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Election crucial to US Supreme Court's makeup, future

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The future of the U.S. Supreme Court is a critical issue in next month's election — its rulings, its composition, and perhaps even its ability to keep its doors open.

Republicans are sending signals that if Hillary Clinton is elected president and they retain control of the Senate, they might block confirmation of anyone she nominates to the high court, which has had one seat vacant for 8½ months.

Those warnings foreshadow a new level of political gridlock. They raise the possibility that the court, in four to eight years, would be so bereft of its members that it could no longer legally hear cases or issue rulings.

Senate Republican leaders have refused to consider President Obama's nomination of Appeals Court Judge Merrick Garland to succeed Justice Antonin Scalia, who died in February. The first hint they might go further came two weeks ago from Sen. John McCain, R-Ariz., who told an interviewer his party would "be united against any Supreme Court nominee" Clinton offered.

US Supreme Court nominee Judge Merrick Garland (center) heads to a meeting in May. Senate Republican leaders have refused to consider President Obama's nomination of Garland to the U.S. Supreme Court.

Sen. Ted Cruz, R-Texas, chimed in later that there was a "long historical precedent for a Supreme Court with fewer justices" and that there would be "plenty of time for debate on that issue."

McCain's office tried to backpedal from his call for a blockade, saying he would consider all court candidates on their merits, but adding that Clinton "has a clear record of supporting liberal judicial nominees."

Senate Judiciary Committee Chairman Chuck Grassley, R-Iowa, said Republicans shouldn't "stonewall" Clinton's Supreme Court picks but predicted she would nominate "judicial activists," a category that would apparently justify a wholesale rejection.

Republican opposition probably wouldn't matter if Democrats won control of both the White House and the Senate. A Republican minority could still try to filibuster Clinton's nominees, but Democrats could then repeal the filibuster — a step they took for lower federal court candidates in 2013 — and allow confirmation by a majority vote.

The same thing could happen, in reverse, if Republican Donald Trump became president and his party maintained its Senate majority.

But a divided government could leave the high court in uncharted waters.

Republicans had not tried to block confirmation of Obama's two previous Supreme Court nominees, Sonia Sotomayor and Elena Kagan. But the stakes now are much higher, because another Democratically appointed justice — either the relatively moderate Garland, who will turn 64 in November, or someone younger and more liberal — would deprive conservatives of the majority they have held since the early 1970s.

With only eight justices, the court has deadlocked 4-4 and left lower-court rulings intact in several major cases, including Obama's attempt to grant a reprieve to nearly 5 million immigrants facing deportation. The president's order remains blocked by lower-court rulings, but could return to the Supreme Court if a future administration renews it.

The justices have also accepted fewer cases for review than usual and have delayed hearings on some cases in apparent hopes of gaining a ninth member.

The U.S. Supreme Court is down to eight judges after the death of Justice Antonin Scalia (first row, second from left), creating deadlock in several crucial cases.

A prolonged stalemate over presidential nominees could further deplete the court with the departure of aging justices — Ruth Bader Ginsburg is 83, Anthony Kennedy is 80 and Stephen Breyer is 78. And federal law defines the court's quorum, the minimum number allowing it to act legally, as six justices.

A court without a quorum would leave the nation's legal ship without a rudder. Each of the 13 federal appeals courts, and the 50 state supreme courts, would become a law unto itself.

The public wouldn't stand for it, and Republicans would eventually come around, said Jesse Choper, a UC Berkeley law professor and onetime law clerk to former Chief Justice Earl Warren.

"Maybe I'm a Pollyanna, but I believe the Republicans would not stop the confirmation of a reasonable sort" of Clinton nominee, he said.

Choper said Senate Majority Leader Mitch McConnell would be reminded of his rationale for blocking Garland — that the choice should be left up to the voters who elected the next president.

But this is one circumstance in which the Constitution has no built-in checks and balances and relies instead on the good faith of the nation's leaders, said Erwin Chemerinsky, the law school dean at UC Irvine and a veteran Supreme Court litigator.

A partisan refusal to confirm nominees to the high court would appear to violate separation of powers, "one branch interfering with another branch, but I don't think anything can be done about it," Chemerinsky said. At some point, he said, he would hope that "people would say this is outrageous, truly disabling the government. ... But will it happen? I don't know."

Ilya Shapiro, editor of the Supreme Court Review at the libertarian Cato Institute, agreed that senators have a free hand to block court appointments and said it didn't trouble him.

"The Senate is fully within its powers to let the Supreme Court die out," Shapiro wrote in the Federalist, an online conservative magazine. While that might not be "politically tenable," he said, "it would be completely decent, honorable, and in keeping with the Senate's constitutional duty" to oppose all of the "super-legislators ... black-robed community organizers" Clinton plans to nominate.

Clinton, for her part, has said she would choose Supreme Court candidates who would overturn the 2010 Citizens United ruling, which allowed unlimited corporate spending on political campaigns. She has also denounced the 2013 ruling that struck down the key enforcement provision of the Voting Rights Act. Both were 5-4 decisions.

Trump, who has published an all-conservative list of 21 potential Supreme Court nominees, said his appointees would "automatically" overturn Roe vs. Wade, the 1973 ruling that legalized abortion nationwide. Clinton supports abortion rights and wants to restore federal funding for poor women's abortions.

The two rivals have also clashed over the court's 5-4 ruling in 2008 that declared a constitutional right to keep handguns in the home — Clinton wanting it narrowed or reversed, Trump favoring broader rights for gun owners.

A renewed version of Obama's immigration order, a court-blocked proposal to limit carbon emissions from power plants, clashes over gay and transgender rights — in short, most of the social issues that divide the nation — are likely to reach its highest court during the next administration.

That's if there's anyone around to hear them.