



# Trumping the 9th

**Lifetime appointees to federal courts will affect country decades after Trump leaves office**

**For the first half hour of a 9th U.S. Circuit Court of Appeals hearing in San Francisco on Jan. 9, Judge Daniel Bress sat quietly.**

To Bress' right, the other judges on his panel, Marsha Berzon and Chief Judge Sidney Thomas, had many questions for August Flentje, an attorney for the U.S. Department of Justice. Flentje's task: Get the panel to stay a district court's injunction preventing the Trump administration from requiring immigrants to prove they could purchase health insurance before they could be permitted legal entry.

Berzon and Thomas each questioned Flentje's assertion, culled from a presidential proclamation, that immigrants were three times more likely to lack health insurance, with each justice asking Flentje for any evidence in the administrative record for the case.

"You submitted nothing. Nothing," Berzon snapped at Flentje at one point.

And then it came time for attorneys representing the other side to speak, and at last, Bress had something to say, with a line of questions that seemed more rhetorical than inquisitive and supported presidential authority to restrict immigration.

It illustrated a pronounced shift over the past few years in one of

America's most famously liberal courts.

Historically, the 9th Circuit, which covers most of the Western United States, has been a bulwark against conservative presidential administrations and a right-leaning U.S. Supreme Court. Just in the past 20 years, the court has upheld the

rights of homeless people to sleep outside without prosecution, insisted on the transparency of anti-abortion clinics, stood up against California voters' 2008 ban on gay marriage and vacated multiple wrongful convictions. But the makeup of the 9th Circuit has changed dramatically since Donald Trump's 2016 election, with the president now having appointed 10 of its 29 active judges.

While many of Trump's most onerous executive actions might quickly be undone as soon as he leaves office, the impacts of his judicial appointments, which come with lifetime terms, could be felt for decades to come.

It used to be that a judge like Bress never had a chance of joining the 9th Circuit. For one thing, his July 2019 confirmation vote of 53-45 in the U.S. Senate, with all Republicans voting "yes," would have fallen short of the 60-vote threshold often needed to clear filibusters and approve judicial appointments.

Former Senate Majority Leader Harry Reid, a Nevada Democrat, changed the threshold to a simple majority vote for district and circuit court confirmations in November 2013. Reid was trying to help President Barack Obama move his judicial appointments through a veritable GOP boycott, but didn't anticipate what would come next.

"The Obama administration got frustrated with the complete logjam on appointments, both to the courts and executive positions," McGeorge School of Law emeritus professor John Cary Sims told News & Review. "Therefore, the Senate changed the rules."

The move ultimately backfired for Democrats, with judicial appointments grinding to a near halt for Obama after Republicans regained control of the Senate in 2014. Appointments have accel-

There haven't been any judicial appointments by President Donald Trump yet to the Eastern District Court in Sacramento, though his administration has appointed 10 of the 29 active justices to the 9th U.S. Circuit Court of Appeals based in San Francisco.

PHOTO BY GRAHAM WOMACK

ated aggressively since Trump took office, with seven of the 10 judges he's put on the 9th Circuit being confirmed with fewer than 60 votes.

Bress and other judges have been confirmed without support from either of California's U.S. senators, Dianne Feinstein and Kamala Harris. The Brookings Institute notes that senators used to have informal veto power for judicial appointments within their states.

But Reid's successor, Republican Mitch McConnell, who can set the rules for Senate confirmations, and the Trump administration have ignored that past practice.

The American Bar Association has rated just five of Trump's picks to the 9th Circuit as "well qualified," with two more picks receiving this rating from a portion of the ABA.

**While politicized cases are the most likely to be affected, Sims believes many cases will be decided the same no matter which judge is on the bench.**

"They're just routine cases," he said.

Some of the politicized cases are heart-wrenching, though.

On Jan. 9, the 9th Circuit panel heard from another Justice Department attorney, Scott Stewart, who asked the judges to set aside a district court order preventing the Trump administration from halting asylum for immigrants at the U.S.-Mexico border.

Attorneys for the Southern Poverty Law Center argued on behalf of Nora Phillips, legal director and co-founder of Al Otro Lado, which has an office in Tijuana and assists Latin American refugees.

"We never, ever saw anything like this," Phillips told the News & Review. "People started being turned away right after Trump got elected. And then once he was inaugurated, we started hearing, 'There's no more asylum. You have to go to the consulate. You need to go to a refugee camp.' The closest refugee camp to Tijuana is in Ecuador."

The Supreme Court, which has had a conservative majority since the Nixon administration, hears 50 to 75 cases a year while lower federal courts hear thousands. The higher court has sometimes let potentially controversial 9th Circuit decisions stand, such as a 2018 ruling prohibiting prosecution of homeless people in areas where emergency shelter was unavailable. At other times, though, the court has overturned 9th Circuit rulings, such as when it allowed the Trump administration's travel ban on certain Muslim nations to take effect.

Needless to say, the stakes are high.

"If Trump is re-elected, they'll undoubtedly be more appointments for him," said Kevin R. Johnson, dean of UC Davis School of Law. "I could guess five to 10, more likely six or seven in the second term of the Trump administration."

—GRAHAM WOMACK

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