

The News & Observer

Obama on Supreme Court: Do as I say, not as I did

Leslie Clark and Anita Kumar

April 7, 2016

As he visits his old law school Thursday to push his nomination of Merrick Garland to the Supreme Court, President Barack Obama has a bit of personal history that complicates his argument.

The onetime constitutional law teacher turned president is pushing Senate Republicans to hold hearings and vote on his nomination, arguing that it's part of their job.

But when he was a senator, Obama and his Democratic colleagues attempted to block the nomination of President George W. Bush's pick to the Supreme Court, Samuel Alito, using the technical procedure of a filibuster.

Obama's critics accuse him of hypocrisy and are quick to point out that he now "laments the type of tactics over judicial nominees that were the hallmark of his tenure in the Senate."

"When it comes to nomination politics, there is plenty of hypocrisy to go around," said Jack Pitney, a former Republican Party official who teaches political science at Claremont McKenna College. "When politicians talk about 'procedural fairness,' what they often mean is 'a procedure that has the outcome that I want.'"

The two sides are engaged in what is expected to be a nearly yearlong tug-of-war that includes TV ads targeting senators, partisans raising money off the conflict and opposition researchers digging for information.

Obama makes his latest push Thursday afternoon at the University of Chicago Law School, where he taught for a decade before he served in the Senate.

Senate Majority Leader Mitch McConnell, R-Ky. said Thursday that Obama will continue to wrongly argue that the Constitution requires the Senate to have a vote on his nominee.

"President Obama will fly to Chicago where he will try and convince Americans that, despite his own actions while in the Senate to deny a Supreme Court nominee a vote, the Constitution somehow now requires the Senate to have a vote on his nominee no matter what — and thereby deny the American people a voice in the future of the Supreme Court," he said on the Senate floor.

Legal and political experts say it's possible – but not likely – that Republicans will hold pre-election confirmation hearings later this year if the public puts enough pressure on them to vote.

Or lawmakers could decide to consider Garland after the November election if the presidential contest doesn't turn out the way they want.

Thomas Keck, a professor of constitutional law and politics at Syracuse University's Maxwell School of Citizenship and Public Affairs, said there's been a steady escalation of polarized conflict over judicial nominations since President Ronald Reagan's second term.

Those examples include Obama's opposition to two nominations, Alito and John Roberts Jr., and Joe Biden's widely reported 1992 comments encouraging Bush not to make any Supreme Court nominations in an election year.

"Despite this long history, the Republican senators' current tactics represent an escalation, in that they are refusing to hold hearings and most of them are refusing to even meet with the nominee," Keck said.

In 2005, Obama voted against Roberts. He said in a DailyKos blog post that a filibuster would have been a "quixotic fight I would not have supported" and that Democrats would have lost both in the Senate "and in the court of public opinion."

But in 2006, Obama did join a filibuster against Alito despite saying on the Senate floor that he had "no doubt that Judge Alito has the training and qualifications necessary to serve." The unsuccessful maneuver came after every senator, including Obama and Biden, met with Alito and hearings were held.

"What's fair to say is that how judicial nominations have evolved over time is not historically the fault of any single party. This has become just one more extension of politics," Obama said at a news conference this year in explaining his actions. "There are times where folks are in the Senate and they're thinking . . . 'Is this going to cause me problems in a primary? Is this going to cause me problems with supporters of mine? And so people take strategic decisions.'"

White House Press Secretary Josh Earnest said Obama now regrets the filibuster, saying Democrats should have made a more effective public case about their objections.

Roger Pilon, vice president for legal affairs for the Cato Institute, a libertarian research group, said the fact that Obama's opposition did not come in an election year, like this one, makes the actions worse.

"It isn't simply hypocritical, it's worse," Pilon said. "He did it during a non-presidential election year and we haven't had Republicans do that. The Democrats don't have much ground to stand on."