

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 President, I ask unanimous consent that the order for the quorum call be rescinded.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

It is a responsibility of the President to nominate. It is a responsibility of the Members of this body to give advice and consent on that nomination. Yet here we are today with the majority of this body saying we do not take seriously our responsibility under the Constitution to give advice and consent.

We have seen the process of really slowing—slow-walking nominations, but this is on a different scale of magnitude.

It is our responsibility to have a committee vet the nominees, our responsibility to have a floor debate on the floor, our responsibility to have a vote, and that certainly is a way the Senate has operated decade after decade, century after century.

I just have to ask each of my colleagues across the aisle, do you find in this beautiful Constitution any phrase that says the President shall nominate but only in the first 3 of the 4 years he or she is in office? Can you find that in the Constitution? Can you truly raise your head and say you are doing your responsibility when you say: I only want to exercise my constitutional responsibility of advice and consent 3 out of every 4 years, and then I will take a year off. I think if you read the Constitution you will find that is not what it says, and the American people know this. They know the Supreme Court is very important to calling the balls and strikes when actions or laws move into areas that are out of bounds. That is what the Supreme Court does. It makes sure our structure of laws and regulations stay within the bounds of the rights and rules of our Constitution.

This is a critical part of the construction of American democracy. The Supreme Court serves as a check on the overreach of the President, the overreach of this body, and the overreach of its regulators. It cannot do its job if it does not have a full set of members.

Not since the Civil War has the Supreme Court been left with a vacancy for more than a year, and of course the Civil War was a very unusual situation. Since the 1980s, every person appointed to the Supreme Court has been given a hearing and a vote within 100 days. Since 1975, on average, it has taken 2 months to confirm Supreme Court nominees.

Despite what some of my colleagues claim, the President's duty to make nominations to the Supreme Court does not disappear during a Presidential election year. Our responsibility to do advice and consent does not disappear in a Presidential year. Let's look to history. More than a dozen Supreme Court Justices have been confirmed in the final year of a Presidency. More recently, Justice Kennedy, who is still on the bench, was confirmed in the last year of President Reagan's final term. That was done by a Senate led by the opposite party. It was a Democratically controlled Senate that honored its responsibility to give advice and consent.

The American people spoke overwhelmingly when they reelected President Obama in 2012 to a 4-year term. They expect him to fulfill his duties for a full 4 years. They expect us to do our duties under the Constitution. The current campaign events do not stop the responsibilities of the U.S. Senate. For the last 200 years, the Senate has carried out its duty to give a fair and timely hearing and a floor vote to the President's Supreme Court nominees. Let us not change that position today, this week or this year. Let's not only honor the tradition, let's honor the constitutional responsibility.

I note it is not only the Supreme Court we have to worry about. Last year the Senate confirmed just 11 Federal judges, the fewest in any year since 1960—in the last 56 years. Only one Court of Appeals judge was confirmed, the lowest in any given year since 1953. The number of judicial emergencies, where there are not enough judges confirmed to do the workload, has nearly tripled over the past year, from 12 in January 2015 to 31 judicial emergencies today.

The obstruction is not limited simply to the judicial branch. The abuse of advice and consent or disregard for the responsibility extends to the executive branch. When we elect a President, the President is not a President of the party, he or she is the President of a nation. Whether you are a Democrat or Republican, the President is our President. Systematically using party politics to undermine the individual because they were elected from the opposite party diminishes the individuals who serve in this body, it diminishes the stature of this institution, and it diminishes the function of our Nation so carefully crafted in our Constitution.

Let's ponder the path forward this year. Let's not diminish this institution by forsaking our responsibility. Let's not politically polarize the Court that is so essential to making sure our laws and regulations and attitudes stay within the bounds of the Constitution. Let's instead restore this institution. Let's restore the Senate. Let it be at least as healthy as it was when we were youngsters serving here as interns, coming to DC for the first time or simply reading about it in a book back home.

Let's restore the effectiveness of our judiciary. When we have judicial emergencies, we have justice delayed, and justice delayed is justice denied, and that does not honor the vision of the role of justice in the United States of America.

So I call on my colleagues to end this obstruction that diminishes your service, diminishes this institution, and damages our Nation. In short, do your jobs. Work together as 100 Senators for the future of our Nation.

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

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

Mr. FRANKEN. Mr. President, I ask unanimous consent to speak for up to 15 minutes.

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

FILLING THE SUPREME COURT VACANCY

Mr. FRANKEN. Mr. President, I rise today to address the recent vacancy on the U.S. Supreme Court and to urge my colleagues to grant swift consideration of the President's eventual nominee.

Make no mistake, the passing of Justice Antonin Scalia came as a great shock. Although Justice Scalia and I did not share a common view of the Constitution or of the country, I recognized that he was a man of great conviction and, it should be said, a man of great humor. My thoughts and prayers are with his family, his friends, his clerks, and his colleagues. But we must now devote ourselves to the task of helping to select his successor.

The Constitution—so beloved by Justice Scalia—provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.”

Let us all remember that each and every Senator serving in this body swore an oath to support and defend that same Constitution. It is our duty to move forward. We must fulfill our constitutional obligation to ensure that the highest Court in the land has a full complement of Justices. Unfortunately, it would seem that some of my colleagues on the other side of the aisle do not agree, and they wasted no time in making known their objections.

Less than an hour after the news of Justice Scalia's death became public, the majority leader announced that the Senate would not take up the business of considering a replacement until after the Presidential elections. “The American people should have a voice in the selection of their next Supreme Court justice,” he said.

The only problem with the majority leader's reasoning is that the American people have spoken. Twice. President Barack Obama was elected and then reelected by a solid majority of the American people, who correctly understood that elections have consequences, not the least of which is that when a vacancy occurs, the President of the United States has the constitutional responsibility to appoint a Justice to the Supreme Court. The Constitution does not set a time limit on the President's ability to fulfill this duty, nor, by my reading, does the Constitution set a date after which the President is no longer able to fulfill his