

Let's do our job. Let's do the work the people sent us here to do. Let's vet this candidate, whoever it might be, and let's move forward so that every person who has a case pending before the Supreme Court or will have a case pending before the Supreme Court is given access to justice by providing a fully functioning Supreme Court.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Washington.

Mrs. MURRAY. Mr. President, I ask unanimous consent to speak on behalf of the nomination before the vote for 2 minutes.

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

Mrs. MURRAY. Mr. President, the role of the FDA Commissioner is central to the health and safety of every family and community nationwide, from a dad making his daughter's peanut butter sandwich in the morning to a patient headed into an operating room. I know this is a nomination we all take very seriously.

After careful review, I believe Dr. Califf's experience and expertise will allow him to lead the FDA in a way that puts patients and families first and upholds the highest standards of patient and consumer safety. Dr. Califf has led one of our country's largest clinical research organizations, and he has a record of advancing medical breakthroughs on especially difficult-to-treat illnesses.

He has a longstanding commitment to transparency in relationships with industry and to working to ensure academic integrity. He has made clear he will continue to prioritize independence at the FAA as the Commissioner and always put science over politics. His nomination received letters of support from over 128 different physician and patient groups.

He earned the strong bipartisan support of the members of the HELP Committee. There is a lot the FDA needs to get done in the coming months, including building a robust postmarket surveillance system for medical devices, making sure families have access to nutritional information, putting all of the agency's tools to work to stop tobacco companies from targeting our children, and playing a part in addressing the epidemic of opioid abuse that is hurting so many communities so deeply.

I believe Dr. Califf will be a valuable partner to Congress in taking on these challenges and the many others the FDA faces. I am here to encourage my colleagues to join me in supporting this nomination. I look forward to continued work with all of the Members on ways to strengthen health and well-being for the families and communities we all serve.

I yield back my time.

The PRESIDING OFFICER (Mr. SASSE). Under the previous order, the question is, Will the Senate advise and consent to the Califf nomination?

Mrs. MURRAY. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The bill clerk called the roll.

Mr. CORNYN. The following Senators are necessarily absent: the Senator from Tennessee (Mr. CORKER), the Senator from Texas (Mr. CRUZ), the Senator from Wisconsin (Mr. JOHNSON), and the Senator from Florida (Mr. RUBIO).

Mr. DURBIN. I announce that the Senator from Missouri (Mrs. MCCASKILL), the Senator from Vermont (Mr. SANDERS), and the Senator from Virginia (Mr. WARNER) are necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 89, nays 4, as follows:

[Rollcall Vote No. 25 Ex.]

YEAS—89

Alexander	Flake	Nelson
Baldwin	Franken	Paul
Barrasso	Gardner	Perdue
Bennet	Gillibrand	Peters
Blunt	Graham	Portman
Booker	Grassley	Reed
Boozman	Hatch	Reid
Boxer	Heinrich	Risch
Brown	Heitkamp	Roberts
Burr	Heller	Rounds
Cantwell	Hirono	Sasse
Capito	Hoeven	Schatz
Cardin	Inhofe	Schumer
Carper	Isakson	Scott
Casey	Kaine	Sessions
Cassidy	King	Shaheen
Coats	Kirk	Shelby
Cochran	Klobuchar	Stabenow
Collins	Lankford	Sullivan
Cooms	Leahy	Tester
Cornyn	Lee	Thune
Cotton	McCain	Tillis
Crapo	McConnell	Toomey
Daines	Menendez	Udall
Donnelly	Merkley	Vitter
Durbin	Mikulski	Warren
Enzi	Moran	Whitehouse
Ernst	Murkowski	Wicker
Feinstein	Murphy	Wyden
Fischer	Murray	

NAYS—4

Ayotte  
Blumenthal

NOT VOTING—7

Corker	McCaskill	Warner
Cruz	Rubio	
Johnson	Sanders	

The nomination was confirmed.

The PRESIDING OFFICER. Under the previous order, the motion to reconsider is considered made and laid upon the table and the President will be immediately notified of the Senate's action.

#### LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will resume legislative session.

The Senator from Missouri.

#### MORNING BUSINESS

Mr. BLUNT. Mr. President, I ask unanimous consent that the Senate be in a period of morning business, with Senators permitted to speak therein for up to 10 minutes each.

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

Mr. BLUNT. Mr. President, I wish to address the Senate in morning business.

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

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

Mr. BLUNT. Mr. President, I wish to talk about Judge Scalia for a few minutes, and then I will address the vacancy on the Court.

There is no question that the Supreme Court has lost a strong and thoughtful voice. No matter what issues the Justices on the Court might have disagreed with, or even when there was a disagreement on how to interpret the Constitution, there is no question that Judge Scalia had a unique capacity to get beyond that. He will be missed by the Court for both his intellect and his friendship. He was an Associate Justice on the Court for almost 30 years. He was a true constitutional scholar, both in his work before the Court and on the Court, and he brought a lifetime of understanding of the law to the Court.

He began his legal career in 1961, practicing in private practice. In 1967, he became part of the faculty of the University of Virginia School of Law. In 1972, he joined the Nixon administration as General Counsel for the Office of Telecommunications Policy, and from there he was appointed Assistant Attorney General for the Office of Legal Counsel. He brought a great deal of knowledge to his work and finished the first part of his career as a law professor at the University of Chicago, and that is the point where he became a judge.

In 1982, President Reagan appointed him to the U.S. Court of Appeals for the District of Columbia, a court that gets many of the cases that wind up on the Supreme Court. He was on that court for a little more than 4 years.

In 1986, President Reagan nominated him to serve as an Associate Justice. He was an unwavering defender of the Constitution, and as a member of the Supreme Court, he had the ability to debate as perhaps no one had in a long time—and perhaps no one will for a long time. He had a sense of what the Constitution was all about and a sense of what the Constitution meant, and by that he meant what the Constitution meant to the people who wrote it.

There is a way to change the Constitution. If the country and the Congress think that the Constitution is outmoded in the way that it would have been looked at by the people who wrote it, there is a process to do something about that. That process was immediately used when the Bill of Rights was added to the Constitution and can still be used if people feel as though the Constitution no longer has the same meaning as what the people who wrote

it and voted on it thought it meant. Justice Scalia had the ability to bring that up in every argument and would sometimes argue against his own personal views. He argued for what the Constitution meant and what it was intended to mean. His opinions were well reasoned, logical, eloquent, and often laced with both humor and maybe a little sarcasm, but they were grounded with the idea that judges should interpret the Constitution the way it was written.

His contributions to the study of law left a profound mark on the legal profession. Lawyers, particularly young lawyers in many cases, talk about the law differently than they did before Justice Scalia began to argue his view of what the Constitution meant and what the Court meant. He had a great legal mind.

He was fun to be with. I will personally miss the opportunity to talk to him about the books we were reading or books the other one should read or maybe books that the other one should avoid reading because of the time required to read it. He had a broad sense of wanting to challenge his own views and was able to challenge other people's views not only in a positive way but in a way that he thought advanced the Constitution and what the Constitution meant to the country.

As I stand here today, I am sure many people all over America and the people who the Scalias came into contact with are continuing to remember his family. Our thoughts and prayers are with his wife Maureen, their nine children, and their literally dozens of grandchildren. I am not sure if the number is 36 or 39, but it is an impressive number.

Those who had a chance to see, be there, or read his son's eloquent handling of the funeral service and the eulogy can clearly see the great legacy he and Maureen Scalia left to the country.

I am not a lawyer, which is often the most popular thing I say, so I don't want to pretend to be a lawyer here talking about the law and the Constitution, but you don't really need to be a brilliant lawyer to understand the Constitution or understand what Justice Scalia was going to be.

I was a history teacher before I came here, and I know the Presiding Officer was a university president. I was the first person in my family to graduate from college. I had unbelievable opportunities because of where we live.

We have the Constitution, and there is no magic as to the number of Justices that should be sitting on the Court at any given time. In fact, the Constitution doesn't even suggest what the number should be, and there have been different numbers over time. For some years now the number has been nine, but there have often not been nine Justices sitting. In the event of a recusal or some other reason that a Justice has to leave, such as resigning to do something else, there has often not been nine Justices. In fact, there

have often been eight Justices. There has often been a Court that could easily wind up in a 4-to-4 tie. In fact, since World War II, the Court has had only 8 Justices 15 times.

Right after World War II and about a month after Harry Truman became President—when he was a Member of the Senate, he used the desk that I now get to use—he asked Justice Robert Jackson to be the chief prosecutor at Nuremberg. Justice Jackson then went to Nuremberg, and for the better part of a year and a half—from May of 1945 until October of 1946—he was not sitting on the Court and wasn't making decisions on the Court. He was the chief prosecutor at the Nuremberg trials.

A tie on the Court can do a lot of things. It can uphold a lower court decision. A tied Court can decide to rehear a case, which is also not unusual in the history of the country. Again, you can be tied even if there are nine Justices and one of them, for whatever reason, decides not to participate in that case. When that happens, the Court can do a number of things and will.

This is an important decision, and it is a decision in the shadow of the next election. We are 9 months and a few days away from people getting a chance to vote, and a lifetime appointment on the Court is an important thing.

Justice Scalia was appointed by Ronald Reagan and served for three decades. He served for a quarter of a century after Ronald Reagan left the White House and for a decade after President Reagan died. This is something worth thinking about, and frankly at this moment in history and in other moments in history when a vacancy has occurred in an election year, it has often been the case that the decision is that the American people ought to have a say on who sits in that Supreme Court seat. That is what will happen this time, and I think it is the best thing to happen this time.

There is a lot at stake. The Court has had 5-to-4 votes on decision after decision. What the Court does on the Second Amendment matters, and what the Court does on the First Amendment matters. The first freedom in the First Amendment is freedom of religion. No other country was ever founded on the principle that the right to pursue your conscience and the right to pursue your faith is a principal tenant of the founding of this government. It was a principal tenet in the Revolution. More importantly, it was immediately added to the Constitution when there was some concern that maybe the Constitution was not clear enough about this fundamental principle.

During a time when the Obama administration is suing the Little Sisters of the Poor because the Little Sisters of the Poor doesn't want their health care plan to be a plan that includes things that are different than their faith beliefs, freedom of religion is very important.

That is one of the cases before the Court right now. I don't know how the Court will decide to determine it. I do know there is a reason we should be concerned about freedom of religion, the right of conscience. President Jefferson, in writing to a church that asked him about individual freedom, said to that church—I think it might have been late in his administration, might have been an 1808 letter—of all the rights we have, right of conscience is the one we should hold most dear. The American people need to be thinking about that as they determine the next President, who is likely to not just fill this vacancy but likely to fill more than one vacancy during their time in office.

Mrs. Clinton says if she is elected President, she will not appoint anybody to the Supreme Court who will not reverse the freedom of speech case in *Citizens United*. Sounds to me as though the Presidential candidates are willing to make the Court a major issue in this campaign. Voters should have the right to make the Court a major issue in this campaign as well—freedom of religion, freedom of speech, the Second Amendment, the Tenth Amendment that says anything the Constitution doesn't say the Federal Government is supposed to do is left to the States. The closer you are to where a problem is, when solving that problem, the more likely you are going to get a commonsense solution. That is why that Tenth Amendment is there and why it needs to be vigorously adhered to.

These are important times. Anytime we have an election in the country, there is always a sense that this may be the most important election we have ever had. They all are and particularly an election where the constitutional principles of government, where Executive overreach, where regulators who are unaccountable and out of control are one of the big concerns in America today. It is an important time to be thinking about the Supreme Court and an important time to be thinking about the responsibilities of citizens and the responsibilities of the next President of the United States. This President has every constitutional right and obligation to nominate somebody to a vacancy on the Supreme Court, but there is a second obligation in the Constitution; that is, the obligation of the Senate to confirm that nomination. I have a view that the answer to that question is not this person, not right now because we are too close to making a big decision about the future of the country to not include this process of what happens to the Supreme Court in that process.

I wish the process of democracy well, the American people well as they think about these things, and the Senate well as we do the other work that the Constitution requires us to do.

I yield the floor.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The senior assistant legislative clerk proceeded to call the roll.

Mr. MERKLEY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. PERDUE). Without objection, it is so ordered.

### OUR "WE THE PEOPLE" DEMOCRACY

Mr. MERKLEY. Mr. President, today I rise to address a topic under the broad notion of the first three words of our Constitution: "We the People." These are the most important three words because they set out the theory, the strategy for our entire Constitution and what it is all about, which is to ensure that we do not have government of, by, and for the most affluent in our society; or government of, by, and for the titans of commerce and industry; but instead a government of, by, and for the people, the citizens. It is within the framework of this Constitution that we find many elements designed to preserve this "we the people" purpose.

In recent years, in recent decades, we have had major attacks on the theory of our Constitution, "we the people." We had the *Buckley v. Valeo* Supreme Court decision 40 years ago that said it is all right for the most affluent citizens in our society to drown out the people in the election process. We had *Citizens United*, which said the Constitution doesn't say "we the people"; it says "we the titans of commerce and industry; we the corporations." So the Supreme Court has made several decisions that have taken us far afield, and we see the results of this. We see the impact of policies crafted by a legislature elected with fabulous sums of money from the people at the height of our society, the height of power and influence, of wealth and connections.

Somehow, we have to reclaim our Constitution. In fact, this understanding is something that is way off base, is the foundation of the frustration we see across our Nation. We see it reflected in the Presidential campaigns this year on the Democratic side and on the Republican side. People know that something is wrong when over the last four decades virtually all additional income in our economy has gone to the top 10 percent. People understand that the middle class is being squeezed and crushed. People are starting to see tent cities pop up in cities across our Nation because policies made here are no longer crafted for "we the people" but instead for "we the titans."

Well, I am going to rise repeatedly to address this challenge that is at the core of who we are as a nation, the core of our Constitution. Our Constitution is being attacked continuously, and we the people must fight back to reclaim it.

The most recent attack has come from colleagues in this body who said they don't want to honor the responsibilities that they took on when they took the oath of office. One of those responsibilities is to give advice and consent on nominations. Recently, we have the majority leader who said: I don't even want to talk to a nominee from the President, let alone take my responsibilities under the Constitution seriously to give advice and consent.

So I thought it might be useful to go back and think a little bit about this advice-and-consent power and how it came to be, what it meant, and what it means for us to honor our responsibility today as Members of the U.S. Senate.

In those days in which the Founders were crafting the Constitution, they had a couple of different theories about how they might possibly create this power, and some said it should go solely to the Executive, solely to the President. Others said that is too much power to concentrate in single hands, that it should go to the body of a legislature, it should go to an assembly.

Some decades after our Constitution was signed, they had a Federalist Paper written by Alexander Hamilton that laid out this discussion. He noted—and I am going to quote at some length here—that the argument for the Executive is as follows:

The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them.

So that was the argument for the President to exercise these powers.

In addition, there was discussion of the weaknesses of an assembly, a body like the U.S. Senate having that responsibility all to itself. Again, I will quote Alexander Hamilton:

Hence, in every exercise of the power of appointing to offices, by an assembly of men, we must expect to see a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly. The choice which may at any time happen to be made under such circumstances, will of course be the result either of a victory gained by one party over the other, or of a compromise between the parties. In either case, the intrinsic merit of the candidate will be too often out of sight.

So thus the argument for the Executive over the assembly to have these appointing powers. But there was a concern, and that was, what if the Executive, the President, goes off track? Wouldn't it be useful to have a check on nominations when the Executive goes off track? So Hamilton explained why this check on the President's nomination power was placed into the Constitution.

Once more I quote:

To what purpose then require the co-operation of the Senate? I answer, that the ne-

cessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.

He goes on to note that the body would be expected to approve most nominations, except when there are special and strong reasons for the refusal.

So that is our job. That is how it is laid out, that we are to make sure the power the President has is not exercised in a way that results in unfit characters being appointed. Thus, this mutual system that took the strengths of the assembly as a check—that is, of the Senate—and the strength of the President in terms of accountability was combined. And Hamilton notes: "It is not easy to conceive a plan better calculated than this to promote a judicious choice of men for filling the offices of the Union."

So that is where we fit in. That is our role. We are to make sure that a nomination—an individual has the preparation, the qualifications, the character, if you will, to fill an office effectively. Hamilton points out in his conversation that just the fact that the Senate will be reviewing the nominations will serve as a check for, if you will, off-track nominations, inappropriate nominations.

During the time I have had a chance to be connected to the Senate—and that now spans four decades; it was 1976 when I came here as an intern for Senator Hatfield—I have seen this body operate as envisioned in the Constitution. I saw this body operate as a simple majority, with rare exception. The use of the filibuster was not used to paralyze, and the power of confirmation—of advice and consent of the Constitution—was not used to systematically undermine the President because he simply happened to be of a different party. It was not used to undermine the judiciary by keeping judicial vacancies open. Indeed, when this body starts to operate in that fashion—as it has been during the time I have been here as a Senator, seeing across the aisle the effort to systematically change the makeup of the core by undermining the responsibility to give advice and consent—then we deeply polarize and undermine this important institution that is our judiciary.

I must say, even though I have seen for years the effort to really harness some gain through the strategy of undermining the ability of the President to appoint, I never thought it would come to this.

Article 2, section 2, declares that "the President, with the advice and consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States."