

gone in a year. We will wait until after the election. No. They said the Constitution requires President Reagan to send the Senate a name, and it requires the Senate to advise and consent, and they did. They had a hearing and they had a vote and Anthony Kennedy, a Ronald Reagan appointee to the Supreme Court, was sent to the Supreme Court by President Ronald Reagan with the support of the Democratic Senate majority. That is consistent with the Constitution.

I hope we can return to that, and I hope that future generations will judge that this Senate under the control of the Senate majority party is going to live by the words of our Constitution.

As I mentioned, a number of prominent historians and scholars from across the political spectrum sent a letter to President Obama about the current vacancy on the Supreme Court.

This letter provides a helpful historical perspective on the decision by Senate Republicans not to give any consideration to the forthcoming Supreme Court nominee.

The letter begins by saying:

We express our dismay at the unprecedented breach of norms by the Senate majority in refusing to consider a nomination for the Supreme Court made by a president with 11 months to serve in the position. . . .

It is standard practice when a vacancy occurs on the Supreme Court to have a president, whatever the stage in his term, nominate a successor and have the Senate consider it. And standard practice (with limited exception) has been for the Senate, after hearings and deliberation, to confirm the president's choice, regardless of party control, when that choice is deemed acceptable to a Senate majority.

The letter notes that history is, "replete with instances where a vacancy on the Supreme Court was filled during a presidential election year."

This includes 1988 under President Reagan; 1940 under President Roosevelt; 1932 under President Hoover; 1916 for two nominees named by President Wilson; and 1912 under President Taft.

The letter also discusses how President Eisenhower used his recess appointment power in the presidential election year of 1956 to appoint Justice William Brennan. Eisenhower, a Republican, made that recess appointment on October 16 while the Senate was under Democratic control.

The letter says, "there was no objection to Eisenhower's use of the recess appointment—there was instead a widespread recognition that it was bad to have a Supreme Court operate for months without its full complement of nine members."

The letter then shifts from the lessons of history to the logical fallacies of the Republicans' position that a nominee of a so-called lameduck President should not be considered. Here's what it says:

If we accept the logic that decisions made by "lame duck" presidents are illegitimate or are to be disregarded until voters make their choice in the upcoming election, that

begs both the questions of when lame duck status begins (after all, a president is technically a 'lame duck' from the day of inauguration), and why senators up for reelection at the same time should not recuse themselves from decisions until the voters have decided whether to keep them or their partisans in office.

The letter ultimately concludes that, "the refusal to hold hearings and deliberate on a nominee at this level is truly unprecedented and, in our view, dangerous."

I hope my Republican colleagues heed the words of these preeminent historians.

There will be real consequences if the Senate fails to do its job and leaves a Supreme Court vacancy open for an extended time.

As President Ronald Reagan said in 1987, quote, "Every day that passes with a Supreme Court below full strength impairs the people's business in that crucially important body."

Major legal and constitutional questions are constantly brought before the Supreme Court for national resolution. When a case ends up with a tie vote among the Justices, the Supreme Court's ruling has no precedential impact and important questions go unresolved.

As Gregory Garre, former Solicitor General under President George W. Bush, recently said, "the prospect of numerous 4-4 ties or dismissals would be undesirable to the Court."

Millions of Americans are awaiting resolution of the questions that are before the Court. It is not fair to leave them twisting in the wind.

Consider the impact on the efforts of law enforcement to protect our communities.

On February 23, four former United States Attorneys wrote an op-ed in the Cincinnati Enquirer.

They said:

For federal prosecutors, agents and criminal investigations, a year is a lifetime. We have seen real threats, whether it is the heroin epidemic or the threat of ISIS recruitment, facing the people in our communities each day. While law enforcement stands ready to protect the public from those threats, they need to know the rules of the road.

The op-ed continues:

The Supreme Court is the ultimate arbiter of the hardest and most important questions facing law enforcement and our nation. Even as we write today, unsettled legal questions regarding search and seizure, digital privacy and federal sentencing are either pending before the Supreme Court or headed there. It is unfair and unsafe to expect good federal agents, police and prosecutors to spend more than a year guessing whether their actions will hold up in court. And it is just as unfair to expect citizens whose rights and liberties are at stake to wait for answers while their homes, emails, cell phones, records and activities are investigated.

We expect our law enforcement agents and prosecutors to do their job every day, even in election years. We should expect Senators to do their jobs as well and fill this Supreme Court vacancy.

Earlier this week, 356 constitutional law scholars wrote a letter to the Senate, explaining that "a long term vacancy jeopardizes the Supreme Court's ability to resolve disputed questions of federal law, causing uncertainty and hampering the administration of justice across the country."

Justice Scalia, in a 2004 memorandum discussing the Supreme Court's recusal policy, noted the problems the Court faces when only eight Justices hear a case. He said that when the Court proceeds to hear a case with eight Justices, it "rais[es] the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case." He then went on to note that under the Supreme Court's Statement of Recusal Policy, "even one unnecessary recusal impairs the functioning of the Court."

Why would the Senate purposefully try to impair the functioning of the Supreme Court by leaving it with only eight Justices?

The Senate should do its job and consider a Supreme Court nominee so the Court can function like it's supposed to. I urge my Republican colleagues to do their job. Give the President's nominee a hearing and a vote.

I yield the floor.

The PRESIDING OFFICER. The majority leader.

MORNING BUSINESS

Mr. MCCONNELL. 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.

ORPHAN DRUGS

Mr. HATCH. Mr. President, in light of recognition of Rare Disease Day, I wish to speak about orphan drug exclusivity and trade promotion authority.

Congress enacted the bipartisan Orphan Drug Act, "ODA", of 1983, Pub. L. 97-414, to address a longstanding unmet need to develop new treatments, diagnostics, and cures for rare diseases and disorders. I am proud to be one of the lead Senate sponsors of the ODA, which was passed with overwhelming bipartisan support. This act and the Rare Diseases Act of 2002—which I also championed—created financial incentives for the research and production of orphan drugs, including 7 years of market exclusivity, tax credits, and research grants, and also established the Orphan Products Board at FDA and the Office of Rare Diseases under the National Institutes of Health.

The purpose of these acts was to encourage the development of new "orphan" treatments, diagnostics, and cures for the millions of Americans with rare disease who lacked access to effective medicines because the existing incentives were insufficient to develop and market drugs for such small groups of patients.