use of delay and forcing of cloture votes for many more nominees than in the past.

For the 179 active court of appeals judgeships, where much of the action is, the pace of change doesn't mostly depend on the White House's or McConnell's intentions. Instead, it is set mostly by the happenstance of which older judges create vacancies by taking senior status, a choice that's up to them.

Of the 13 circuits, only one has undergone any real partisan lurch since January 2017: the 11th (Georgia, Florida, Alabama), which went from eight Democratic appointees and three Republicans to a 6-6 tie. (I am indebted to my Cato Institute colleague Ilya Shapiro, who keeps a running tally of these.) But keep in mind, in January 2009, when Obama first took office, the 11th was 7-5 split in favor of Republican appointees. Trump didn't "reshape" the 11th, he "unshaped" what Obama did.

The influential Second Circuit, which includes New York, has two vacancies and might soon approach near-ideological balance, with Democratic appointments holding just a 7-6 majority. But the Second is known as an unusually collegial circuit that avoids partisan divisions where it can. The Third (New Jersey, Pennsylvania) may be evolving from a small Democratic to a small Republican edge.

Since Trump took office, nine of the 13 circuits have seen either no or only slight change in their partisan balance. Many of the judges who have won confirmation serve in parts of the country where the bench already leaned right. That's true of the Louisiana-based Fifth Circuit, as well as the circuits that cover most of the Midwest (Sixth, Seventh and Eighth).

The California-dominated Ninth, of course, is special — as special as LA, the Bay Area and Seattle, which dominate it. Its staunch liberalism (16 Dems, 7 Republicans) exceeds that of any of its peers, even if the mid-Atlantic Fourth has lately been getting frisky. Trump critics love to head to the Ninth to sue the administration, where they have scored temporary victories on DACA, the travel ban, transgender troops and more.

These gadfly rulings from the Ninth generate a satisfying buzz, but in time they ascend to the US Supreme Court, which awaits them like a spider.

Even so, the Ninth has a remarkable six vacancies, which has led to rumors about whether the White House might cut a deal with California Sens. Dianne Feinstein and Kamala Harris to fill three of them. (Latest word: no deal.)

How much difference does party appointment make? Cases that made it up to the Supreme Court last term, reports Adam Feldman of Empirical SCOTUS, had a 73 percent concordance with partisan prediction, way over the 50 percent of a world where party didn't matter but way below the 100 percent you'd get if judges merely voted as partisan blocs.

The nature of the courts in our system is not that one side wins any permanent victories on judicial selection. And that's a good thing. Republicans shouldn't get their hopes up too high: Even if Trump manages to place far more judges on the bench than other presidents, the idea that court rulings will be solidly conservative for "generations to come" is far from guaranteed.

Walter Olson is a senior fellow at the Cato Institute's Robert A. Levy Center for Constitutional Studies.