



# McConnell gave progressives a playbook to reshape the judiciary

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There aren't many positive things a progressive strategist can say about Mitch McConnell's corrosive Senate career, but here's one: McConnell gave Democrats an excellent playbook for how to stock the federal judiciary with ideologically minded judges without delay.

As President Joe Biden prepares his first slate of judicial nominations to fill 96 current and expected vacancies, Democrats should pay special attention to McConnell's hardball judicial tactics to reshape the judiciary in a more progressive image after years of a relentless rightward march.

There are huge incentives for Senate Democrats to get their judicial confirmation game in order. There are key vacancies on federal benches in Texas, Alabama, Michigan, Florida and Pennsylvania, where GOP state legislators have cooked up dozens of draconian voter suppression bills certain to end up in court. And with Washington gridlock at maximum stall, courts are an increasingly essential means to overturn Republican excesses and defend progressive legislation.

Even though McConnell's election-year rush to confirm Supreme Court Justice Amy Coney Barrett denied Biden a shot at reshaping America's highest court (for now), the GOP's prioritization of filling powerful appellate court seats means Biden still has an opportunity to nominate progressives for unfilled district court slots lower down the judicial food chain.

Still, Republicans did a remarkable job confirming judges under Donald Trump, as the Senate largely abandoned lawmaking in favor of judicial rubber-stamping. In just four years, the Trump administration got 226 judges confirmed, 54 of them to the powerful federal courts of appeals and three to the Supreme Court. That's not far behind Barack Obama, who confirmed just 320 judges in twice the time.

## **Schumer: Biden judicial nominations to follow once Cabinet is filled**

If Democrats want to even the score, they will need to adopt the McConnell strategy of suffering no delays in the nomination and confirmation process. For instance, as majority leader, McConnell, R-Ky., stacked the Senate schedule with votes to confirm appeals court nominees even as senators were separately managing Barrett's confirmation. McConnell also bucked the Senate tradition of not confirming a defeated president's judicial nominees when he rammed through 14 additional judicial confirmations after Trump's loss in November.

It also means Democrats need to set aside visions of bipartisanship to confirm strong progressive judges who will counterbalance the GOP's decadeslong effort to control the federal courts. Right now, a quarter of the federal judiciary is made up of Trump appointees. That thrills conservative

judicial advocates like the Judicial Crisis Network and the Federalist Society, which played leading roles in recommending hyperpartisan names to Trump and McConnell.

Twenty-first-century legislative history teaches us that anything worth doing will have to be done over screeching Republican opposition, so Democrats should prepare their earplugs. As McConnell's methods so ruthlessly demonstrated, the majority party is held back only by the extent to which it chooses to recognize the opposition.

McConnell refused to even consider Obama's nomination of Merrick Garland to the Supreme Court and then spent the next four years packing the federal bench with a record number of judges rated "not qualified" by the American Bar Association. When Democrats objected, McConnell barreled through their protests and kept on confirming.

The confirmation process, however, can offer unity in another realm. In a Democratic Senate caucus divided between conservatives Joe Manchin of West Virginia and Kyrsten Sinema of Arizona on one side and most of the rest of the party on the other, judicial nominations offer a rare opportunity to push for progressivism with one voice. That's thanks in part to the fact that few Americans pay attention to judicial nominations. Even when people do get fired up about a Supreme Court fight, say, judicial picks don't tend to be as big a driver of Democratic voting behavior as they are among rank-and-file Republicans. That means Sinema and Manchin can vote for progressive nominees without fear of backlash among their constituents.

Biden is committed to nominating people worthy of the federal bench, unlike the unqualified judges approved by Republicans. But appointing competent jurists won't be enough for the Democratic activists itching to undo McConnell's capture of the judiciary. Criminal justice reformers and progressives within the Democratic Party will be looking in particular for Biden to elevate nominees with experience as public defenders and civil rights lawyers, as he has expressed interest in doing. Even the libertarian Cato Institute notes the corrosive effect on equal justice outcomes when a majority of federal judges are drawn from prosecutorial roles.

Rumors that Biden plans to nominate District Judge Ketanji Brown Jackson to replace Garland, who is now the attorney general, on the D.C. Court of Appeals have liberal hearts aflutter. Jackson — already bearing the media-ready nickname KBJ — is a fantastic example of Democratic values translated into thoughtful, progressive jurisprudence.

Jackson, a Harvard Law graduate and former public defender, protected organized labor from Trump's coordinated attacks and restored federal funding to a teen pregnancy program targeted by the GOP's right-wing network. She also drives Republicans crazy. Biden can't counter hundreds of far-right Trump judges with Jackson alone. Her values and sharp legal mind should be the standard for future nominees, not a remarkable exception.

Reshaping the federal judiciary in a more progressive and modern image is a monumental task, especially given McConnell's years undermining that necessary goal. His assault on the judiciary was so painful to watch because it was so effective. It's time for Democrats to erase those bad memories by using the same power and tactics to reverse the damage he caused.