ORDERS FOR THURSDAY, MARCH 3, 2016

Mr. MCCONNELL. Mr. President, I ask unanimous consent that when the Senate completes its business today, it adjourn until 9:30 a.m. tomorrow, Thursday, March 3; that following the prayer and pledge, the morning hour be deemed expired, the Journal of proceedings be approved to date, and the time for the two leaders be reserved for their use later in the day; further, that following leader remarks, the Senate resume consideration of S. 524.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

ORDER FOR ADJOURNMENT

Mr. MCCONNELL. Mr. President, if there is no further business to come before the Senate, I ask unanimous consent that it stand adjourned under the previous order, following the remarks of Senators CASEY and BENNET.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Colorado.

FILLING THE SUPREME COURT VACANCY

Mr. BENNET. Mr. President, I am here tonight to discuss the Supreme Court vacancy caused by Justice Antonin Scalia's death.

First, I think it is important to reflect on Justice Scalia's life and profound contribution and influence on the Court and our country. He was one of the longest serving Justices in our Nation's history, and, as far as I can tell, every single day he served, he applied his considerable intellect, integrity, and wit to the work before him.

Although I disagreed with many of his decisions, I never doubted his commitment to the rule of law. He was a principled originalist. He was loyal to his country. By all accounts, including moving testimony from his children, he was devoted to his family and to his friends, including to Justice Ruth Bader Ginsburg, with whom he often disagreed.

Judge Scalia's judicial philosophy was well understood when President Reagan nominated him to the Supreme Court in 1986. Many Senators then opposed his judicial approach, but in an echoing indictment of today's Senate and its partisanship, 30 years ago the U.S. Senate confirmed Justice Scalia 98 to 0—a vote that testifies to Justice Scalia's qualifications and to the integrity of Members of this body who disagreed with his vision of the Constitution but, exercising their constitutional duty, refused to withhold their support for a qualified nominee.

Here is what article II, section 2, clause 2 says about our and the President's duty: The President ''shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.''

When a vacancy arises, the President shall nominate a replacement and the Senate shall advise and consent by voting on that nominee. That is what the plain language of the Constitution requires, and that is what Presidents and the Senate have done throughout our history. That is why, in the past 100 years, the Senate has taken action on every single Supreme Court nominee—even those made during a Presidential election year. Throughout our history, there have been at least 17 nominees confirmed by the Senate in Presidential election years. The last of these was Justice Kennedy in 1988.

This history reveals that when the chairman of the Judiciary Committee said last week that ''[t]he fact of the matter is that it's been standard practice over the last 80 years to not confirm Supreme Court nominees during a presidential election year,'' he was incorrect. The fact of the matter is that since the founding of this country, the Senate has done its job even in an election year. In fact, during one election year, the Senate voted to confirm not just one but three Justices to fill vacancies on the Court. The President was none other than George Washington, and he was in the fourth year of his second term when that happened. That Senate included some of our Founders, delegates to the Constitutional Convention. But, come to think about it, what did they really know about the Constitution?

On that subject, by the way, it has been incredible in the truest sense of the word to hear people—Senators and even candidates for President who claim to be, as Justice Scalia surely was, constitutional originalists or textualists—willfully ignore the plain meaning of the Constitution in favor of this so-called standard practice. That is not a form of constitutional interpretation with which I am familiar, but it seems to be guiding the majority leader and the chairman of the Judiciary Committee away from the text they claim to revere. They wrote together in the Washington Post:

It is today the American people, rather than a lame-duck President whose priorities and policies they just rejected in the most-recent national election, who should be afforded the opportunity to replace Justice Scalia.

I have a chart. I redlined the actual words of the Constitution with the claim of the majority leader and the chairman of the Judiciary Committee. We can see they bear no relationship to one another. In fact, only seven words—the black words—remain from the original constitutional text, including in those seven words a conjunction, a definite article, and a preposition—otherwise known as ''and,'' ''the,'' and ''of.''

Oh, and by the way, if we want to talk about a real standard practice, the President becomes a lameduck only after the election that is coming up and only until the inauguration.

When we look at the history, it is telling that, unlike almost all our other work, the Senate's consideration of Supreme Court nominees has been remarkably expeditious. On average, the Senate has voted 70 days after the President's nomination. When Justice Scalia died, 342 days remained in the President's term—nearly a full quarter of his final term in office. Why has the Senate, notorious for its glacial slowness, historically acted with such deliberate speed when it comes to our consideration of Supreme Court Justices?

I suspect there are three principal reasons: first, the constitutional clarity that commands us; second, the unique nature of the responsibility—no one else, including the House of Representatives, can exercise it; and third, the essential importance of the Supreme Court's composition.

With respect to the Supreme Court's composition, no less of an authority than Justice Scalia himself explained it well. Asked to recuse himself from a case involving Vice President Cheney, Justice Scalia rejected the suggestion that he should ''resolve any doubts in favor of recusal.'' He observed that such a standard might be appropriate if he were on the court of appeals, where his ''place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: The court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case.''

Justice Scalia then quoted the Supreme Court's own recusal policy observing that, ''[e]ven one unnecessary recusal impairs the functioning of the Court.'' If even one unnecessary recusal impairs the Court, imagine what a 14-month vacancy would do. Imagine if, in 2016, we had a repeat of 2000, when the Supreme Court decided Bush v. Gore, except with only eight Justices on the bench. Imagine the constitutional crisis our Nation would have to endure.

I know it has become fashionable for Washington politicians to tear down rather than work to improve the democratic institutions that generations of Americans have built. But to impair so cavalierly the judicial branch of our government is pathetic. It is a standard one would expect of a lawless nation, rather than a nation committed to the rule of law. It is the behavior of a petty kangaroo court, not of the U.S. Senate. And it threatens to deny justice to millions of Americans in the name of petty politics. It is time for the Senate to do its job, as every Senate before us has done.

I am not asking my colleagues to support the nominee. That is a matter of conscience for each of us. But what is unconscionable is that the majority, if it keeps its word, will have no hearing, will hold no vote, and refuse even the courtesy of a meeting with the President's nominee.

Speaking of doing our job, in view of the seriousness of the Court's nomination, we should reconsider the majority's proposed 7-week summer recess for the Senate. In July and August alone, we are barely in session for 8 days. Unlike our responsibility to vote on Supreme Court nominees, the Senate schedule is not enshrined in the Constitution. It is set by the majority.

In that connection, I am glad to invite any of my colleagues to my office to watch a video of a constituent of mine whom I met 2 weeks ago in Pueblo West. She manages a retail store and struggles every month to keep it going. Unlike the Senate, she has 22 vacation days a year, not a month. Instead, she works a second job to pay for childcare so she can keep her main job. Millions of Americans are watching the Senate take the entire summer off and claim there isn't time to do our job. That doesn't meet the standard of a great nation or a great parliamentary body. What is worse is that this whole charade has become an extension of playground politics, the childish pettiness that has metastasized in this Presidential primary season.

How far have we drifted from our simple constitutional obligations when one side refuses to even meet with any prospective nominee? What message does that send to the people of Colorado and across the country? Where I come from, taking your ball and going home isn't acceptable behavior on the playground. How could it possibly be acceptable in the U.S. Senate?

Senate greatness, the national interest as a legislative guide, maturity, and comity will not be restored overnight or with a single decision. It has taken far too long for us to travel down this destructive road to deadlock, ideological rigidity, and bitter partisanship for restoration of greatness to the Senate to occur quickly, but we should begin—we must begin, and we can begin—with our treatment of some of our most serious, even sacred duties: the confirmation of the next Justice of the Supreme Court.

We are not here to pacify a political base or satisfy one or more special constituencies or rally our political parties. We are here to elevate our Republic, to make it a beacon for the world, to demonstrate how mature representatives of sovereign States govern a mature nation.

This Supreme Court nomination is not a test of strength between the executive and legislative branches. It is a test of our strength as leaders with an honorable history and a heritage of wisdom and maturity. How we manage our constitutional duty to provide serious consideration and deliberation to a rare appointment to the Nation's highest judicial office will determine whether we deserve the respect of Americans who rightly expect us to exhibit dignity, mutual respect, and wisdom on their behalf.

I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. CASEY. Mr. President, I ask unanimous consent to speak as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. CASEY. Mr. President, I, too, rise this evening to discuss the vacancy on the Supreme Court and the need for the Senate to do its job and give fair consideration to any nominee made by President Obama to fill this seat on the Supreme Court. Many of my Republican colleagues have vowed to block any nominee out of hand, and every single Republican member of the Judiciary Committee has likewise vowed to refuse any nominee a fair hearing. The Senate majority leader, along with several other Republican Senators, went as far to say they would not even meet with the nominee. I am not sure I ever heard anything like that in my 9 years in the Senate, going on 10. This is inconsistent, totally inconsistent with our duty as U.S. Senators.

Let me start tonight by saying to my Republican colleagues, respectfully: Do your job. Do your job, consider this nominee, and then vote whichever way you want.

We know the Supreme Court cannot permanently function as the Constitution intends with only eight members. Last week I asked questions of a panel of experts, constitutional scholars, including Georgetown law professor Peter Edelman at a steering committee hearing in the Senate. These constitutional experts confirmed that because split decisions defer to the holding of the lower court, it is entirely possible we could see a string of split decisions that would undermine the primary purpose of the Supreme Court; that is, to resolve differences in the opinions coming out of the various circuit courts across the country.

This is no doubt why the Constitution provides specific instructions on filling Supreme Court vacancies. Article II, section 2 of the Constitution states, in part, ''[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall Appoint . . . Judges of the Supreme Court.''

In both instances, the word ''shall'' is used. There is no equivocation. It doesn't say ''shall appoint at a certain time in a presidency'' or ''may appoint.'' It is very clear from the Constitution what the Senate must do and what the President must do.

Barack Obama is the President of the United States. According to the Constitution, in the event of a vacancy on the U.S. Supreme Court, the President of the United States shall nominate a replacement. Nothing more needs to be said to counter the, what I would argue, outrageous calls for the President to refrain from nominating a replacement simply because his 323 days left in office are fewer than 365 days. To refrain would violate the letter of the Constitution.

Republican Senators, for whatever reason, seem to disagree with the original intent of the Framers in this situation. Often those same Republican Senators come to the floor and make floor statements inciting the Constitution, but now they would completely ignore a constitutional directive.

The Constitution is also clear with respect to the Senate's duty to advise and consent on the President's nominee. No sincere reading could lead to the conclusion that the Senate would be within its rights and upholding its responsibility if it refused any potential nominee fair consideration. My Republican colleagues argue they are absolved of their responsibility to give fair consideration to a nominee simply because the Senate is constitutionally allowed to withhold its consent.

That is one argument. It doesn't make sense, but that is the argument they make. The other argument is that ''we should let the American people decide'' by refusing to consider any nominee until the next President takes office. This denies precedent. Justice Kennedy was confirmed in the last year of President Ronald Reagan's final term under a Democratic Senate, and the Senate has confirmed 17 Supreme Court nominees in Presidential election years.

This point of view also neglects the obvious fact that the American people already decided in twice electing Barack Obama to be our President. Both the President and his office deserve to be treated with respect. Denying the President's legitimate authority to nominate a candidate for Supreme Court is more than just an irresponsible attempt to score political points; it is a distortion of the separation of powers unprecedented in modern times.

Senate Republicans have not been granted authority to prematurely terminate Presidential powers. They have not been granted that authority. The Senate has taken action on every Supreme Court nominee in the last 100 years, regardless of whether the nomination was made in a Presidential election year, and not since the Civil War has the Senate taken longer than a year to fill a Supreme Court vacancy. These nominees have always been seen as entitled to timely consideration as well. Since 1975, the Senate has taken an average of just 70 days from the date of nomination to the date of confirmation.

Like many Senators here—virtually every Senator who serves in this body receives mail all the time from our constituents. On this issue, I have received thousands of letters urging the Senate to fulfill its duty and give fair consideration to the Supreme Court nominee that the President chooses.

One particular letter came from a woman by the name of Jane from Southeastern Pennsylvania, a community outside of Philadelphia. The letter Jane sent me was profound in its simplicity. Jane said that having an understaffed Court would be ''unfair to the process of justice.''

Jane's words, not mine. A fully functioning Supreme Court is not about obscure details of Senate procedure to Jane. It is about something more than that. To her, one of my constituents, it is also not about who said what 10 years ago, nor is it about Presidential politics. It is about something else. Access to justice is what matters to Jane. It is what should matter to every Senator.

Jane ended this letter she sent me with a reminder that I will repeat in the hope that my Republican colleagues will take it to heart, as I did. Jane said the ''opportunity to take part in a Justice's nomination is a privilege and deserves respect.''

I agree. Consideration and casting a vote regarding a Supreme Court nominee nominated by the President of the United States to serve as one of only nine Justices on the Supreme Court, you bet, that is a privilege and it deserves respect.

To my Republican colleagues, I say, again, do your job, as I must do my job, and give this duty that you have—the duty to consider and to vote on a Supreme Court nominee—this rare privilege, the respect it deserves.

Mr. President, I yield the floor.

ADJOURNMENT UNTIL 9:30 A.M. TOMORROW

The PRESIDING OFFICER. The Senate stands adjourned until 9:30 a.m. tomorrow morning.

Thereupon, the Senate, at 6:44 p.m., adjourned until Thursday, March 3, 2016, at 9:30 a.m.