

# THE PLAY ON THE SCALIA REPLACEMENT: REMEMBER THE LAME DUCK

Within minutes after the public announcement of Antonin Scalia's death, Senator Mike Lee's flack Conn Carroll started predicting Obama would have zero chance of successfully naming a successor. After Carroll, one after another actual Senator followed that sentiment, including Chuck Grassley and Mitch McConnell, both of whom would have the ability to stall any Obama nominee. From that point, the GOP was pretty much committed, they said, to preventing any Obama nominee from being confirmed.

That led to a bunch of bad comparisons – between judges like Robert Bork who was rejected and Miguel Estrada who never got a vote – and simply going a year without acting on a President's nominee. Even the comparison with Anthony Kennedy (who was nominated in November after two other nominees, including Bork, failed) is inapt, as he was nominated earlier than any Obama pick would be (though in a sense that fetishizes the year that would pass without a nominee).

I, like bmaz, believe Obama will pick someone fairly centrist, probably someone who has been recently confirmed by big margins. I agree the most likely nominee will be Sri Srinivasan, who in 2013 was confirmed to the DC Circuit with a 97-0 vote – though I'm also mindful of the wisdom (given the GOP unanimity about obstructing this nominee) of picking someone who drive Democratic turnout – an African-American woman, for example. Though I highly doubt Obama will nominate Loretta Lynch, as some have suggested, not least because the fight over releasing data on HSBC's continued money laundering will draw more attention as it moves toward appeal, which might focus attention on

her role in administering the wrist slap in the face of egregious drug cartel and terrorist supporting money laundering.

After some reflection, some conservatives have suggested that the GOP would have been better served if they had simply not managed to pass Obama's nominee, rather than making such a big stink about it.

I think that ignores how much both parties look forward to using this nominee to drive turnout – and regardless of who the respective nominees are, the GOP have a much bigger challenge in getting enough voters to turn out to elect a GOP president in November, so I'm sure they're quite happy to have an issue that (they presumably hope) might flip some conservative Latino votes – though one likely outcome of an extended 8-member court is that the Fifth Circuit's ruling staying Obama's immigration orders will be upheld after a 4-4 tie on the court, which might have the opposite effect.

Furthermore, I think it ignores one other factor. Srinivasan has been predicted to be Obama's most likely SCOTUS appointment for almost 3 years (few people consider how such predictions might have influenced Ruth Bader Ginsburg's decision not to retire). The Republicans probably presume he's the most likely candidate as well.

The presumption Srinivasan – or someone similar – would be the nominee easily justifies the GOP's immediate promise they won't confirm a nominee. That's because they need to explain why someone they just overwhelmingly confirmed, someone who faced more opposition from the left than the right, suddenly became unacceptable.

More importantly, I presume the GOP wants to keep open the possibility of confirming Srinivasan or whatever centrist Obama appoints during the Lame Duck. Here's why:

Barring any replay of Bush v. Gore, both sides will know on November 9 who would get to pick Scalia's replacement if Obama's pick failed.

Both sides will also know the makeup of the Senate. Because of the demographic issues I mentioned earlier, the likely Democratic nominee, Hillary Clinton, is most likely to win. That's not to say I think she's necessarily the strongest candidate – even ignoring the potential the email scandal will taint close advisors like Huma Abedin or Jake Sullivan, I think it likely the economy will be crashing by November in a way that would favor Trump if he were the GOP nominee facing Hillary. But I think electoral demographics suggest the GOP will have a harder time winning this year, particularly after a year of Trump branding the GOP with bigotry.

Plus (ignoring my suspicion the economy will be crashing by November), we're likely to have a more Democratic Senate after November. Harry Reid is the only retiring Democrat where the replacement race is currently perceived to be toss-up, whereas Marco Rubio, Mark Kirk, Kelly Ayotte, and Ron Johnson are all deemed to be likely toss-ups, if not Dem-favorable. It's still most likely the GOP will have a slight majority, but a smaller one, in the Senate, one where people like Susan Collins could make more of a difference. But it is likely to be more Democratic.

If Hillary wins (the most likely outcome) and Democrats win the Senate (unlikely, but feasible), then the Republicans will have good reason to want to confirm an Obama nominee perceived to be centrist. Whereas Srinivasan looks far worse than Scalia to the Republicans, he would all of a sudden look far preferable to a Hillary choice with the time to wait out the Senate. The GOP would have time between November 9 and the Christmas break to confirm whatever Obama nominee has been languishing.

In other words, I think the GOP have provided a way to stall someone (like Srinivasan) they have recently confirmed, while leaving the possibility of confirming that person if November makes it likely the next nominee will

be more liberal.

One more thing: Commentary on this process has presumed that McConnell and Grassley (and Obama) learned of Scalia's death when we all did. I would hope that Obama, at least, got word well before that, particularly given the involvement of at least the US Marshals and according to some reports the FBI. But I also wouldn't leave out the possibility that one of the 39 other still unidentified guests at the ranch this weekend gave the Republican leadership a heads up as soon as a hearse showed up. So it's possible that what looked like quick knee-jerk response on the part of Republican leadership was instead more considered, along the lines I've just laid out.