

THE STATE OF OUR COURTS

PART 3 OF 3: THE FUTURE OF THE BENCH

SEPTEMBER 23, 2024

Introduction

While much attention is often paid to the make-up of the Supreme Court and the justices' impact on our country, the vast majority of federal cases are concluded before the U.S. District Courts and U.S. Courts of Appeals. As a result, the judges who sit on these courts have a huge impact on the lives of everyday Americans who turn to the federal judiciary for justice.

The below, the final in a series of three briefs, examines the power the next president will have to shape the judiciary with concrete examples on why that is the case. As with the first brief in this series, the below data focuses on the powerful Courts of Appeals to illustrate these points.

Current Appointments by President & Political Gamesmanship

While the ideology of any judge or even justice shouldn't necessarily be equated to the president who appointed that individual, a wealth of research, as well as common sense, demonstrates that party affiliation does have a strong impact on judicial decision-making.

Currently, the 13 Courts of Appeals are made up of a slight majority of Republican appointees.

While this majority is quite modest (and it should be noted that Democratic appointees make up a majority of district court judges), what is more significant is the difference between the current and most-recent administrations.

President Trump's appointees make up approximately 30 percent of active appeals court judges. President Biden's appointees make up only about 24 percent of active judges—and, given the current state of vacancies, it is unlikely the current administration will catch up to the former.

The reasons for this disconnect are overwhelmingly political in nature.

The People and Their Courts

Despite some improvements in this regard over the past several years, the judiciary can often feel untouchable and even all-powerful, given the deference still shown to federal judges and justices in the media and certainly among some policy makers who may feel allegiance to certain jurists.

This can be a disheartening fact, particularly in the face of overwhelmingly unpopular decisions issued by the judiciary.

At the same time, while Americans do not directly vote for federal judges, their votes for president and senators have a tremendous impact on the make-up of the courts that are designed to serve them. Far from being powerless, the power of ordinary voters to shape the judiciary is a critical part of our constitutional system.

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Senator Mitch McConnell, with Republicans in control of the Senate at the end of the Obama administration, broke with decades of tradition and not only refused to move forward on President Obama's nominee for the Supreme Court but also nearly all of his Circuit Court nominees. In fact, due to McConnell's actions, President Obama appointed the fewest number of circuit court judges of any two-term president in modern history.

The stunningly high number of vacancies at the end of the Obama administration enabled President Trump to have an outsized impact on the judiciary and move the courts far to the right of the values of everyday people.

Looking Forward: The Make-Up of the Circuit Courts

Due to the extreme nature of many of President Trump's nominees the ideology of the circuit courts is further to the right than the numbers alone suggest. The next administration will have the opportunity to either continue to address this state of affairs, as the Biden administration has worked to do, or worsen it.

And when considering the potential impact the next president may have on the courts, it's important to not only consider the vacancies that will exist at the start of the next administration—but also those that are likely or may occur over the course of the term.

Senior status is a form of semi-retirement that opens up the seat for a new appointee though the judge can still receive their full pay while hearing cases on a part-time basis or otherwise serving the judiciary. There are currently 37 circuit court judges currently eligible to take senior status who haven't yet announced their intention to do so. The majority of those eligible were appointed by Republican presidents but a dozen were appointed by Democrats.

It is fair to assume a significant number of these individuals—for reasons that may range from age, their own political leanings, or simple happenstance—will step down during the next administration, opening up seats. And, of course, additional judges will become eligible for senior status in the years ahead.

Even a small number of seats—and the ideologies of those individuals—can make a major impact on the trajectory of a circuit court's output.

To illustrate, most of the Courts of Appeals are narrowly divided between Democratic and Republican appointees, with either party holding between 1-3 seat majorities.

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Democratic appointees hold majorities in 7 out of the 13 circuits though, again, most of those majorities are quite narrow.

Among those circuits with larger majorities, Republicans typically dominate—and do so in some of the larger circuits. For example, Republicans make up 71 percent of the 5th Circuit (12 out of 17 authorized seats) and 91 percent of the 8th Circuit (10 out of 11 authorized seats). In contrast, while Democratic appointees currently occupy every seat on the 1st Circuit, only six seats are authorized for that court. Democrats do not command any other majorities on par with the dominance seen on the 5th and 8th.

Further, judges who are already eligible to retire and/or will become eligible during the next administration, make the difference in many narrowly divided circuits—essentially, setting the stage for possible, significant shifts in the overall make-up of the circuit courts.

This possibility is particularly notable given the nature of how cases are decided at the appellate level. While district court judges consider cases individually, typically panels of three judges are pulled randomly to decide cases appealed to the circuit. When one ideology dominates within a circuit, more ideologically extreme decisions can be expected given the lack of any moderating influence—as the far-right decisions out of the [5th](#) and [8th](#) demonstrate.

Conclusion

From protections for consumers and workers, to basic human rights and freedom, the federal courts at all levels have an enormous impact on American life. The make-up of these courts, determined by elected officials, are critically important in ensuring that our federal courts are ruling with the public's best interests in mind.

The American people deserve to appear before judges they can trust and who will rule fairly. Lawmakers must deliver for them.