

### RECOGNITION OF THE MAJORITY LEADER

The PRESIDING OFFICER. The majority leader is recognized.

### MOMENT OF SILENCE IN MEMORY OF JUSTICE ANTONIN SCALIA

Mr. MCCONNELL. Madam President, I ask unanimous consent that the Senate observe a moment of silence in memory of Justice Antonin Scalia.

The PRESIDING OFFICER. Without objection, it is so ordered.  
(Moment of silence.)

### REMEMBERING JUSTICE ANTONIN SCALIA

Mr. MCCONNELL. Madam President, I wish to say a few words about a towering figure of the Supreme Court who will be missed by many. Antonin Scalia was literally one of a kind. In the evenings, he loved nothing more than a night at the opera house. During the day, he often starred in an opus of his own.

For most watchers of the Court, even many of Scalia's most ardent critics, the work he produced was brilliant, entertaining, and unmissable. Words had meaning to him. He used them to dissect and refute, to amuse and beguile, to challenge and persuade. And even when his arguments didn't carry the day, his dissents often gathered the most attention anyway.

President Obama said that Justice Scalia will be "remembered as one of the most consequential judges and thinkers to serve on the Supreme Court." I certainly agree. It is amazing that someone who never served as Chief Justice could make such an indelible impact on our country. He is, in my view, in league with Oliver Wendell Holmes, Louis Brandeis, and John Marshall Harlan as perhaps the most significant Associate Justices ever.

I first met him when we both served in the Ford administration's Justice Department. I was fortunate, as a young man, to be invited to staff meetings that featured some of the most influential conservative judicial minds of the time. Robert Bork was there. He was the Solicitor General. Larry Silverman was there. He was the Deputy Attorney General. Everyone in the Department agreed on two things: One, Antonin Scalia was the funniest lawyer on the staff; and, two, he was the brightest.

Scalia was usually the smartest guy in whatever room he chose to walk into. Of course, he didn't need to tell you he was the smartest. You just knew it.

I came back to Washington a few years later as a Senator on the Judiciary Committee, serving there when Scalia was nominated to the Supreme Court. His views on the Court were strong, and they were clear. Some tried to caricature his judicial conservatism as something it was not. It was not political conservatism.

Scalia's aim was to follow the Constitution wherever it took him, even if he disagreed politically with the outcome. We saw that when he voted to uphold the constitutional right of protesters to burn the American flag. He upheld their right to do that. This is what he said: "If it was up to me, I would have thrown this bearded, scandal-wearing flag burner into jail, but it was not up to me."

It was up to the Constitution. "If you had to pick . . . one freedom . . . that is the most essential to the functioning of a democracy, it has to be freedom of speech," Scalia once said. He went on:

Because democracy means persuading one another. And then, ultimately, voting. . . . You can't run such a system if there is a muzzling of one point of view. So it's a fundamental freedom in a democracy, much more necessary in a democracy than in any other system of government. I guess you can run an effective monarchy without freedom of speech. I don't think you can run an effective democracy without it.

Justice Scalia defended the First Amendment rights of those who would express themselves by burning our flag just as he defended the First Amendment rights of Americans who wished to express themselves by participating in the changemaking process of our democracy: the right to speak one's mind, the right to associate freely, the rights of citizens, groups, and candidates to participate in the political process.

Numerous cases involving these kinds of essential First Amendment principles came before the Court during his tenure. I filed nearly a dozen amicus curiae briefs in related Supreme Court cases in recent years, and I was the lead plaintiff in a case that challenged the campaign-finance laws back in 2002.

These core First Amendment freedoms may not always be popular with some politicians who would rather control the amount, nature, and timing of speech that is critical of them, but Scalia recognized that protecting the citizenry from efforts by the government to control their speech about issues of public concern was the very purpose of the First Amendment. He knew that such speech—political speech—lay at its very core.

It is a constitutional outlook shared by many, including the members of an organization such as the Federalist Society. You could always count on him attending the Society's annual dinner. One of his five sons, Paul, is a priest, and he always gave an opening prayer. This is what Scalia said about that.

If in an old-fashioned Catholic family with five sons you don't get one priest out of it, we're in big trouble. The other four were very happy when Paul announced that he was going to take one for the team.

That is the thing about Antonin Scalia. His opinions could bite. His wit could be cutting. But his good humor was always in abundant supply. One study from 2005 concluded decisively—or as decisively as one can—that Scalia was the funniest Justice on the Court.

He was also careful not to confuse the philosophical with the personal.

I attack ideas. I don't attack people. If you can't separate the two, you gotta get another day job.

These qualities endeared him to many who thought very differently than he did—most famously, his philosophical opposite on the Court, Ruth Bader Ginsburg. Their friendship began after Ginsburg heard him speak at a law conference. Here is what she said: "I disagreed with most of what he said," she recalled, "but I loved the way he said it."

Scalia put it this way:

She likes opera, and she's a very nice person. What's not to like?

Well, he continued, "except her views on the law."

Ginsburg called him Nino. Scalia referred to the pair as "the Odd Couple." They actually vacationed together. They rode elephants. They parasailed. And just a few months ago, their relationship was captured in the perfect medium: opera, their shared love.

"Scalia/Ginsburg: A (Gentle) Parody of Operatic Proportions" premiered last summer. In it, a jurist named Scalia is imprisoned for "excessive dissenting," and it is none other than Ginsburg, or an actress faintly resembling her, who comes crashing through the ceiling to save him. It is the kind of show that is larger than life, and so was Nino Scalia.

He leaves behind nine children and a wife who loved him dearly, Maureen. Maureen would sometimes tease her husband that she had her pick of suitors and could just as well have married any of them. But she didn't, he would remind her, because they were wishy-washy, and she would have been bored. "Whatever my faults are," Scalia once said, "I am not wishy-washy."

Far from wishy-washy and anything but boring, Justice Scalia was an articulate champion of the Constitution. He was a personality unto himself, and his passing is a significant loss for the Court and for our country. We remember him today. We express our sympathies to the large and loving family he leaves behind. We know our country will not soon forget him.

### RECOGNITION OF THE MINORITY LEADER

The PRESIDING OFFICER. The Democratic leader is recognized.

### REMEMBERING JUSTICE ANTONIN SCALIA AND FILLING THE SUPREME COURT VACANCY

Mr. REID. Madam President, we were all shocked by the sudden passing of Supreme Court Justice Antonin Scalia. Justice Scalia and I had our differences. However, there was no doubting his intelligence or dedication to the country. I offer my condolences to the entire Scalia family, who laid to rest a devoted husband, father, and grandfather this weekend.

I watched the funeral from Nevada, and I was deeply impressed with Justice Scalia's son, Reverend Paul Scalia, and the moving eulogy he gave his father. It was quite remarkable.

But now President Obama must nominate a qualified individual to the Supreme Court. Once the President has sent a nominee to the Senate, it is our responsibility to act.

Unfortunately, it appears that the Republican leader and his colleagues have no intension of filling this important vacancy. The Republican leader has repeatedly declared himself to be "the proud guardian of gridlock." That is a quote. He has lived up to that moniker, and that is an understatement.

In recent years, the Republican leader and the Republican Senators have done everything possible to grind the wheels of government to a halt. But now we are seeing something from the Republican leader that is far worse than his usual brand of obstruction. We are seeing an unprecedented attempt to hold hostage an entire branch of government.

The damage already done to the legislative branch has been written about. The last 7 years, the Republicans have done everything they can to stop President Obama's legislative ability to move forward. As leader of this democracy, it is too bad that President Obama has had to put up with this obstruction of everything dealing with the legislature.

The statement the Republican leader issued less than an hour after Justice Scalia's death announcement argued that starting now, any President should be denied the right to fill a Supreme Court vacancy in a Presidential election year.

Think about that. This is a foolish gambit, one to deny President Obama his constitutional right to appoint nominees to the Supreme Court. This is a full-blown effort to delegitimize President Obama, the Presidency, and undermine our basic system of checks and balances, which is integral to our Constitution.

I can find no limits on the President's legal authority to nominate Supreme Court Justices during an election year in our Constitution. I can find no mention of a 3-year Presidency in our Constitution. What I do find in the Constitution is article II, section 2, which clearly provides President Obama with the legal obligation to nominate Justices to the Supreme Court, contingent on the advice and consent of the Senate.

This is how our system of government has operated for more than 200 years. This constitutional prerogative is essential to the basic functioning of our coequal branches of government. What the Republican leader is suggesting runs contrary to two centuries of precedent and is inconsistent with the Constitution.

Our Founding Fathers constructed this American democracy while maintaining certain assumptions of us as

elected officials in the future. They expected us to be rational. They expected us to operate in good faith. They expected this government to be effective. The Republican leader's proposal is none of those things. It is, instead, an attempt to nullify what James Madison and the other constitutional architects envisioned.

The Founding Fathers never intended the Senate to simply run out the clock on its constitutional duties, subverting the President's authority and leaving the judiciary in limbo. The authors of the Constitution never envisioned the level of cynicism and bad-faith governance that we see exhibited by today's Republican Party—a Republican Party that so loathes this President that it is willing to render useless our government's system of checks and balances.

Senate Republicans would have the American people believe that is a long-held practice to deny the President the right to fill a Supreme Court vacancy. That is simply not true. I have heard several of my Republican colleagues repeat this line in public statements. It grieves me to say it, but the fact is, when Republicans repeat this statement, they are clearly spreading a falsehood. It is not true. I have enormous respect for my Republican friends, but repeatedly skirting the truth is beneath the dignity of their office.

According to Amy Howe, an expert on Supreme Court proceedings and editor at the popular SCOTUSblog—the Supreme Court of the United States blog—there is no such precedent. She writes:

The historical record does not reveal any instances since at least 1900 of the president failing to nominate and/or the Senate failing to confirm a nominee in a presidential election year because of the impending election.

There is not one shred of evidence in the last 116 years to back the Republicans' claims. Democrats never stopped a Republican Supreme Court nominee from receiving a hearing and ultimately getting a vote on confirmation—never, never, never.

Republicans want to talk about precedent. Well, let's talk about precedent. As recently as 1988, which was both an election year and the last year of a Presidency, the Senate confirmed Supreme Court nominees. That year, a Democratic Senate confirmed President Ronald Reagan's nomination of Justice Anthony Kennedy in the final year of his administration. I voted to confirm Justice Kennedy's nomination, as did my friend, the current chairman of the Judiciary Committee, Senator GRASSLEY.

I think it is well that the Presiding Officer today is the junior Senator from Iowa. I hope she will listen to what Senator GRASSLEY, the senior Senator from Iowa, has said time and time again. Senator GRASSLEY had no trouble supporting Justice Kennedy's nomination then, notwithstanding the fact that it occurred during President Reagan's last year in office. Since that

time, the senior Senator from Iowa has been on record defending the President's right to put forward nominees during a Presidential election year. In 2008, in fact, Senator GRASSLEY said: "The reality is that the Senate has never stopped confirming judicial nominees during the last few months of a president's term." I will repeat that quote. "The reality is that the Senate has never stopped confirming judicial nominees during the last few months of a president's term." I agree with Senator GRASSLEY—or at least I agreed with him. Frankly, now I am not sure where the senior Senator from Iowa stands. He issues a contradictory statement, it seems, every day on this one issue.

Another person who voted to confirm Justice Kennedy in 1980 was a first-term Senator from Kentucky, Senator MCCONNELL. In fact, for 40 years the Republican leader was remarkably consistent in asserting that the Senate has a duty to consider the Supreme Court's Presidential nominations.

As a law student at the University of Kentucky, he wrote in 1970:

Even though the Senate has at various times made purely political decisions in its consideration of Supreme Court nominees, certainly it could not be successfully argued that it is an acceptable practice.

If political matters were relevant to senatorial consideration it might be suggested that a constitutional amendment be introduced giving to the Senate rather than the president the right to nominate Supreme Court justices.

My friend the Republican leader carried that belief with him into public service. As a freshman Senator in 1986, during a Senate Judiciary Committee hearing, he said:

Under the Constitution, our duty is to provide advice and consent to judicial nominations, not to substitute our judgment for what are reasonable views for a judicial nominee to hold.

Again, in 1990, the Senator from Kentucky said:

It is clear under our form of government that the advice and consent role of the Senate in judicial nominations should not be politicized.

In 2005, the Senator from Kentucky reaffirmed his stance, stating:

Our job is to react to that nomination in a respectful and dignified way, and at the end of the process, to give that person an up-or-down vote as all nominees who have majority support have gotten throughout the history of the country. It's not our job to determine who ought to be picked.

Finally, just 6 years ago, the Republican leader put it in the simplest terms possible:

Americans expect politics to end at the courtroom door.

These are just a few examples, but there are pages of similar quotes from the Republican leader spanning four decades on this subject. Unfortunately, he seems to no longer believe that politics end at the courtroom door. The reason for the Republican leader's about-face is clear: He and his party want to undermine this President,

Barack Obama. Senate Republicans would upend our Nation's system of checks and balances rather than afford President Obama the same constitutional authority his 43 predecessors enjoyed.

Throughout the news today, it is said by all the Republican think tanks—or a lot of them—that it is more important for the Republicans to make sure Obama does not get a Supreme Court nominee on the floor of the Senate than it is for them to maintain the majority in the Senate. Think about that. That is not what I am saying; that is what they are saying.

A few minutes ago, the junior Senator from Delaware was here on the Senate floor reading George Washington's Farewell Address. He did a remarkable job. This man, who was the national debate champion twice, did a very good job.

In his address, President Washington warned of the partisan party politics that Republicans are now employing. He warned of their negative influence on our government. He said:

All obstructions to the execution of the laws, all combinations and associations, under whatever plausible character, with the real design to direct, control, counteract or awe the regular deliberation and action of the constituted authorities, are destructive of this fundamental principle, and of fatal tendency. They serve to organize faction, to give it an artificial and extraordinary force; to put, in the place of the delegated will of the nation, the will of a party.

The American people are watching. They are watching the Republicans' obstruction on this issue and the direct contravention of the belief of President George Washington. The vast majority of Americans are wondering how Republicans can say the Senate is back to work—we hear that all the time from my friend the Republican leader—while at the same time denying a vote on a nominee who hasn't even been named yet.

I say to my friends across the aisle: For the good of the country, don't do this.

I hope my Republican colleagues will heed the counsel offered by the senior Senator from Iowa and chairman of the Judiciary Committee, CHARLES GRASSLEY, just a few short years ago when he said:

A Supreme Court nomination isn't the forum to fight any election. It is the time to perform one of our most important Constitutional duties and decide if a nominee is qualified to serve on the nation's highest court.

Elections come and go, but the centerpiece for our democracy, the U.S. Constitution, should forever remain our foundation.

I say to my Senate Republican colleagues: Do not manipulate our nearly perfect form of government in an effort to appease a radical minority.

Madam President, will the Chair announce the business of the day.

#### MORNING BUSINESS

The PRESIDING OFFICER. Under the previous order, the Senate will be

in a period of morning business until 5:30 p.m., with Senators permitted to speak therein for up to 10 minutes each.

The Senator from Iowa.

Mr. GRASSLEY. Madam President, it is my understanding that I can have 40 minutes at this point, and if I don't have that time, I ask unanimous consent for that time.

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

#### REMEMBERING JUSTICE ANTONIN SCALIA

Mr. GRASSLEY. Madam President, I rise today to pay tribute to Associate Justice Scalia of the Supreme Court. His recent death is a tremendous loss to the Court and the Nation.

He was a defender of the Constitution. Since his death, a wide range of commentators—even many who disagreed with him on judicial philosophy—have hailed him as one of the greatest Supreme Court Justices in our history. Justice Scalia was a tireless defender of constitutional freedom. In so many cases when the Court was divided, he sided with litigants who raised claims under the Bill of Rights. This was a manifestation of his view that the Constitution should be interpreted according to the text and as it was originally understood.

The Framers believed that the Constitution was adopted to protect individual liberty, and, of course, so did Justice Scalia. He was a strong believer in free speech and freedom of religion. He upheld many claims of constitutional rights by criminal defendants, including search and seizure, jury trials, and the right of the accused to confront the witnesses against them.

Justice Scalia's memorable opinions also recognize the importance the Framers placed on the Constitution's checks and balances to safeguard individual liberty. Their preferred protection of freedom was not through litigation and the Court's imperfect after-the-fact redress for liberty deprived.

Justice Scalia zealously protected the prerogatives of each branch of government and the division of powers between Federal and State authorities so that none would be so strong as to pose a danger to freedom.

We are all saddened by the recent death of Supreme Court Justice Antonin Scalia. I extend my sympathies to his family. His death is a great loss to the Nation.

This is true for so many reasons. Justice Scalia changed legal discourse in this country. He focused legal argument on text and original understanding, rather than a judge's own views of changing times. He was a clear thinker. His judicial opinions and other writings were insightful, witty, and unmistakably his own.

Even those who disagreed with him have acknowledged he was one of the greatest Justices ever to serve on the Supreme Court.

Today I would like to address a common misconception about Justice Scalia, one that couldn't be further from the truth. Some press stories have made the astounding claim that Justice Scalia interpreted individual liberties narrowly. This is absolutely untrue.

It's important to show how many times Justice Scalia was part of a 5-to-4 majority that upheld or even expanded individual rights.

If someone other than Justice Scalia had served on the Court, individual liberty would have paid the price.

The first time Justice Scalia played, such a pivotal role for liberty was in a Takings clause case under the Fifth Amendment. He ruled that when a State imposes a condition on a land use permit, the government must show a close connection between the impact of the construction and the permit condition.

Even though I disagreed, he ruled that the First Amendment's Free Speech clause prohibits the States or the Federal Government from criminalizing burning of the flag.

Congress cannot, he concluded, claim power under the Commerce clause to criminalize an individual's ownership of a firearm in a gun-free school zone.

Justice Scalia was part of a five-member majority that held that under the Free Speech clause, a public university cannot refuse to allocate a share of student activity funds to religious publications when it provides funds to secular publications.

He found the Tenth Amendment prohibits Congress from commandeering State and local officials to enforce Federal laws.

The Court, in a 5-to-4 ruling including Justice Scalia, concluded that it didn't violate the First Amendment's Establishment of Religion clause for public school teachers to teach secular subjects in parochial schools, as long as there is no excessive entanglement between the State and the religious institution.

Justice Scalia believed that the Sixth Amendment right to a jury trial requires certain sentencing factors be charged in the indictment and submitted to a jury for it to decide, rather than a judge.

He concluded with four other Justices that the First Amendment's freedom of association allowed the Boy Scouts to exclude from its membership individuals who'd affect the ability of the group to advocate public or private views.

Showing that original intent can't be lampooned for failing to take technological changes into account, Justice Scalia wrote the Court's majority opinion holding that under the Fourth Amendment, police can't use thermal imaging technology or other technology not otherwise available to the general public for surveillance of a person's house, even without physical entry, without a warrant.

He decided that notwithstanding the Establishment clause, a broad class of