AUTHORITY FOR COMMITTEES TO MEET

COMMITTEE ON ARMED SERVICES

Mrs. CAPITO. Mr. President, I ask unanimous consent that the Committee on Armed Services be authorized to meet during the session of the Senate on September 27, 2016, at 9:30 a.m.

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

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

Mrs. CAPITO. Mr. President, I ask unanimous consent that the Committee on Commerce, Science, and Transportation be authorized to meet during the session of the Senate on September 27, 2016, at 10 a.m., in room SR–253 of the Russell Senate Office Building to conduct a hearing entitled ''Oversight of the Federal Trade Commission.''

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

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

Mrs. CAPITO. Mr. President, I ask unanimous consent that the Committee on Homeland Security and Governmental Affairs be authorized to meet during the session of the Senate on September 27, 2016, at 10 a.m., to conduct a hearing entitled ''Fifteen Years After 9/11: Threats to the Homeland.''

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

COMMITTEE ON FOREGN RELATIONS

Mrs. CAPITO. Mr. President, I ask unanimous consent that the Committee on Foreign Relations be authorized to meet during the session of the Senate on September 27, 2016, at 2:30 p.m.

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

SELECT COMMITTEE ON INTELLIGENCE

Mrs. CAPITO. Mr. President, I ask unanimous consent that the Select Committee on Intelligence be authorized to meet during the session of the Senate on September 27, 2016, at 10 a.m., in room SH–216 of the Hart Senate Office Building.

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

APPOINTMENT

The PRESIDING OFFICER. The Chair, on behalf of the President pro tempore, pursuant to Public Law 110–315, announces the reappointment of the following individual to be a member of the National Advisory Committee on Institutional Quality and Integrity: Dr. Paul LeBlanc of New Hampshire.

ORDERS FOR WEDNESDAY, SEPTEMBER 28, 2016

Mr. BOOZMAN. Mr. President, I ask unanimous consent that when the Senate completes its business today, it adjourn until 9:30 a.m., Wednesday, September 28; that following the prayer and pledge, the morning hour be deemed expired, the Journal of proceedings be approved to date, and the time for the two leaders be reserved for their use later in the day; further, that following leader remarks, the Senate resume consideration of H.R. 5325 until 10 a.m.; finally, that at 10 a.m., the Senate resume consideration of the veto message to accompany S. 2040, as under the previous order.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

ORDER FOR ADJOURNMENT

Mr. BOOZMAN. Mr. President, if there is no further business to come before the Senate, I ask unanimous consent that it stand adjourned under the previous order, following the remarks of the Senator from Colorado, Mr. BENNET.

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

The Senator from Colorado.

NOMINATION OF MERRICK GARLAND

Mr. BENNET. Mr. President, I am privileged to be here with the Presiding Officer this evening. I thank my colleague from Arkansas for allowing me to speak at this time.

I rise to discuss the vacancy on the Supreme Court. Nearly 200 days have passed since the President nominated Judge Merrick Garland to fill the Supreme Court vacancy. Yet the majority still refuses to hold a hearing on his record or a vote on his nomination. As a result, Judge Garland is now the longest pending nominee in the Nation's history.

Next week, the Supreme Court will reconvene for a new term with one seat still vacant. I remember reading Justice Scalia's opinion in a case where he described an eight-member Court as a diminished Court. That was the language he used. We now have a Supreme Court that, not just in one term but in two terms, has been diminished by the inability of this Senate to confirm a nominee.

There is no doubt that anybody with any sense can see this has been an unconventional period in American politics, to say the least, but in many cases, the majority's refusal to even consider Judge Garland's nomination is the most egregious example of Washington dysfunction I have seen.

Within an hour of Justice Scalia's death, the majority leader unilaterally decided the Senate would not consider the President's nominee, even though 342 days remained in the President's term. By taking this unprecedented action, the majority leader hoped that the next President would nominate someone with the same originalist judicial philosophy as Justice Scalia. Indeed, that is what some of my colleagues have said. Waiting would allow the next President to ''nominate a justice who will continue Justice Scalia's unwavering belief in the founding principles we hold dear.'' Another said that we should wait so as to ''preserve the conservative legacy of the late Antonin Scalia.'' By taking this position, they have made clear that they want the next President—perhaps Donald Trump—to replace an originalist such as Antonin Scalia with another originalist. But by taking this approach, the majority leader has radically departed from the plain language of the Constitution and more than 200 years of historic precedent in this Chamber.

As an originalist—and he certainly was—Justice Scalia would interpret the Constitution by examining the meaning of the words when it was enacted.

Article II, section 2 of the Constitution states: ''[The President] shall nominate, and by and with the Advice and Consent of the Senate shall appoint . . . Judges of the Supreme Court.'' When a vacancy arises, the President has an affirmative duty to nominate a replacement, and the Senate, in return, has an affirmative duty to advise and consent. That is what the plain language of the Constitution requires, and that is what the original meaning would have been.

But beyond the text of the Constitution, we should also consider the traditions of our predecessors in this Chamber. Members of the majority seem eager to make this point. One of our colleagues said that ''we should follow a tradition embraced by both parties and allow his successor to select the next Supreme Court Justice.'' Another said: ''There is significant precedent for holding a Supreme Court vacancy open through the end of a president's term in an election year.'' The truth is exactly the opposite. In fact, the majority's position today is absolutely unprecedented in the history of the United States or the history of the U.S. Senate.

Recently, Professors Robert Kar and Jason Mazzone combed through the history of Supreme Court nominations and Senate confirmations for a piece I believe appeared in the NYU law journal. Since the founding of the country, there have been 103 instances similar to the moment we face today, where an elected President nominated a person to fill a vacancy before the election of the successor—where an elected President nominated an individual to fill a vacancy before the election of his successor.

The professors found that in all 103 instances, the sitting President was able to both nominate and appoint a replacement Justice by and with the advice and consent of the Senate. The professors further wrote: ''This is true even of all eight such cases where the nomination process began during an election year.''

That is the history. That is the precedent. So when we hear people

come to the floor and say the customary practice has been to do this or that, it is not true. I sometimes wonder why people who are committed originalists are out here talking about the customary practice at all because it ought to be the plain meaning of the Constitution folks are following, but if we are going to talk about the customary practice, let's talk about what has actually happened rather than inventing it on the floor of the Senate.

For the last 200 days, the majority has argued we should, for the first time ever—ever—depart from this 200-year tradition. I will say this on this floor: There is nothing conservative about that position. That is a radical position, at war with the Founders' view of this. When the chairman of the Judiciary Committee said that ''the fact of the matter is that it's been standard practice''—his language—''to not confirm Supreme Court nominees during a presidential election year,'' he was incorrect.

The fact is, the standard practice in the Senate is just as clear as the plain text and the original meaning. If the sitting President nominates an individual to fill a Supreme Court vacancy, the Senate acts with an up-or-down vote.

I should say I am not here to say anybody should vote for the nominee. That is a matter of conscience for every single Member of the Senate, but our job is to have a vote. When Members of the majority say things like, ''It's been 80 years since any President was permitted to immediately fill a vacancy that arose in a presidential election year,'' they fail to mention that in the past 80 years a vacancy has not arisen on the Supreme Court in an election year at all.

The 80-year time period the majority highlights is precisely the 80-year period in which no Supreme Court vacancies occurred during an election year. If you go back just one more election—84 years ago—you will find a case from 1932 that is very similar to ours today. On February 25 of that election year, President Hoover nominated Benjamin Cardozo to replace Justice Holmes on the Supreme Court. The Senate confirmed Cardozo 9 days later.

So when Senators come to the floor and say we have an 80-year precedent of not confirming Justices at this moment in a President's term, that is only because there hasn't been a vacancy. I might as well say we have an 84-year precedent where we do confirm Justices in the last year because that is what happened 84 years ago with Justice Cardozo.

The Senate also confirmed three other Supreme Court nominees in election years in the 20th Century—twice in 1916 and once in 1912. So I can extend my 84-year precedent farther back into history.

Through their research, Professors Kar and Mazzone found only six cases where the Senate acted consistent with today's majority—to deliberately ignore the President's nominee for a Supreme Court vacancy and wait for the successor—but none of these cases is analogous in any way to the vacancy we face in this Senate.

In those six cases, there were questions about the sitting President's legitimacy, either because that President had assumed office by succession, unlike the current President, who was elected to the Presidency and then reelected to the Presidency, or because the nominations came after the election of the next President, which we know is not the case today because the vacancy occurred 340 or so days before the end of the President's term, and anybody watching television last night would know we have yet to select the next President of the United States.

What is amazing is that even in the remaining 13 cases, where there was some question about legitimacy or it was after the successor had been elected, the Senate still confirmed a majority of the President's nominees. Six were the minority, where they weren't confirmed. The rest they confirmed.

To suggest this President, whom the American people elected twice, should not be able to fill a Supreme Court vacancy is a radical departure from the Constitution's text and the Senate's historical practice. As the professors conclude, the majority's actions are ''unprecedented in the history of Supreme Court appointments.''

Whether by interpreting the original meaning of the Constitution or by following standard practice, every other Senate has acted, not by refusing to consider the nomination or stalling until after an election or waiting for the next President to make a nomination but by having a debate in full view of the American people and to give the nominee an up-or-down vote.

As I said earlier, of course the majority can withhold its consent by voting no. That is their constitutional prerogative. That is what it did in 1987, when the full Senate voted against Robert Bork, even after the Judiciary Committee conducted full hearings and a majority voted against his nomination.

The Constitution doesn't say the Judiciary Committee shall advise and consent. It says the Senate shall advise and consent, and that is what a majority of the Senate did in 1795, when it rejected George Washington's nomination of Justice John Rutledge as Chief Justice. By the way, that Senate—which unlike ours actually included some of the Framers who wrote the Constitution—went on to confirm three nominees, all in the fourth year of George Washington's second term—all in the eighth year that George Washington was President.

This was true in 1968, when there were serious concerns about President Johnson's nominee, Justice Abe Fortas, to replace the outgoing Chief Justice. Even then, in President Johnson's final months in office, the Senate held confirmation hearings and floor debates. The Senate had a full and public debate on the merits of the nominee.

In fact, as the professors found, only 12 nominations out of 160 over the entire course of the history of the United States failed to reach the Senate floor. Most of these were made near the end of a legislative session or were later withdrawn by the President, but in every other instance, the Senate brought the nomination to the Senate floor for a full debate and consideration.

If today's majority is concerned with the American people having a voice on who the next Supreme Court Justice is, we should follow our ordinary procedures and allow our representatives in the Senate to consider the merits of the President's nominee. We have denied the American people a debate in a runup to an election. When we should be debating what the composition of the Supreme Court should look like, when we should be debating what is at stake in this Presidential election, our floor is empty.

I say, again, this action has been taken in the name of conservatism. There is nothing conservative about this—nothing. This is a radical departure from standard practice. It is a threat to our democracy. It is a threat to judicial oversight. It is a threat to the rule of law. It is lawless.

What makes this even worse is that the majority's failure to fulfill our constitutional responsibilities isn't even about policy, it is about politics. It is about rolling the dice on an election, instead of following the plain text of the Constitution and more than two centuries of Senate tradition in the history of the United States.

We have had more than enough time to consider the merits of Judge Garland's nomination. The American people have watched the U.S. Senate take the entire summer off and not do our job. In fact, as some of my colleagues have noted, this Senate has worked fewer days this year than any Senate in 60 years, and a lot of those Senates didn't have a Supreme Court vacancy to fill.

By refusing to consider the President's Supreme Court nominee for nearly 200 days, the majority is creating, I fear—I hope not—a new precedent, one that threatens to shape future vacancies to the Court and further politicizes the one branch of our government that is meant to be above the partisan bickering that has paralyzed this institution.

It is one thing for people in this body to drive the approval rating of the U.S. Congress down to 9 percent, and that is a feat—that is a feat—but to denigrate another institution of government this cavalierly for politics is wrong.

The longer this vacancy remains, the more uncertainty and confusion the American people will suffer. Petty politics is now jeopardizing, as I said earlier, not just one but two terms of the Supreme Court. We have to reject this unprecedented abdication of our most

basic constitutional obligation. This is one of those things that is written in the Constitution, and there is no one else assigned the duty of doing it other than the Senate. The House has no responsibility.

Some people here have said let the people decide. As I said earlier, the best way of letting the people decide is by having an open debate in the Senate. But the Constitution doesn't actually say let the people decide, it sets up what we ought to be doing.

I fear that if we start here, where will it end? If a President can't have his nominee considered over 300 days from an election, why not 2 years or 4 years from an election? Why not routinely hobble the Supreme Court until you get your way, until you have your President and your majority? Until then, we will not do the American people's business.

Even if the Constitution does not in fact oblige us to consider President Obama's nominee, it is, nevertheless, it seems to me, our duty as responsible public servants to do so and the American people's obligation to hold elected officials accountable and demand a full, functioning judiciary.

Believe me, I know it has become fashionable for Washington to tear down rather than work to improve the democratic institutions generations of Americans have built, but as I said, to impair so cavalierly the judicial branch of our government is unacceptable. It doesn't meet the standard of a great nation or a great parliamentary body. Comity and cooperation will not be restored overnight or with a single decision in this Senate. It has taken far too long for us to travel down this destructive road to deadlock, ideological rigidity, and bitter partisanship. Even with all of that, the least we could do is follow centuries of tradition and practice, preserve the judiciary from the partisanship that has paralyzed much of the other two branches, and act as conservatives by fulfilling one of our most fundamental duties as elected representatives.

It is long past time for the Senate to do its job, as every Senate before us since its founding has done.

Mr. President, I yield the floor.

ADJOURNMENT UNTIL 9:30 A.M. TOMORROW

The PRESIDING OFFICER (Mr. DAINES). The Senate stands adjourned until 9:30 a.m. tomorrow.

Thereupon, the Senate, at 6:44 p.m., adjourned until Wednesday, September 28, 2016, at 9:30 a.m.

NOMINATIONS

Executive nominations received by the Senate:

THE JUDICIARY

JULIE REBECCA BRESLOW, OF THE DISTRICT OF COLUMBIA, TO BE AN ASSOCIATE JUDGE OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA FOR THE TERM OF FIFTEEN YEARS, VICE RHONDA REID WINSTON, RETIRED.

DEBORAH J. ISRAEL, OF THE DISTRICT OF COLUMBIA, TO BE AN ASSOCIATE JUDGE OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA FOR THE TERM OF FIFTEEN YEARS, VICE MELVIN R. WRIGHT, RETIRED.

CARMEN GUERRICAGOITIA MCLEAN, OF THE DISTRICT OF COLUMBIA, TO BE AN ASSOCIATE JUDGE OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA FOR THE TERM OF FIFTEEN YEARS, VICE STUART GORDON NASH, RETIRED.

IN THE NAVY

THE FOLLOWING NAMED OFFICER FOR APPOINTMENT IN THE UNITED STATES NAVY TO THE GRADE INDICATED UNDER TITLE 10, U.S.C., SECTION 624:

To be rear admiral (lower half)

CAPT. PAUL A. STADER