

Making Circuits Courts Appealing Again

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Even beyond passing tax reform, slashing federal regulations, and pruning the federal bureaucracy, Donald Trump's most impressive and lasting achievement so far is his record-setting pace of judicial appointments to the U.S. courts of appeals. While the Supreme Court gets attention for its blockbuster national cases, the 13 federal circuit courts represent the end of the line for all but 70 or so of the more than 50,000 cases they decide annually. Judges sit on those appellate benches for life, affecting our law long after the White House has changed hands.

After eclipsing the previous first-year records set by Presidents Kennedy and Nixon with 12 appellate judges confirmed in 2017, what are the prospects for continuing this momentum and increasing Trump's judicial legacy?

Ultimately, the answer depends on two factors: (1) the number of open seats to fill and (2) the power to get preferred nominees confirmed. With regard to the latter, to paraphrase Yogi Berra, making predictions about control of the Senate is hard, particularly beyond this year's elections. But engaging in a bit of informed speculation as to the number of seats that will be available for filling is less of a parlor game. The key consideration in forecasting such vacancies — beyond the 17 that currently exist, for which six nominees are pending — is the potential for judges to take advantage of what is known as senior status. This status is governed by the so-called Rule of 80: A federal judge who is at least 65 years old has the option of going into semi-retirement once the judge's combined age and years on the bench add up to 80. So someone who was appointed before the age of 50 (as most of Trump's nominees have been) can go senior immediately at 65.

The decision to take senior status has significant consequences. Under it, a judge has the option of presiding over a reduced caseload while maintaining his or her full salary. (In effect, whatever work they do is voluntary at that point because they get their full salary in retirement regardless, so we should be grateful to them for picking up that slack.) For those who consider interpreting the law and deciding cases to be a labor of love, doing less work for the same pay can prove to be quite enticing. Most relevant to a president wishing to leave a lasting mark on the courts is that these senior judges don't count against the 179 total appellate judgeships authorized by Congress. As soon as a judge takes senior status, the president can nominate a new judge to fill the newly vacant seat.

For President Trump, this is the most likely way he could begin to reverse the historic shift in the jurisprudential balance of the courts that occurred during the Obama years. When President Obama first took office, only one federal appeals court contained a majority of judges appointed

by Democrats — the West Coast’s Ninth Circuit, which has a built-in Democratic advantage not because the Pacific states lean left but due to judgeships added during the Carter administration. When Obama departed the presidency, the number with Democrat-appointed majorities had swelled to nine, with Republican-appointed majorities remaining in only the Fifth, Sixth, Seventh, and Eighth Circuits (essentially the middle of the country). While those four courts are virtually guaranteed to maintain their Republican-appointed majorities through the remainder of Trump’s presidency, the more interesting question is how much the president will be able to reverse the tide in the other nine circuits.

In the short term, the mid-Atlantic Third Circuit looks to be the most likely to flip back. When President Trump took office, the court had seven judges appointed by Democrats, five by Republicans, and two vacancies. One seat has already been filled by Judge Stephanos Bibas, and an additional vacancy was created when Judge D. Michael Fisher (a George W. Bush appointee) took senior status shortly after the inauguration. Assuming Trump can fill the two current vacancies, there would be a 7–7 split on the court. Three additional judges are already eligible for senior status, two of them Clinton appointees—but the oldest of these just turned 70, so this project may have to wait until a potential second Trump term if the senior-eligible judges try to wait out this president.

Republican takeovers of the remaining circuits will require the departure of an even greater proportion of judges originally nominated by Democrats. Such nonpartisan decision-making by sitting judges is not altogether unheard of though; Clinton-appointed Judges Ann Claire Williams and Diana Murphy of the Seventh and Eighth Circuits, respectively, elected to take senior status after Donald Trump’s election, while Ninth Circuit Judge Richard Tallman announced last summer that he would be following suit. But even in the event of massive vacancies left by Democrat-appointed judges, Trump is exceedingly unlikely to restore the 12–1 advantage held by Republicans when President Bush left office, with the Federal Circuit (a specialized court that handles patents and other technical areas) and Eleventh Circuit particularly unlikely to flip.

Still, to the extent that waiting out the president is less of a factor in at least some judges’ retirement decisions, two particularly interesting prizes might be put in play (or at least become much closer): the court that is second only to the Supreme Court in importance and prestige, and the one that has been most associated with progressive jurisprudence. The former is the U.S. Court of Appeals for the D.C. Circuit (not to be confused with the D.C. Court of Appeals, the highest court for municipal issues in the capital district). The D.C. Circuit currently features seven Democratic appointees — three of them confirmed only because of then–Senate majority leader Harry Reid’s elimination of filibusters in 2013 — as compared to just four members appointed by a Republican. Three of those Democratic appointees are eligible for senior status. Intriguingly, the oldest of them, 78-year-old Judge Judith Rogers, was originally appointed to the district court by President Reagan before being appointed to the circuit court by President Clinton. Should she and either Judge David Tatel (somewhat plausible) or Chief Judge Merrick Garland (not a chance; see 2016) choose to move on to greener pastures, the D.C. Circuit would become much less predictable.

As consequential as that would be, a far more significant shift could be brewing in the Ninth Circuit. Not only is this the most liberal circuit court in the country; its 29 judgeships make it by far the largest, and its makeup currently stands at an astounding 18 Democrat appointees, six Republican appointees, and five vacancies. The most important factor, though, is that the circuit

skews old: Ten of those Democratic appointees are currently eligible for senior status. That includes the last full-time Carter appointee, Judge Stephen Reinhardt, who turns 87 in March. Also included is the previously mentioned Judge Tallman, who will take senior status that same month. If Reinhardt retires and all seven resulting vacancies (including Tallman's) are filled — a big “if” given the “blue slip” war over seats in states with two Democratic senators — the Ninth Circuit would suddenly become a very different animal. Unthinkable? Maybe, but stranger things now regularly happen in our political world.

Ironically, President Trump's biggest short-term impact may be on courts that already hold a majority of Republican-nominated judges. This is particularly true of the Sixth, Seventh, and Eighth Circuits. The Sixth Circuit already boasts three Trump nominees in its 16-judge complement, including two highly reputed Supreme Court short-listers, Judges Amul Thapar and Joan Larsen. Six more judges are senior-eligible, including three Republican appointees, and two more will become eligible in the next year and a half.

The Seventh Circuit has eleven full-time seats but only eight active judges, one of them the recently confirmed Judge Amy Coney Barrett. With an additional five judges currently eligible to take senior status (four of whom were appointed by a Republican president), it's conceivable that President Trump could appoint as many as eight judges here in his first term alone, constituting over three-quarters of the whole court! Not far behind for potential Trumpian impact is the eleven-judge Eighth Circuit, which has already seen three nominations (two confirmed). An additional three judges on this court are currently eligible for senior status, all of whom were appointed by Republican presidents.

Finally, the wild card as far as President Trump's influence goes could end up being the Fourth Circuit, historically one of the most conservative courts in the land, but which has changed radically with President Obama's six appointments and now stands at the forefront of the judicial “resistance.” It's a court with 15 seats, ten of them filled by Democratic appointees (counting Chief Judge Roger Gregory, who was renominated by George W. Bush as a good-faith gesture after Gregory's Clinton nomination expired without Senate action). Two judges have already announced that they're taking senior status this year, four more are eligible, and two more become eligible in 2018 — making potentially a total of eight vacancies, four of them Democratic appointees (all Clinton). So there could be anywhere from two to eight vacancies during President Trump's first term — a feast-or-famine scenario!

As with almost any prognostication of this sort, what plays out in reality may not follow the probabilities discussed above, which understandably don't take into account deaths, sex scandals, and the like. And of course if Supreme Court justice Anthony Kennedy retires this spring — or whenever he does — it will make the battle over the late Justice Antonin Scalia's seat look like a minor procedural skirmish.

Perhaps our safest prediction for this new year is also the boldest: As strange and entertaining as 2017 was for court-watchers of every political stripe and interpretive theory, 2018 promises to be the rare example of a sequel that surpasses the original.

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