

Op-Ed: Can Obama be Reagan? Can the Senate be reasonable?

By Akhil Amar and Vikram Amar Feb. 16, 2016 5 AM

A Supreme Court vacancy arises late in the second term of an idealistic and ideological president. He confronts a Senate controlled by his opponents and he hopes to win a third term by proxy. This describes the United States this week — and it also describes the U.S. 28 years ago, but with the Rs and Ds reversed.

Back then, Republican Ronald Reagan had to contend with a Democrat-controlled Senate. Today Democrat Barack Obama must deal with a Senate dominated by Republicans. In 1987-88, Reagan was hoping that his handpicked successor, George H.W. Bush, would extend his presidential legacy, much as Obama's flag now flies with the Democrats' front-runner Hillary Clinton. Just as the resignation of Justice Lewis Powell in mid-1987 opened the way for a pivotal new justice chosen in a genuinely bipartisan process, so now the death of Justice Antonin Scalia creates an opportunity for both parties to work together to select the court's next swing justice.

In 1988, after a few false starts that included the failed nomination of arch-conservative Robert Bork, the country ended up with the more moderate Justice Anthony M. Kennedy. Today, Kennedy straddles the judicial aisle — sometimes siding with Democrat appointees, other times with court Republicans on hot-button issues including same-sex marriage, campaign finance, abortion rights, gun rights, affirmative action and voting rights. Kennedy's decisive votes and views are doubtless different from those a Justice Bork would have generated. The idealistic and ideological Republican in the White House in 1988 didn't get his first choice, but neither did Senate

Democrats get exactly what they'd hoped for. That's the essence of compromise.

Is there a nominee acceptable to Obama that the Republican-controlled Senate could tolerate? Senate Majority Leader Mitch McConnell (R-Ky.) and Senate Judiciary Committee Chairman Charles E. Grassley (R-Iowa) have both signaled that nobody Obama sends over should even be voted on. But other Republicans are taking a softer line. On Saturday, Sen. Lindsey Graham (R-S.C.) left the door open a crack: "No one will be appointed who isn't a consensus choice."

The key number for consensus is 60% because of filibuster rules. That means 15 or so Republicans would need to join all the Democrats to make up a 60-vote bloc to bring a nomination to the floor over the opposition of the other 40 Republicans. What kind of person could appeal to the president and win over a significant swath of Republicans? It would have to be someone who shares Obama's instincts about democracy and social justice but also Scalia's reverence for constitutional text and history, and his heartfelt respect for the rule of law. It would have to be someone whose constitutional views and philosophies have been laid out publicly, so Republicans could know what they were getting (they have felt burned by "stealth" nominees lacking long paper trails and public track records).

Assuming the president could find someone who fit the right (and left) profile, why should the Republicans give the nominee full consideration? First, a hard-line refusal to give Obama's nominee a fair shake could play poorly with middle America. Come November, an appealing but thwarted nominee could energize the Democrats' electoral coalition, and sway swing voters in crucial states. It is easy for hard-liners now to pronounce that any conceivable nominee is a non-starter; it will be much more difficult to stick to this party line if the president puts forth an articulate, earnest, honest

candidate with requisite legal chops and a compelling life story.

Senate Republicans should also note that a compromise candidate today may be far better for them than an unknown future nominee. Imagine, for example, that Clinton wins and the Democrats also regain the Senate. She would not have to compromise on a nominee nearly as much as Obama might be willing to now. (To put an extra-sharp point on the matter: Republicans who hated the very thought of four more years of President Obama back in 2012 should ask themselves how they would feel about 40 more years of Justice Obama in the advent of a Clinton victory. Clinton was recently asked whether Obama might make a good justice, and she seemed quite smitten with the idea.)

There is yet another scenario Republicans must consider: They may win the White House in November but still lose the Senate. A Democrat-controlled Senate would then take office in early January, weeks before Obama leaves the White House. During that overlap, the Democrats could undo the filibuster rule by a simple majority vote (the so-called nuclear option), and Obama could replace his compromise candidate with someone far more liberal. Such a move might seem aggressive, but so too is not giving a president's nominee a fair shake and a floor vote. What goes around comes around.

Advertisement

Now think about the president's incentives. What would Obama gain by threading the needle with a consensus nominee? If common sense and public pressure forced Republicans to accept the candidate, Obama would increase his imprint on the court, and end his presidency with a bipartisan bang. He could make good on his so far unrealized campaign promise to "reduce the polarization and meanness in our politics."

Will Obama and his congressional critics choose to do, at last, what so many Americans desperately want them to do, namely, work together? Ronald Reagan, the very president who gave us Justice Antonin Scalia in 1986, was able to find common ground with Senate opponents soon thereafter with his nomination of Kennedy. His final choice for the court cemented his greatness and provided the high court with welcome moderation. The current president and Senate would do well to ponder the precedent.

Akhil Amar is a professor of law and political science at Yale University.

Vikram Amar is dean and a professor at the University of Illinois College of Law.
