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## Biden, as president, could face strong opposition to judicial appointments from a GOP Senate

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If the Republicans retain control of the Senate, Chuck Grassley (left), chairman of the Judiciary Committee, and Majority Leader Mitch McConnell could derail new President Biden's appointments to judgeships.

Photo: Alex Wong / Getty Images 2018

Not long ago, a Republican-controlled Senate blocked most of a Democratic president's nominations to federal courts and refused to consider his choice to fill a vacancy on the Supreme Court.

It could soon happen again.

If President-elect Joe Biden withstands long shot legal challenges from President Trump and Republicans keep their Senate majority, the new president will be confronted in January with a legislative chamber that holds the power, and willingness, to veto any of his nominees.

Senate Majority Leader Mitch McConnell, R-Ky., has already signaled that Senate Republicans would be willing to consider centrist choices for Biden's Cabinet but would reject any "radical progressives," according to the Axios website. And if history is any indication, the response would be even more stern to the Democratic president's nominations for lifetime positions on the federal bench.

After Republicans gained a Senate majority in 2014, they approved only two of President Barack Obama's nine nominees for federal appeals courts in the Democrat's last two years in office. Forty-three of Obama's 61 candidates to U.S. District Courts were denied confirmation. Scores of additional judgeships remained vacant because Obama realized further nominations would be futile.

When Supreme Court Justice Antonin Scalia died in February 2016 and Obama nominated Merrick Garland, a federal appeals court judge with a moderate record, to succeed him, Senate Republican leaders denied Garland a hearing, saying the voters should have a say when they elected the next president that fall. By contrast, after Justice Ruth Bader Ginsburg's death in September, her successor, Trump nominee Amy Coney Barrett, was confirmed on a party-line vote a month later, eight days before the election.

And in the weeks before the 2016 election, when Democrat Hillary Rodham Clinton was widely expected to defeat Trump, several Republicans said they would vote against anyone she nominated to the Supreme Court.

“If Hillary Clinton becomes president, I am going to do everything I can do to make sure four years from now, we still got an opening on the Supreme Court,” Sen. Richard Burr, R-N.C., told Republican volunteers, according to a recording obtained by CNN.

Sen. John McCain, R-Ariz., in a radio interview during his final campaign in 2016, two years before his death, said, “I promise you that we will be united against any Supreme Court nominee that Hillary Clinton, if she were president, would put up.” He later tried to reverse course, saying he would oppose Clinton’s nominees if they were too liberal. Meanwhile, Sen. Ted Cruz, R-Texas, noted that there was historical precedent for having fewer than nine justices on the court.

Their positions were applauded at the time by Ilya Shapiro of the libertarian Cato Institute.

“If Hillary Clinton is president it would be completely decent, honorable and in keeping with the Senate’s constitutional duty to vote against essentially every judicial nominee she names,” Shapiro said in a 2016 article in the Federalist, a publication of the Federalist Society, the conservative group that now screens prospective judges for Trump.

Shapiro took a softer approach last week, telling The Chronicle he had meant only that a senator would be justified “in voting against nominees he or she thinks would harm the rule of law or damage the Constitution.”

But the record of judicial nominations and rejections in Obama’s last two years suggests that a harder line awaits the next Democratic president.

“They’ve been willing to play hardball,” said Carl Tobias, a University of Richmond law professor who monitors judicial appointments. In contrast, he said, when Democrats have controlled the Senate in recent decades, they have rarely blocked confirmation of Republican judicial nominees, with occasional exceptions such as Robert Bork, the conservative stalwart nominated to the Supreme Court by President Ronald Reagan in 1987.

If a vacancy occurs on the Supreme Court, “I wouldn’t be surprised to see them just say no to anybody and say let’s wait till 2024 till we have a new president,” Tobias said. Meanwhile, he noted, McConnell — who has overseen confirmation of Trump’s judicial appointees at record-setting levels — has vowed to “leave no vacancy behind” and is pressing to confirm more judges in the coming weeks.

A different perspective was offered by Michael McConnell, a Stanford law professor, director of the school’s Constitutional Law Center and a former federal appeals court judge appointed by President George W. Bush. In the current congressional session, he said, Senate Democrats voted unanimously against 13 of Trump’s 21 nominees to the appeals courts.

“Republicans will understandably be reluctant to extend to President Biden deference that the Democrats refused to extend to President Trump,” McConnell, no relation to the senator, said by

email. “Reasonable voices in both parties have to decide to draw back from this partisan precipice and return to historic norms.”

The U.S. Judicial Conference, in its current biennial report, has recommended that Congress create five new appeals court seats — all in the San Francisco-based Ninth Circuit — and 65 U.S. District Court judgeships, 22 of them in California, over two years to keep up with population increases and workload.

That would require legislation, and Tobias said Senate Republicans would never approve it with a Democrat in the White House. He noted that Sen. Chuck Grassley, R-Iowa, had complained that federal judgeships cost taxpayers \$1 million a year when he sponsored unsuccessful legislation in 2013 to shrink the U.S. Court of Appeals in Washington, D.C., by three seats rather than allowing Obama to fill the vacancies.

Grassley later served as chairman of the Senate Judiciary Committee, which considers judicial nominations, and is scheduled to return to that position next year if Republicans keep control of the Senate. That will apparently depend on the outcome in January of two runoff elections in Georgia, which Democrats will have to sweep to gain a 50-50 split and allow the new vice president, Kamala Harris, to cast tie-breaking votes.

The Chronicle sought comment from Sens. Grassley, McConnell, Burr and Cruz on whether they would try to block Biden’s nominees for the Supreme Court or lower federal courts if the Democrat became president. There were no replies.