

Ninth Circuit Could Lose Its Liberal Lustre Under Trump

Written by Bob Adelman
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President Donald Trump has the opportunity to turn the Ninth Circuit from blue to red before the end of his first term. In October, after months of fruitless negotiating with California Senators Dianne Feinstein and Kamala Harris, the president finally gave up and nominated three conservative judges from the Federalist Society to fill three of the six vacancies on the court.

Not only is the Ninth Circuit Court of Appeals the largest in the country, covering nine states including Hawaii and Alaska, it is arguably the most liberal in its rulings. More than 80 percent of them, when reviewed by the Supreme Court, are reversed. Of its 29 judgeships, 16 were nominated by Democrat presidents, while only seven by Republicans.

But Trump has already filled two open slots, with three more pending Senate approval, leaving three still to be filled. The White House honored the two senators from California when they failed to return their “blue slips” supporting his nominees by attempting to find a middle ground.

But there was, not surprisingly, no middle ground. The day after the president announced his candidates, Senator Feinstein groused that “the White House moved forward without consulting me, picking controversial candidates from its initial list and another individual with no judicial experience who had not previously been suggested.” A spokesman for Senator Harris also denied any interaction with the White House on the nominees, complaining, “Instead of working with our office to identify consensus nominees for the 9th Circuit, the White House continues to try to pack the courts with partisan judges who will blindly support the President’s agenda.”



As of January 17, the U.S. Senate has confirmed 85 “Article III” (Supreme Court and other lower federal courts) judges, including two associate justices of the Supreme Court. The

Senate has also confirmed 30 judges for U.S. Courts of Appeals and 53 judges for the U.S. District Court. At present there are 12 vacancies on U.S. Courts of Appeal and 120 vacancies on the U.S. District Courts.

All of this gives great hope and comfort to the First Liberty Institute (FLI), a non-profit legal group focused on religious freedoms guaranteed under the First Amendment whose enemies characterize as having a Christian-right and/or religious-right position with “a strong anti-LGBT agenda.”

It did the nominational mathematics on the Ninth Circuit and concluded that the president is within shouting distance of turning it back to “originalist” or “textualist” jurisprudence. All that needs to happen is for the Senate to confirm three more of Trump’s nominees, and for one or two of those appointed by Democrats to retire or pass away.

And, according to FLI, not just the Ninth Circuit is in jeopardy of losing its cobalt stance, but also the Second, the Third, the Fourth, and the 11th Circuits as well. The Second Circuit has seven Democrat appointees and four Republican appointees, with two vacancies. To change it (or “flip it” as FLI expresses it) would require filling those two vacancies with Republican nominees and replacing one Democrat with a Republican nominee.

In the Third Circuit, there are six Democratic appointees and six Republican appointees, with two vacancies. Fill those open slots the right way and it’s done, the report from FLI said.

In the Fourth Circuit, there are eight Democratic appointees, seven from GOP presidents, and at least one known “future vacancy”. The flip would require a Republican taking that coming slot, as well as changing out one Democrat appointee.

And at the 11th Circuit, one Democrat appointee must retire and be replaced, since that bench has a six-six tie right now.

The report from FLI said nothing about the Supreme Court, where rumors abound that Justice Ginsburg may be on the verge of retiring for health reasons (despite her protestations to the contrary), and where Justice Breyer turns 81 this summer.

This is highly annoying to liberal senators such as those from California, who see exactly what the president’s “agenda” is. As Trump stated repeatedly during his campaign, he promised to nominate judges with an “originalist” viewpoint on the Constitution. As Ken Klukowski, senior legal editor at Breitbart, expressed it, things are only going to get better for that viewpoint in 2019: “President Donald Trump has had as much impact on the third branch of government in two years as most presidents have in two full terms, and the new Senate opens the door for the second half of his first term to be even more significant than the first half.”

Image: JasonDoiy via iStock / Getty Images Plus

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*(Locations of Court of Appeals Hearings via
United States Courts for the Ninth Circuit website map added)*