

How Big a Deal Are Four 9th Circuit Vacancies That Await Trump?

Change is coming to the nation's largest, and arguably its most liberal, appeals court. We parse the possibilities.

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SAN FRANCISCO — When President-elect Donald Trump takes office later this month, he'll be greeted by four vacancies at the U.S. Court of Appeals for the Ninth Circuit—the nation's largest circuit court and, by reputation, one of its most liberal.

The prospect of four Republican appointees joining the court prompted the conservative news site [breitbart.com](#) to proclaim in a recent headline: "[Liberals Panic as Trump Could Flip Left-Leaning Ninth Circuit.](#)"

But perhaps all the hand-wringing by court watchers on the left—and the salivating by those on the right—is a bit premature.

Four openings on other courts might be a game-changer. But in the Ninth Circuit, where 18 of the 25 sitting judges were appointed by Democratic presidents, the opportunity to shape the court is a bit more muted. Moreover, Sen. Charles Grassley, the Republican chair of the Senate Judiciary Committee, has said that he will abide by the tradition of allowing home-state senators to hold up objectionable nominees, which will pressure the White House to put forward compromise candidates.

"The Ninth Circuit isn't going to become a conservative court even under the most optimistic perspective for Trump," said Arthur Hellman, a Ninth Circuit scholar at University of Pittsburgh School of Law.

The openings took some court watchers by surprise: Circuit Judge Harry Pregerson took senior status early last year. U.S. District Judge Lucy Koh, nominated to fill Pregerson's seat, was passed out of committee in September, but has yet to receive a vote from the full Senate. In the meantime, Circuit Judge Barry Silverman took senior status in October and Judges Diarmuid O'Scannlain and Richard Clifton both went senior at the end of the year.

Given the volume of cases the Ninth Circuit considers, the Administrative Office of the U.S. Courts considers each of the openings a judicial emergency.

Carl Tobias, a professor at the University of Richmond School of Law in Virginia, said that he thinks it's "critical" to get the seats filled.

Even with the relatively high number of positions Trump will be able to fill on the court, Tobias said he doesn't anticipate a dramatic ideological shift. For one, he said, the judges to be replaced include only one of the court's most liberal jurists—Pregerson. O'Scannlain was a leading voice among the conservative judges on the Ninth Circuit bench and both Silverman and Clifton were largely viewed as moderates.

Ben Feuer, of the California Appellate Law Group, however, sees the openings contributing to a rightward drift on the Ninth Circuit. President Barack Obama's picks for the court have been by-and-large [more centrist than the judges they've replaced](#), he said. Bottom line: Feuer still sees one reliably liberal voice and two moderates on the court being replaced with judges "within the conservative ambit."

"You're not going to see too many folks going up who are clear moderates or centrists, at least right now" with Republicans in the majority, Feuer said.

Pittsburgh Law's Hellman said he sees the four openings having the biggest impact on the court's en banc process. Although all 29 active judges vote on whether to grant en banc review, only 10 judges are drawn to sit on the 11-judge panel that hears and decides the case. (The circuit's chief judge, currently Clinton-appointee Sidney Thomas, sits on all en banc panels.) Hellman said that with four more Republican appointees on the court, reversing a conservative panel decision would depend more "on the luck of the draw" than it does currently.

He pointed to a recent decision to [grant en banc review in a Second Amendment case](#) where the panel decision was seen as a defeat for gun control advocates. Hellman said he wonders if the liberal majority on the court would be as likely to take up such a case with four Trump appointees in the mix. While a conservative panel decision might be seen as "distinguishable," he said, an en banc decision could be "harder to get around" when deciding future cases. "It has a stature that a panel decision doesn't."

Much will depend on who Trump taps to fill the four open spots. Benjamin Shatz, an appellate practitioner at Manatt, Phelps & Phillips, said that he expects Trump to look beyond the "usual suspects" of sitting lower-court judges to fill the seats.

"I wouldn't be surprised if Trump picked some practicing lawyers and I'd be surprised if they were dyed in the wool Republican party animals," Shatz said. Although Trump's list of potential U.S. Supreme Court nominees, released during the campaign, was populated by conservative judges

bearing Federalist Society and Heritage Foundation approval, Shatz said he doesn't expect Trump to be constrained in who he considers in the lower courts.

"Once you have the power and you're no longer trying to curry power—he can do what he wants," Shatz said. "I wouldn't necessarily use that list and that process as the template for what we will see over the next four years."

Courting California

Although federal law requires the Ninth Circuit to have a judge from each of its nine states serving actively, there's no formal rule that Pregerson, a Californian, be replaced by another Golden Stater given the court's current make-up. But Tobias and Hellman both said the Trump administration would be well served to avoid picking unnecessary fights with California Sen. Dianne Feinstein, the ranking minority member of the Senate Judiciary Committee.

"She has so much ability to make their lives difficult that they would be crazy to do that. In fact that it may well be that she could still get her way with Judge Koh," Tobias said. An early concession by Trump on a favorite pick of Feinstein's, he said, could help grease the wheels for more controversial picks to make it through the committee further down the line.

Hellman agreed but said that it's currently impossible to tell how the process will unfold. "There's going to be quite a bit of people feeling each other out and seeing what they can get away with and how they can proceed in this new environment where we have a Republican president and a Republican Senate for the first time since 1997."

After decades of "rancor" in the Senate surrounding the confirmation process, he said, "It's sort of like the Hatfields and the McCoys."

Contact the reporter at rtodd@alm.com.

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