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Trump Falling Behind on Filling Empty Judge Seats

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Despite winning confirmation of Supreme Court Justices Brett Kavanaugh and Neil Gorsuch, plus a historic number of federal appeals court judges, President Donald Trump today faces more vacancies in the judiciary than he did when he took office.

That remarkable statistic points to flaws in the confirmation process and highlights the stakes of the midterm Senate elections next month.

If Sen. Chuck Schumer (D-N.Y.) swaps his minority leader title for majority leader status come January, the pace of judicial confirmations likely will come to a screeching halt.

“If Democrats take control of the Senate, there is a good chance there will be a lot fewer judicial confirmations,” said Paul Collins, director of legal studies at the University of Massachusetts Amherst. “I would expect to see a lot of obstruction by the Democrats.”

In an administration criticized even by allies for its performance on executive branch nominees, Trump officials in charge of identifying judges have moved aggressively.

From Afghanistan to Pakistan to London to JFK to LAX, this girl finally made it home, thanks to a dedicated rescue group

The president has offered up more nominees for district and appellate judgeships than any other president at this point in his first term since Bill Clinton. Trump’s 113 total nominations are nearly twice as many as former President Barack Obama at the same point of his presidency.

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What’s more, the Senate has been under Republican control for the entire time Trump has been in the Oval Office, and — thanks to a change in rules pushed through in 2013 by former

Democratic Majority Leader Harry Reid — today’s minority Democrats do not even have the filibuster to block or slow nominees.

Yet even after the confirmation of 15 more judges on Thursday, the vacancies in the judiciary have grown from 104 when Trump took office to 118 today, according to the Administrative Office of the U.S. Courts. Trump has not yet made nominations for 52 of those slots.

“These vacancies have jumped from an already historically high number of vacancies,” Carrie Severino, chief counsel and policy director of the Judicial Crisis Network, told LifeZette. “It’s stunning.”

Severino, whose organization advocates for the appointment of originalist judges, told LifeZette that Democrats have plenty of opportunities to obstruct even without the filibuster and have not been shy about using them.

“They’ve been able to grind this down ... They’ve been able to dramatically slow the process,” she said.

‘Blue slip’ shenanigans. Ilya Shapiro, senior fellow in constitutional studies at the libertarian Cato Institute, said Democrats have used maneuvers such as the “blue slip” to block nominees. Under long-standing custom, any senator can put a nomination in his or her state on hold by refusing to return his blue slip to the Senate Judiciary Committee.

The practice takes its name from the color of the form on which senators are supposed to register their approval or disapproval of nominees.

This blue slip veto is the main reason for the longest of the country’s judicial vacancies — an opening in the Eastern District of North Carolina dating all the way back to the end of 2005, when U.S. District Judge Howard Malcolm took semiretirement “senior” status.

George W. Bush nominated Thomas Farr in 2006 and 2007, but he never got a vote. Sen. Richard Burr (R-N.C.) never returned his blue slips, effectively killing a pair of Obama nominees to the post. Trump renominated Farr, who passed out of the judiciary committee last year but did not get a vote in the full Senate.

Trump nominated him again in January. Farr has drawn fierce opposition from civil rights advocates for his role in helping to craft political boundaries in North Carolina to favor the GOP, by packing large numbers of Democratic-leaning black voters into a small number of districts.

Other experts pointed to a requirement that every nomination be debated for 30 hours. In past times, senators would waive that rule except for controversial nominees. During Trump’s term, Senate Democrats have demanded the full 30 hours for every nomination — even those that eventually pass with unanimous or near-unanimous support.

“Opportunities for obstruction have dropped down more obscure parliamentary procedures,” Shapiro told LifeZette.

With Thursday’s wave of confirmations, Trump now has won judgeships for 84 people. Among modern presidents at the same stage, this trails only Clinton’s 128 confirmations. Obama had 56, Bush had 80, George H.W. Bush had 70, and Ronald Reagan had 83.

Republicans helped create backlog. Collins, the UMass professor, said part of the reason why Trump started with a large number of vacancies is that the Republican-controlled Senate slow-walked Obama nominations at the end of his second term.

“This was intentional. This was similar to the gamble with the Supreme Court,” he said, referring to Senate Majority Leader Mitch McConnell’s decision to deny Obama nominee Merrick Garland a Supreme Court confirmation hearing and make the open seat a campaign issue during the 2016 presidential election.

Collins, who co-wrote a book in 2013 on Supreme Court confirmations, pointed out that Trump also has prioritized positions on the appeals courts. While Trump’s total confirmed federal district judges, 53, is relatively low compared with those of recent past presidents, his circuit judge total of 29 already accounts for 17 percent of the judges on the nation’s 12 appellate courts.

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“The Trump administration was really focused on Supreme Court and court of appeals nominations,” Collins told LifeZette. “They were kind of letting district court positions take a back seat.”

Beyond the frustration Republicans feel at resistance to their attempts to reshape the direction of the courts, Collins said the real losers are litigants who must wait longer to resolve disputes.

The Judicial Conference currently recognizes 70 vacancies as “judicial emergencies” based on the size of the caseloads. That is up from 38 in January 2017 and 18 in January 2009.

There are signs Republicans are stepping up confirmation efforts. Earlier this year, Senate Judiciary Committee Chairman Charles Grassley (R-Iowa) started to schedule appeals court nominations for hearings over the objections of Democratic senators who have not returned their blue slips. The custom remains in place, however, for senators who want to block district court nominees in their own states.

Some conservative activists said Republicans could be doing more, though. Rachel Bovard, senior policy director at the Conservative Partnership Institute, said Democrats force the chamber to burn time by requiring 30 full hours before voting for each nominee.

“And Republicans haven’t really pushed back ... As a result, the confirmations have been plodding,” she told LifeZette.

Severino, of the Judicial Crisis Network, said Republicans should keep the Senate in session on nights and weekends and force Democrats to keep up debate on nominations they can’t block if they will not cooperate.

“You may go home when you finish your homework,” she said.

Past threats have resulted in period deals with Schumer to allow votes on lower court judges. The minority leader, however, has sparked a backlash from progressive activists who want no compromises.

Allotting the full 30 hours of debate for each of Trump's 70 pending nominees would total 2,100 hours, or more than 87 full 24-hour days. That is more days than are left before the new Senate term starts in January.

Bovard said the leadership also should adhere to a little-enforced rule to limit each senator to one hour of debate. That would mean 30 Democrats would have to commit to staying in the chamber in order to use the full 30 hours.