

## Dianne Feinstein, Kamala Harris try to cut a deal with Trump

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President Donald Trump has referred to the 9th U.S. Circuit Court of Appeals as “the much overturned Ninth Circuit Court,” called its rulings “ridiculous,” and even threatened to break the court up.

But when it comes to filling California’s vacancies on the federal appeals court, by far the largest and busiest in the country, the White House has been much more restrained.

The president’s legal advisers have been working with California’s two Democratic senators, Dianne Feinstein and Kamala Harris, to vet potential nominees. And sources in Washington and California say the list of names being circulated for the court include respected, mainstream picks that both Trump and the Democratic senators could potentially get behind.

Liberal groups have been highly critical of many other federal judicial nominees the Trump White House has put forward for the lifetime appointments elsewhere. “They are nominating very young, ideologically conservative” judges, said Marge Baker, executive vice president of People for the American Way, a liberal advocacy group. And the impacts, Baker said, are serious. “It affects every aspect of our lives and our well being.”

The 9th Circuit, for example, is considering a case challenging the president’s termination of the Deferred Action for Childhood Arrivals, or DACA, program for undocumented young people brought to the country as children, and is positioned to hear the lawsuit challenging the White House’s attempts to withhold federal funds from sanctuary cities. It also struck down the president’s travel ban on people from several Muslim-majority countries last year. And it has issued landmark rulings on gay marriage and the Second Amendment in recent years.

Even if Trump could fill all seven of the vacancies on the 9th Circuit (across the nine states in its jurisdiction), it would not tip the balance on the court towards conservatives. However, having more of a balance between Democrat- and Republican-appointed judges “would make a difference,” said Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute, a right-of-center think tank. Many of the court’s cases are decided by a three-judge panel, for instance, and there would be a better chance of getting two conservatives.

As negotiations over the openings ramp up – Senate Republicans are pushing to fill as many federal court vacancies as possible before the 2018 election – there is hope that a deal can be struck.

“I would certainly say that everybody who’s been mentioned is very smart and qualified,” said attorney Ben Feuer, a former clerk on the 9th Circuit who is now chairman of the California

Appellate Law Group. “As far as I know, none of them are ghost hunters,” Feuer added, an allusion to the White House’s nominee for an Alabama district court. Brett Talley had to withdraw his name from consideration for the post last fall over concerns about undisclosed ties to the Trump White House, lack of experience and his pastime tracking paranormal activity. Two other district court nominees were also forced to withdraw last year over questions about their credentials.

Judicial expert Russell Wheeler, a visiting fellow at the Brookings Institution, a centrist D.C. think tank, said that, “By and large, (the White House’s candidates) have the kind of conventional legal credentials that you would be looking for.”

Earlier this month, Feinstein and Harris issued a statement saying that their judicial nominating commissions had interviewed all of the names on the White House’s list. And they said they’d proposed three other candidates for the White House to consider, as well. U.S. District Court Judge Lucy Koh, based in San Jose, is widely assumed to be one of them. President Obama nominated Koh for a 9th Circuit appeals court vacancy in 2016, but Republicans in the Senate refused to vote on her nomination.

The senators would not confirm that, nor would they release the names of their other two picks. But speculation within the California legal community has centered on U.S. District Court Judge Andrew Guilford and Boris Feldman, a partner at Wilson Sonsini Goodrich Rosati in Palo Alto. Both have GOP credentials: Guilford was appointed to the Central District of California by President George W. Bush in 2006, while Feldman was considered by Bush for a Ninth Circuit appointment.

“The White House would not go for (Koh), she’s an Obama nominee,” Shapiro said . “I think (Feinstein and Harris) have more chance with Judge Guilford or Boris Feldman.”

The exchange of names between the White House and senators represents just the opening bid by each side. With a number of vacancies open on California’s federal courts, there are efforts underway to seek some kind of package deal on judicial nominees. In such a scenario, the administration would get to appoint some of their picks in exchange for nominating some from the Democrats’ list. Alternatively, each side could get a veto to strike one or more of the most objectionable of the names the other side has selected.

One key factor as negotiations continue: the potential judges' age. The White House has made a point of picking relatively young nominees for lifetime judicial appointments — some only in their 30s and 40s — as part of an aggressive bid to reshape the courts to conservatives’ liking. Many of the names the White House has floated for the Ninth Circuit are in their 40s. By putting forward Guilford and Feldman, who are in their 60s, the senators would be compromising on ideology in exchange for limiting the time a conservative would hold the seat.

“Deals get worked out,” said John Malcolm, senior legal fellow at the conservative Heritage Foundation. “You give on my circuit court judge and I’ll give on your nominee to the district court,” for example.

Feinstein’s senior position on the Senate Judiciary Committee — she’s the top Democrat on the panel — makes it more likely the two sides will be able to cut a deal. “I think there will be more

solicitude towards her,” said Shapiro, given that she and Committee Chairman Chuck Grassley have a long standing, cordial relationship.

And Grassley has motivation to keep it that way. The seven-term Iowa Republican senator is well aware that he and Feinstein could swap places as soon as next year, if Senate Democrats win back the majority in November and Feinstein is re-elected.

Still, Feuer cautioned, there’s not much long-term thinking happening in Congress right now, even among Capitol Hill’s veterans. “It’s about scoring quick, tactical victories so you can go back to your base,” he said. And with Republicans struggling to motivate their voters in the 2018 election, Feinstein facing a re-election challenge from the left and Harris eyeing a 2020 presidential run, those kind of political incentives could ultimately overwhelm the desire for compromise.

Feinstein, for one, isn't tipping her hand. Asked last week if she and the White House could reach a deal on 9th Circuit nominations, California's senior senator replied, "I would hope that would be the case, that’s the best I can say right now."