

JAMES LANKFORD



UNITED STATES SENATOR FOR OKLAHOMA

FLOOR SPEECH

Tribute to Justice Antonin Scalia and Supreme Court vacancy

Wednesday, March 9, 2016

YouTube Video: <https://www.youtube.com/watch?v=JEn0jdSjadM&feature=youtu.be>

Full Transcript:

Mr. President, on February 13, 2016, the Supreme Court not only lost one of its justices, our nation lost a true legal giant. Justice Scalia was described by his colleagues as extraordinary, treasured and a stylistic genius. Beyond his unwavering dedication of upholding an originalist viewpoint of the Constitution, Justice Scalia was also wholeheartedly committed to his family. He was a husband, father of nine, grandfather to 36 grandchildren. His son Paul said during his homily that God blessed dad with a love for his family. He was the father that God gave us for the great adventure of family life. He loved us and sought to show that love and sought to share the blessing of the faith he treasured and he gave us one another, to have each other for support. It is the greatest wealth parents can bestow. Right now we're particularly grateful for it.

Justice Scalia was nominated to the United States Supreme Court in 1986 by President Reagan, confirmed by the Senate in a unanimous vote. While his time on the Court led to criticism of his legal opinions and his very colorful dissents, he remained respected by his colleagues, even those of the opposite end of the judicial spectrum. This is a sign of true character to have the ability to have an open, honest debate about a particular issue while respecting the individual person holding an opinion different from your own. Justice Scalia said "I attack ideas. I don't attack people. And some very good people have some very bad ideas. And if you can't separate the two you've got to get another day job."

The sentiment was best portrayed through his friendship with Justice Ginsburg. As one of his friends, she said, "we're different, but we are one. Different our interpretation of written text. One in our reverence for the Constitution and the institution we serve. From our years together on the D.C. Circuit we were best buddies. We disagreed now and then but when I wrote for the Court and received a Scalia dissent, the opinion ultimately released was notably better than my initial circulation."

Justice Scalia was known for his wit and sarcasm. Famously referring to legal interpretations of his colleagues as "jiggery pokery," "pure applesauce," and "a ghoul in a late horror movie." Yet, it was the same criticisms that Justice Ginsburg said nailed the weak spots in her opinions and gave her what she needed to strengthen her writings.

Justice Scalia represented a consistent Constitutional voice on the court. Just as the Constitution is the pillar of our legal system, so too was his affirmation of this foundational document of our nation. He said it is an enduring Constitution that I want to defend. What did the words mean to the people who ratified the Bill of Rights or who ratified the Constitution, as opposed to what do people today would like. As Justice Kennedy said, "in years to come, any history of the Supreme Court will and must recount the wisdom, scholarship, and technical brilliance of Justice Scalia and what he brought to the Court. His insistence on demanding standards shaped the work of the Court in its private discussions, oral arguments and written opinions. Yet these historic achievements are all the more impressive and compelling because of the foundation of Justice Scalia's jurisprudence. The driving force in all of his work and his powerful personality were shaped by an unyielding commitment to the Constitution of the United States as the highest ethical and moral standards."

With Justice Scalia's passing, we have a vacancy on the Court to fill. The question is, when? I would submit, with only months left until the presidential election, we should let the people decide. I've heard over and over again for the past seven years that elections have consequences. But apparently some people seem to only think elections

have consequences on presidential elections. The American people elected a brand-new Senate in 2014 because of their incredible frustration with the operation of the previous Senate and because of the direction that we're now heading under this President. I've heard this argument for years. The President should be able to do whatever he wants. He is the President. But may I remind everyone of a document in our National Archives called the United States Constitution that gives divided power to our nation. President is not over the Senate, not over the House and is not over the Supreme Court.

The hyperbole of this has been overwhelming to me in the debate of the past few weeks. I have heard that unless we replace Justice Scalia right now, we will shut down the Court. I have heard on this floor people call that if we don't replace Justice Scalia immediately, it's dangerous, it is unprecedented, it's unheard of. I have heard, "do your job. A failure to do your duty." I even heard one Senator say, the Constitution says the President shall appoint and the Constitution says the Senate shall consent. Well, let me show you article 2, section 2, of the Constitution where that comes up. It says "The president shall have power and by and with the advice and consent of The Senate to make treaties, provided two-thirds of the senators present concur and he shall nominate." Now, the president shall nominate. That's his Constitutional responsibility.

But it is not the Constitutional responsibility. It never says The Senate shall give consent to the president. Why? Because the Constitution gives the role of selecting the Supreme Court nominee into a 50/50 responsibility between the United States Senate and the President of the United States. The President shall nominate. That is his responsibility. But that only moves forward with the advice and consent of the United States Senate. There's no shall give consent. There's no requirement of how it moves. In fact, Alexander Hamilton in "The federalist" papers discussing this exact issue, said the ordinary power of appointment is confided to the President and the Senate jointly. This is a 50/50 agreement. And what we're facing right now are incredible attacks on the chairman of the Judiciary [Committee] because he dares to do what Vice President Biden, what Senator Schumer, and Senator Reid recommended years ago.

I even heard that we shouldn't listen to the words of Vice President Biden. I would understand why people would say that because when you go back to Vice President Biden's words, when he was the Senator and the chair of the Judiciary in the same spot that Chairman Grassley is in now, this is what, at that time, Senator Biden said. Senator Biden, chairman of the judiciary, arguing on this same issue said, "Arguing from a constitutional history and senate precedent I want to address one question and one question only. What are the rights and duties of the senate in considering nominees to the Supreme Court? This is from Vice President Biden—then Senator Biden. Some argue that the senate should defer to the president in the selection process. They argue that any nominee who meets the narrow standards of legal distinction, high moral character and judicial temperament is entitled to be confirmed in the senate without further question. Apparently, there are some in this body and outside this body who share that view. I stand here today to argue the opposite proposition."

This is from Vice President Biden. He stated at that time, "We have quashed the myth that the senate must defer to a presidential choice of a Supreme Court Justice. The men and women at the apex of the independent third branch of government. Can our Supreme Court nomination and confirmation process so racked by discord and bitterness be repaired in a presidential election year? He stated. Vice President Biden as Senator Biden said, "History teaches us that this is extremely unlikely. Some of our nation's most bitter and heated confirmation fights have come in presidential election years. The Senate, too, Mr. President, must confirm how it would respond to a Supreme Court vacancy that would occur in the full throes of an election year. Vice President Biden at that time said this. "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."

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

This past week, Senator Reid came to the floor to discuss Senator Grassley and what he's doing, exactly what then-Senator Biden recommended be done. And he made this statement. Senator Reid said the past week, "Last

Thursday, the Senior Senator from Iowa addressed the Conservative Political Action Conference, CPAC, which took place here in Washington. In his speech to them, here's what Senator Grassley said, 'I feel it is about time we have a national debate on the Supreme Court and how it fits in with our Constitutional system of Government.'" And Senator Reid continued, "The chairman of the judiciary is suggesting that we reevaluate the Founding Fathers work, reevaluate the Constitution of the United States and change the Constitution of the United States. Why is Senator Grassley debating what the sure makes clear? The Senate must provide its advice and consent on nominees appointed by the President to the Supreme Court. Think of the irony. Justice Scalia was a strict Constitutionalist. Yet now, in the weeks following his death, Senator Grassley wants to throw out the Constitution just because President Obama gets to pick Scalia's replacement."

Well that's what Senator Reid said this week. Let's look what Senator Reid said in 2005 on this exact same issue. In 2005 on this floor, Senator Reid said, "The President of the United States has joined in the fray and become the latest to rewrite the Constitution and reinvent reality." This is speaking of President Bush at the time. Senator Reid continued, "Speaking to fellow Republicans, on Tuesday night, two days ago he said that the Senate has a duty to promptly consider each nominee on the Senate floor, discuss and debate their qualifications and then give them an up-or-down vote that they deserve. Referring to the President's duties, duty to whom? The duties of the Senate," this is from Senator Reid in 2005, "The duties of the Senate are set forth in the U.S. Constitution. Nowhere in that document does this say the Senate has a duty to give presidential appointees a vote. The fact was even acknowledged by the Majority Leader that a vote is not required. Senator Byrd asked the Majority Leader if the Constitution accorded each nominee an up or down vote on the Senate floor. The answer was no. Senator Frist was candid, the answer was no. The language was not there, Senator Frist said. He is correct. Senators should read the same copy of the Constitution Senator Frist had memorized." Continuing what Senator Reid said, "It is clear that the President misunderstands the meaning of advice and consent clause because that's not how America works. The Senate is not a rubber stamp for the executive branch."

Earlier this week, Senator Reid chastised Senator Grassley saying he wants to rewrite the Constitution. In 2005, Senator Reid stood on this Floor and encouraged all members to read the Constitution and that it nowhere requires that we have to take an up-or-down vote. So I don't know which one to take on this. The current statements from Senator Reid or the previous statements from Senator Reid because they're in direct contradistinction.

Senator Schumer, July 27, 2007, said this speaking of the last 18 months of President Bush's term as president, "For the rest of this President's term and if there is another Republican elected with the same selection criteria, let me say this. We should reverse the presumption of confirmation. The Supreme Court is dangerously out of balance. We cannot afford to see Justice Stevens Reese placed by another Roberts or Ginsburg replaced by an Alito. Given the track record of this president and the experience of obfuscation of the hearing with respect to the Supreme Court, at least I will recommend to my colleagues that we should not confirm a Supreme Court nominee except in extraordinary circumstances."

I've also heard, don't look at the worded but the actions.

Senator Reid, Senator Schumer, when he was here, Senator Obama, and Senator Biden have all filibustered Supreme Court nominees when they were senators. All four of them have. Suddenly now this is a dangerous idea that will shut down justice and is completely unconstitutional and shouts of "do your job" come from the same Senate leaders who block untold nominations from Republican presidents and didn't allow amendments on basic bills.

There's a lot of emotion in this body; I get that. There's a lot of politics in this process. I would hope to bring some facts to light and to turn down the hyperbole and all the rhetoric. So let me bring some basic facts to this. The last time a Supreme Court vacancy arose in an election year and the Senate approved a new appointee to the court in that same year was 1932.

Since there's no nominee right now, it would not be possible to fill the vacancy in time for that individual to hear cases in the spring session of the supreme court, which means any nomination selected now would only be able to serve and hear arguments in the fall, which is a much shorter session of the Supreme Court, before this President actually leaves. We're talking about the final session at the end of this fall, a very few number of cases. Justice Stephen Breyer, just a few weeks ago, said about the passing of Justice Scalia, "We'll miss him but we'll do our work. For the most part it won't change." The Supreme Court is open and is working this week. In fact, the court hasn't halted at all. The court has heard ten cases already since justice Scalia's passing and they're continuing to release decisions. It's a myth that you have to have an uneven number of Justices for the Supreme Court to work.

In the past six years 80% of the cases were decided 6-3 or greater. So it's a small minority of the cases that ever get to a 5-4 decision and we don't know that that 5-4 would end up not being 5-3 at this point. Eight members can operate the court. In fact, the Constitution doesn't even give a specific number to the Justices. It's always been a decision of the President and the Congress together about how many justices are on the Supreme Court. The first Congress, for example, enacted the Judiciary Act of 1789, which stated the Supreme Court consists of a Chief Justice and five Associate Justices. If you're counting it up right, that's six Justices on the early Supreme Court. The size of the Court varied during the 19th century with the Courts shrinking to five justice for awhile, following the passing of the Judiciary Act of 1801, growing to as large as ten Justices in 1863. Then in 1869 Congress changed the number to nine where it has remained. But it doesn't need nine justices to decide a case.

Congress has established the quorum requirements to be only six. The Court ends in a tie decision of 4-4 or in the case of six Justices 3-3. The Court will not write an opinion or affirm the lower court or ask for reargument of the case. In other words, the Court is already set up to function and is functioning and it will continue to function with eight people. I would say what is really happening is the Democrats who implemented the nuclear option, while they were leading the senate and packed all the lower courts, urgently want to be able to pack the Supreme Court as well. That will not happen.

We will also not allow a recess appointment. That has been floated multiple times in the media – that the President will just do a recess appointment and go around us. The Senate chooses when the Senate is in recess. Not the President.

So we can do this. We can remain in continuous session without recess to prevent a recess appointment by this President through the rest of this year. I and many of my Republican colleagues have already agreed to be in Washington every three days for the rest of this year to gavel in this body in pro Forma session, so that this President cannot put in a recess appointment Judge. Ironically enough, this right of the Senate was just affirmed by the Supreme Court just a few years ago by a 9-0 ruling when this President tried to force in new members of the national labor relations board through a recess appointment, and this supreme court kicked those out saying the president cannot choose when the senate is in recess. Our nation faces really big issues, accelerating debt, threats from terrorism, struggling economy, major education and health care reform issues.

This is a moment when the people of the United States should speak about the direction of our nation. We are still a nation of the people, by the people, for the people. And for the next President and for the next Supreme Court nomination, we should let the people decide. With that, I yield the floor.