

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,

from July 1987, was titled "The Right and Duty of the Senate to Protect the Integrity of the Supreme Court." This chairman delivered those remarks in 1987 as the Senate embarked on one of its saddest episodes: the unfair and ugly treatment of an exceptional jurist, Judge Robert Bork.

I don't reference that episode to open old wounds, only to provide context because it was in that speech during the debate that this former chairman defended the Senate's constitutional role in the appointment process. It was there in that speech during that debate in 1987 that this former chairman reached back to an early debate from an especially warm summer in Philadelphia 200 years prior. He reached back to the Constitutional Convention because it was then and there that individuals such as Rutledge of South Carolina, Wilson of Pennsylvania, Gohram of Massachusetts, and, of course, the father of the Constitution, Madison of Virginia, debated how our young Nation's judges were going to be appointed. It was his examination of the debate in 1787 that led this former chairman to declare 200 years later, nearly to the day:

Article II, Section 2 of the Constitution clearly states that the president "shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court." I will argue that the framers intended the Senate to take the broadest view of its constitutional responsibility. I will argue that the Senate historically has taken such a view.

That discussion on the advice and consent clause transpired in 1987, but, as I said, it was during a Presidential election year in 1992 that my friend, this former chairman, took to this very floor. Why did he begin his remarks in 1992 by reference to an earlier speech on the advice and consent clause? I will say it wasn't only because Senators sometimes like to quote the wise words they once spoke. My friend referenced his own remarks on the advice and consent clause because he wanted to remind his colleagues in this Senate of this Senate's constitutional authority to provide or withhold consent as circumstances might require. And he wanted to remind his colleagues of the Senate's constitutional authority before he addressed the real reason he rose to speak in 1992: the prospect of a Supreme Court vacancy in a Presidential election year.

After discussing confirmation debates that had not occurred in Presidential election years, my friend turned to some of those who had:

Some of our nation's most bitter and heated confirmation fights have come in presidential election years. The bruising confirmation fight over Roger Taney's nomination in 1836; the Senate's refusal to confirm four nominations by President Tyler in 1844; the single vote rejections of nominees Badger and Black by lameduck Presidents Fillmore and Buchanan, in the mid-19th century; and the narrow approval of Justices Lamar and Fuller in 1888 are just some examples of these fights in the 19th century.

This former chairman continued:

Overall, while only one in four Supreme Court nominations has been the subject of significant opposition, the figure rises to one out of two when such nominations are acted on in a presidential election year.

This former chairman then outlined some additional history of Supreme Court nominations in Presidential election years. He emphasized that in four vacancies that arose during a Presidential election year, the President exercised restraint and withheld from making a nomination until after the election. One of those Presidents was Abraham Lincoln.

Ironically, like President Obama, our 16th President was a lawyer and called Illinois home. But unlike our current President, Abraham Lincoln didn't feel compelled to submit a nomination before the people had spoken in November of 1864.

Eventually, my friend got to the heart of the matter during election year 1992:

Should a justice resign this summer and the President move to name a successor, actions that will occur just days before the Democratic Convention and weeks before the Republican Convention meets, a process that is already in doubt in the minds of many will become distrusted by all. Senate consideration of a nominee under these circumstances is not fair to the president, to the nominee, and to the Senate itself.

My friend went on to say:

It is my view that if a Supreme Court justice resigns tomorrow, or within the next several weeks, or resigns at the end of the summer, President Bush should consider following the practice of a majority of his predecessors and not name a nominee until after the November election is completed.

And what is the Senate to do if a President ignores history, ignores good sense, ignores the people, and submits a nominee under these circumstances? Here again my good friend, the former chairman, had an answer:

It is my view that if the President goes the way of Presidents Fillmore and Johnson and presses an election-year nomination, the Senate Judiciary Committee should seriously consider not scheduling confirmation hearings on the nomination until after the political campaign season is over.

Well, what of the likely criticisms that will be lobbed at the Judiciary Committee and at the entire Senate if they were to choose this path of not holding a hearing?

My friend, the former chairman, continued:

I am sure, Mr. President, having uttered these words, some will criticize such a decision and say it was nothing more than an attempt to save the seat on the Court in the hopes that a Democrat will be permitted to fill it, but that would not be our intention, Mr. President, if that were the course to choose in the Senate, to not consider holding hearings until after the election.

Continuing to quote:

Instead, it would be our pragmatic conclusion that once the political season is under way . . . action on a Supreme Court nomination must be put off until after the election campaign is over. That is what is fair to the nominee and is central to the process. Otherwise, it seems to me, Mr. President, we will be in deep trouble as an institution.

But won't that impact the Court? Can it function with eight members for some time? Won't it create "crisis"? Not remotely. My friend considered this issue as well and appropriately dismissed it:

Others may fret that this approach will leave the Court with only eight members for some time. But as I see it, Mr. President, the cost[s] of such a result, the need to re-argue three or four cases that will divide the Justices four to four, are quite minor compared to the cost that a nominee, the President, the Senate, and the Nation would have to pay for what assuredly would be a bitter fight, no matter how good a person is nominated by the President, if that nomination were to take place in the next several weeks.

"In the next several weeks" refers to sometime between June and November of 1992.

I want to read this part again:

Others may fret that this approach will leave the Court with only eight members for some time. But . . . the cost[s] of such a result . . . are quite minor compared to the cost that a nominee, the President, the Senate, and the Nation would have to pay for what assuredly would be a bitter fight, no matter how good a person is nominated by the President.

That is very well said. This former chairman is eloquent, where I happen to be very plainspoken. I would put it this way: It is the principle that matters, not the person.

My friend concluded this section of his remarks this way:

In the end, this may be the only course of action that historical practice and practical realism can sustain.

I think probably everybody kind of knows these are the Biden rules.

The Biden rules recognize that "the framers intended the Senate to take the broadest view of its constitutional responsibility."

The Biden rules recognize the wisdom of those Presidents—including another lawyer and former State lawmaker from Illinois—who exercised restraint by not submitting a Supreme Court nomination before the people had spoken.

The Biden rules recognize that the Court can operate smoothly with eight members for some time, and "the cost of such a result, the need to re-argue three or four cases that will divide the Justices four to four, are quite minor compared to the cost that a nominee, the President, the Senate, and the Nation would have to pay for what assuredly would be a bitter fight."

The Biden rules recognize that under these circumstances, "[the President] should consider following the practice of a majority of his predecessors and not name a nominee until after the November election is completed." The President he is referring to there is President George H.W. Bush.

The Biden rules recognize that under these circumstances, "[it does not] matter how good a person is nominated by the President."

The Biden rules recognize that "once the political season is under way . . . action on a Supreme Court nomination

must be put off until after the election campaign is over. That is what is fair to the nominee and is central to the process."

The Biden rules recognize that "Senate consideration of a nominee under these circumstances is not fair to the President, to the nominee, or to the Senate itself."

The Biden rules recognize that under these circumstances, "the Senate Judiciary Committee should seriously consider not scheduling confirmation hearings on the nomination until after the political campaign season is over."

Vice President BIDEN is a friend, as I said three or four times during my remarks, and I say it with the utmost sincerity. I served with him in this body and on the Judiciary Committee for nearly 30 years. He is honorable, he is sincere, and he is loyal to the President he now serves. Because I know these things about him, I can say with confidence that he will enthusiastically support the President and any nominee he submits to the Senate, but I also know this about Vice President BIDEN: He may serve as Vice President, but he remains a U.S. Senator. That is why when he rose to speak in this Senate Chamber for the last time, he shared this with his colleagues:

I may be resigning from the Senate today, but I will always be a Senate man. Except for the title of "father," there is no title, including "Vice President," that I am more proud to wear than that of United States Senator.

If the President of the United States insists on submitting a nominee under these circumstances, Senator BIDEN, my friend from Delaware, the man who sat at a desk across the aisle and at the back of this Chamber for more than 35 years, knows what the Senate should do, and I believe in his heart of hearts he understands why this Senate must do what he said it must do in 1992.

I yield the floor and give back the remainder of my time.

#### NOMINATION OF ROBERT CALIFF

Mr. MCCONNELL. Mr. President, drug overdose deaths, driven largely by prescription painkillers, continue to outpace the number of fatalities from traffic accidents in Kentucky. While I recognize the need to protect legitimate patient access to prescription painkillers, the FDA must do more to help us fight back in the midst of today's prescription-opioid epidemic.

The FDA plays a leading role in addressing this epidemic through its drug approval process, in which it is required by Federal law to ensure the safety and effectiveness of all drugs. However, the FDA has been rightly criticized for not recognizing the severity of this significant problem and for not taking greater action to address it.

Over the years, I have heard from many Kentuckians concerned about FDA's lax attitude in this area, with many of the belief that the agency simply has not taken its role in fighting

the prescription opioid epidemic seriously.

To try and push the FDA in the right direction, I contacted the agency in both 2012 and 2013 to warn of the problems with allowing generic, crushable opioids to be made available without the introduction of abuse-deterrent features. As a result, the FDA announced in April 2013 that it had decided to prohibit a generic version of a certain opioid that lacked abuse-deterrent features.

I also cosponsored a measure in the last Congress that aimed to push the FDA to encourage the development and use of abuse-deterrent formulations of prescription opioids, which make them harder to crush and abuse.

Additionally, I joined more than 20 Senate and House Members last October in a letter to OMB's Administrator of Information and Regulatory Affairs, Howard Shelanski. We urged him to help us tackle the prescription-drug abuse epidemic by taking down barriers in the Medicaid repayment system that actually discourage manufacturers from developing the very same abuse-deterrent formulations that I have been pushing the FDA to encourage.

I recently met with Dr. Robert Califf, the FDA Commissioner nominee we will consider this evening. We had a productive meeting in which I expressed my concerns about the agency's past insensitivity to the opioid crisis, along with my desire to see the FDA play a more prominent role in addressing this prescription-opioid epidemic.

Dr. Califf shared his proposed plan to reassess the agency's approach to approving and regulating prescription painkillers. Dr. Califf also acknowledged that a cultural shift will be needed within the FDA if the potential for addiction and abuse of prescription opioids is to be taken more seriously. He assured me that, as head of this important agency, he would be the kind of leader our country needs when it comes to confronting this growing epidemic.

I believe Dr. Califf understands the dire nature of the opioid epidemic, and accordingly, I believe he is today the right person to lead the FDA in a new direction. That said, confirming Dr. Califf will be just the beginning of a much longer and enduring effort on everyone's part; he and the FDA should expect continued rigorous oversight in the way the agency deals with prescription opioids moving forward.

Mr. LEAHY. Mr. President, today the Senate will consider the nomination of Dr. Robert Califf to head the Food and Drug Administration. For too long, the FDA has been without a Senate-confirmed commissioner, and, given the scope and reach of the agency, action on Dr. Califf's nomination is welcomed. After speaking with him and carefully reviewing his record, I have decided to support this nomination.

Consumers depend on the FDA to ensure that food, medicine, and products

sold in this country are safe. The agency has oversight of one-quarter of all consumer goods sold in the United States, including nearly \$1 trillion in foods, drugs, medical devices, cosmetics, and supplements. The Commissioner must supervise this critical work with independence from outside influence. Some Senators have raised concerns about Dr. Califf's record as a researcher who worked closely with drug companies and have questioned his ability to make decisions free from the influence of the multibillion dollar pharmaceutical industry. After speaking with Dr. Califf and reviewing his record, I believe that he will conduct himself with integrity and in the best interest of the public.

While the head of the FDA must be an independent voice, we should not discount the benefits having a Senate-confirmed Commissioner who understands the importance of medical research and the potential to advance lifesaving treatments. Under Dr. Califf's leadership, the Duke Clinical Research Institute made advances in drugs that dissolve blood clots, cut the risk of heart attacks and strokes, and lower cholesterol. As director of the Duke Translational Medicine Institute, Dr. Califf worked closely with the National Institutes of Health, the FDA, and the Institute of Medicine to help ensure scientific discoveries are translated into usable treatments. I believe that Dr. Califf's understanding of the importance of research in promoting lifesaving treatments and his ability to navigate potential conflicts that can arise with drug-industry funded research will be an asset to him as the leader of the FDA.

Dr. Califf and I also discussed other issues of importance before the FDA, including the labeling of generic drugs. For several years, I have led a group of nearly 40 Democrats in Congress in pressing the FDA to require generic drug manufacturers to update their safety labeling, instead of simply mirroring the brand companies' warnings, as they do now. Generics fill over 80 percent of prescriptions, but injured patients have no remedy against them if their product is mislabeled. Patients who are injured by a brand-name drug can seek justice, but they have no remedy if, like countless Americans, the drug that injures them is a generic. All drug manufacturers should be required to improve the warning information they give to doctors and consumers. Americans have waited 3 years for the FDA to finalize their rule regarding the labeling of generics, and I intend to continue to urge the FDA, and Dr. Califf if he is confirmed, to move forward on this critical issue.

The next Commissioner of the FDA must also work to promote safer alternatives to powerful prescription painkillers and to remove from the market older, less safe drugs. Dr. Califf and I discussed the FDA's recent announcement to expand access to abuse-deterrent formulations of these powerful