

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

low-income parents may receive public school vouchers to defray the costs of their children's attendance at private schools of their choice, including religious schools.

He voted to strike down as a violation of the Sixth Amendment's right to a jury trial Federal and State sentencing guidelines that permit judges rather than juries to determine the facts permitting a sentence to be lengthened beyond what is otherwise permissible.

Justice Scalia found placing the Ten Commandments on the Texas State House grounds doesn't violate the First Amendment's Establishment clause when the monument was considered in context, and conveyed a historical and social message rather than a religious one.

He was part of a 5-to-4 Court that concluded the denial of a criminal defendant's Sixth Amendment right to his counsel of choice, not only denial of counsel generally, automatically requires reversal of his conviction.

He wrote for a 5- to-4 majority that the Second Amendment protects an individual's right to possess a firearm for traditionally lawful purposes, such as self-defense within the home, in Federal enclaves such as Washington, DC. A later 5-to-4 decision applies this individual Second Amendment right against State interference as well.

According to Justice Scalia and four other Justices, a warrantless search of an automobile of a person who has been put under arrest is permissible under the Fourth Amendment only if there is a continuing threat to officer safety, or there is a need to preserve evidence.

Justice Scalia also voted that it is a violation of the Sixth Amendment right of the accused to confront the witnesses against him for the prosecution to use a drug test report without the live testimony of the particular person who performed the test.

He was part of a 5-to-4 majority that found that the First Amendment requires that corporations, including nonprofit corporations such as the Sierra Club and the National Rifle Association, are free to make unlimited independent campaign expenditures.

And under the Free Exercise of Religion clause, according to Justice Scalia and four other Justices, a closely held corporation is exempt from a law that its owners religiously object to, such as ObamaCare's contraception mandate, if there is a less restrictive way to advance the law's interests.

Think about the liberty lost, had Justice Scalia not served our Nation.

A different Justice might have ruled against individual liberty in each of these cases. It is a frightening prospect. But in each instance, that is what four of Justice Scalia's colleagues would have done.

Of course, these are only the 5-to-4 opinions. There were many others where Justice Scalia ruled in favor of constitutional liberty, and more than four other Justices joined him.

And then there were other decisions where Justice Scalia voted to accept the claim of individual liberty, but a majority of the Court didn't. Some of those cases unquestionably should've come out the other way.

When considering Justice Scalia's contribution to individual liberty, it's vital to consider his great insight that the Bill of Rights are not the most important part of the Constitution in protecting freedom.

For him, as for the Framers of the Constitution, it is the structural provisions of the Constitution, the checks and balances and the separation of powers that are most protective of liberty.

These were made part of the Constitution not as ends unto themselves, or as the basis to bring lawsuits after rights were threatened, but as ways to prevent government from encroaching on individual freedom in the first place.

For instance, Justice Scalia protected the vertical separation of powers that is federalism. Federalism keeps decisions closer to the people but also ensures we have a unified nation.

And it prevents a Federal government from overstepping its bounds in ways that threaten freedom.

He also maintained the horizontal separation of powers through strong support of the checks and balances in the Constitution. He defended the power of Congress against Executive encroachment, such as in the recess appointments case.

Justice Scalia protected the judiciary against legislative infringement of its powers. He defended the Executive against legislative usurpation as well.

The best example, and the one that most directly shows the connection between the separation of powers and individual freedom, was his solo dissent to the Court's upholding of the Independent Counsel Act.

Contrary to the overwhelming views of the public, the media, and politicians at the time, Justice Scalia correctly viewed that statute not as a wolf in sheep's clothing, but as an actual wolf.

Dismissively rejected in 1988 by nearly all observers, his dissent understood that the creation of a prosecutor for the sole purpose of investigating individuals rather than crimes not only was a threat to the Executive's power to prosecute, but was destined to produce unfair prosecutions.

It's now viewed as one of the most insightful, well-reasoned, farsighted, and greatest dissents in the Court's history. But his powerful and true arguments didn't convince a single colleague to join him.

As important as his 5-to-4 rulings were, in so many ways, the difference between having Justice Scalia on the Court and not having him there, was what that meant for rigorous analysis of the law.

Justice Scalia's role as a textualist and an originalist was vital to his vot-

ing so frequently in favor of constitutional liberties. He reached conclusions supported by law whether they were popular or not, and often whether he agreed with them or not.

He opposed flag burning. And he didn't want to prevent the police from arresting dangerous criminals or make trials even more complicated and cumbersome.

He acted in the highest traditions of the Constitution and our judiciary.

We all owe him a debt of gratitude. And we all should give serious thought to the kind of judging that, like his, is necessary to preserve our freedoms and our constitutional order.

#### FILLING THE SUPREME COURT VACANCY

Mr. GRASSLEY. Madam President, we find ourselves in a very unusual situation. We are in a Presidential election year. The campaign for our next Commander in Chief is in full swing. Voting has begun. Some candidates for President have dropped out of the race after disappointing finishes in the primaries. Republicans hold the gavel in the U.S. Senate, and a term-limited Democrat in the twilight of his Presidency occupies the White House. It is within this context that our Nation has lost one of the greatest legal minds ever to serve the Court.

Justice Scalia's death marks the first time a sitting Supreme Court Justice passed away in a Presidential election year in 100 years, and it is the first time a sitting Supreme Court Justice passed away in a Presidential election year during a divided government since 1888.

As my colleagues and I grapple with how the Senate Judiciary Committee should approach this set of circumstances, we seek guidance and wisdom from a number of sources. These include history, practice, and common sense, and, yes, we look to what former committee chairmen have had to say on the subject. In reviewing this history, I am reminded of remarks a former chairman delivered during an election year. That former chairman tackled this knotty problem, and he described what should happen if a Supreme Court vacancy arises during a Presidential election year. In fact, this chairman's guidance is particularly instructive because he delivered his remarks in a Presidential election year during a time of divided government.

The Presidential election year was 1992. We had no Supreme Court vacancy. No Justice had passed away unexpectedly. No Justice had announced his or her intention to retire. Rather, it was the fear of an unexpected resignation that drove this former chairman to the Senate floor 1 day before the end of the Court's term.

Near the beginning of his lengthy remarks, this chairman—who was and remains my friend—noted another speech he delivered several years prior on the advice and consent clause. That speech,