



# **GOP Leader Makes Late Drive To Leave 'No Vacancy Behind'**

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Senate Majority Leader Mitch McConnell has just shy of four weeks left before his chamber's 2020 session is relegated to lame-duck status, and with dozens of court nominees still on tap, the question hangs over Washington as to how many he can get confirmed before the November election.

The Kentucky Republican — who famously promised to leave "no vacancy behind" once a GOP-controlled White House started churning out nominees to the federal bench — is making the endgame clear: get as many through the Senate's procedural hurdles before lawmakers head home Oct. 12 for the campaign season's final stretch.

More than 60 seats remain unfilled in the federal trial courts, with a large slate of Trump nominees in waiting, though McConnell has already made good on his pledge to push through all of the president's circuit court appointees. Judicial observers said the coronavirus pandemic put a damper on the majority leader's plan to fill all vacancies by the end of President Donald Trump's term.

But McConnell has sped up the process in recent days. On Thursday, he teed up procedural votes on eight nominees, including the first four Trump picks for the overburdened California district courts. Those nominees, along with four to the Illinois trial courts, are on the path to Senate confirmation within days.

McConnell's latest move capped an active week for court nominations, as the Senate approved largely noncontroversial judges to fill seats in Pennsylvania, Wisconsin, Michigan, Virginia and New York, including one holdover from the Obama era.

That flurry of activity can be expected to continue through September and early October, with one expert predicting a drumbeat of confirmations, perhaps as many as five per week, though nearly all of those that move forward will have bipartisan support.

## **More Blue Slips, Blue States?**

"There are people in the pipeline who could move forward," said Carl Tobias, professor at the University of Richmond School of Law, who noted that there are not just appointees who are considered moderate but also several who enjoy the backing of home-state senators.

Getting support from either party in a district nominee's own state remains key because despite the rancor over filling judicial seats over the last decade, the Judiciary Committee still observes the "blue slip" tradition that gives home-state senators an effective veto for district court picks.

That dynamic also shapes scheduling negotiations between McConnell and Senate Minority Leader Chuck Schumer, D-N.Y., and leaders of the Senate Judiciary Committee, and thus the pace at which nominees get hearings and floor votes.

McConnell and Senate Judiciary Chairman Lindsey Graham, R-S.C., having already achieved the milestones of getting all appeals court nominees onto the bench and more than 150 trial court seats filled, could turn their attention in the final weeks to partly accommodating Democrats or at least advancing nominees least likely to run into opposition.

That was the case last week when Republicans agreed to fill five seats that included an open judgeship in the Southern District of New York, where a federal prosecutor had been waiting for confirmation since 2016. And this week the GOP plans to accommodate Democrats again to clear the nominees for the California and Illinois seats.

Although California Sen. Dianne Feinstein, the ranking Democrat on the Judiciary Committee, has long decried Trump filling appellate seats without what she considers adequate consultation, she has nevertheless pressed to get trial seats in the Golden State filled because of the **shortage on the bench**.

Since Democrats ended the filibuster for lower-court nominees in 2013, McConnell could theoretically move at a fast clip on the remaining pool of nominees — 41 are still in waiting, representing almost two-thirds of vacancies — but both the legislative calendar and Senate politics pose obstacles. Republicans still need their opponents' cooperation on a string of crucial legislative items, ranging from coronavirus relief to a must-pass spending bill to keep the government running past Sept. 30, and Democrats may threaten to let the clock run out on nominees, even ones they support, if negotiations over other legislative priorities bog down.

A McConnell spokesman had no immediate comment.

More appointees like the ones in recent weeks would move things along faster, Tobias said. Many garnered home-state support and a substantial majority, "which has been rare or at least unusual," he said. "There have been a lot of party-line votes."

"They were well-qualified mainstream nominees, and those types of people will get strong votes. My guess is McConnell will try to bring forward five a week or so at the district level," and it's also a Senate priority because of multiple emergency vacancies, he added.

"He's got to do some blue-state ones or the Democrats are going to be in open revolt," Tobias said, and that's not good for the key legislative priorities. "Those are very important, but the nominees are not taking a whole lot of time. I think he could squeeze them in [and] it's really just a half-hour it takes to have a roll call vote."

## **Bills Take a Back Seat**

Ilya Shapiro, director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute, a libertarian think tank, noted that for right now the Senate "isn't doing much other than judicial nominations," and that gives McConnell a fair amount of breathing room.

Though Republicans did start moving on nominations more quickly than the early days of the pandemic crisis, the Senate has also not been idle on the legislative front, most recently trying to pass a second major round of pandemic relief. The Democratic side ended that effort Thursday, calling the GOP's plan far short of what the economy and state and local governments need.

Lawmakers are eyeing an 11th-hour continuing resolution to keep agencies open when the fiscal year ends, rather than trying to pass a politically charged spending package.

"I think there's plenty of time on the calendar to confirm more judges, and obviously that's a priority for McConnell," said Shapiro, who also emphasized what little floor time a confirmation vote takes up. "There's no indication that Republicans are wavering ... [and] it seems like the financial stuff is just going to come down to the latest moment."

At a left-leaning group that closely monitors the judicial landscape, Alliance for Justice, legal director Daniel Goldberg called it "outrageous" that at this time four years ago, the Senate majority leader had put the kibosh on President Barack Obama's judicial nominations, in a policy that reached far beyond what he was best known for that year, refusing to consider D.C. Circuit Judge Merrick Garland for the U.S. Supreme Court.

Goldberg said that the last time McConnell's Senate held a judicial hearing before the election of Donald Trump was July 2016, and by then McConnell had "completely shut down judicial nominations writ large," he said.

As the Senate busies itself putting as many of Trump's nominees on the courts as possible, the country is beleaguered with pressing health, economic and other issues, he said. "It is stunning that Mitch McConnell is prioritizing using valuable Senate time on filling judicial vacancies as opposed to dealing with the pandemic."

Goldberg advised Senate Democrats to fight back using the blue slip, saying "no Democrat at this point should be acquiescing to putting a Trump judge on the bench so soon before the election."

But even as they scramble toward an early October finish line, Senate Democrats likely realize it might not be easy to run out the clock.

Cato's Shapiro pointed out that the chamber has previously leveraged through some White House court appointees even as time runs out after an election. "It's not unprecedented to confirm judges in a lame duck," he said. And such a move can have lasting ramifications.

That's what happened in the waning weeks of 1980, when a Democratic-controlled Senate voted just over a week after Ronald Reagan's defeat of President Jimmy Carter to confirm, 80-10, a youthful Harvard Law professor to serve on the First Circuit.

His name was Stephen Breyer and his confirmation set him on a career path that eventually led to appointment to the Supreme Court.