

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.

The ODA has been enormously successful. Before Congress enacted the ODA in 1983, the Food and Drug Administration, FDA, approved only 38 drugs in the United States specifically to treat orphan diseases. From the passage of the ODA in 1983 until May 2010, the FDA approved 353 orphan drugs and granted orphan designations to 2,116 compounds. As of 2010, 200 of the roughly 7,000 officially designated orphan diseases have become treatable.

Yet, despite the benefits of these policies, the incentives and access guarantees found in the ODA are not yet part of any free trade agreement negotiations.

The Bipartisan Congressional Trade Priorities and Accountability Act of 2015, or TPA, contain a number of negotiating objectives for the administration to follow. For example, the TPA law's negotiating objectives require that U.S. trade agreements provide a standard of intellectual property rights protection that is similar to that found in the United States, which includes providing incentives for biopharmaceutical innovation that are similar to those in the United States. The language in the TPA law is necessarily broad, and although it does not explicitly reference critical incentives for orphan drug development, I want to make it clear that these incentives, including the 7-year market exclusivity at the heart of the ODA, are consistent with the TPA law's requirement that U.S. trade agreements provide a standard of intellectual property protection that is similar to U.S. law.

This is especially important because vital incentives for orphan drug development are lacking in many markets outside the United States, hindering the development of treatments, diagnostics, and cures for rare diseases—particularly diseases endemic to those markets. A lack of incentives for orphan drug development in any one country can have a very real impact on the likelihood of investment into a research or cure for a given disease. Particularly in the case of ultra-rare diseases, those affecting fewer than 1 in 50,000 individuals, there may only be a handful of patients around the world who would benefit from a particular treatment or cure, and removing a number of them from the pool of potential patients may render investments in these therapies untenable and could drive up costs for rare disease patients in the United States.

Therefore, I want to make it clear that I believe it is appropriate for the administration to negotiate ODA incentives and access guarantees, including the 7-year market exclusivity period, in future U.S. trade agreements and that the intent of Congress is that TPA's negotiating objectives are consistent with that goal.

ARMS SALES NOTIFICATION

Mr. CORKER. Mr. President, section 36(b) of the Arms Export Control Act

requires that Congress receive prior notification of certain proposed arms sales as defined by that statute. Upon such notification, Congress has 30 calendar days during which the sale may be reviewed. The provision stipulates that in the Senate the notification of proposed sales shall be sent to the chairman of the Senate Foreign Relations Committee.

In keeping with the committee's intention to see that relevant information is available to the full Senate, I ask unanimous consent to have printed in the RECORD the notifications which have been received. If the cover letter references a classified annex, then such annex is available to all Senators in the office of the Foreign Relations Committee, room SD-423.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

DEFENSE SECURITY COOPERATION AGENCY, Arlington, VA, March 9, 2016.

Hon. BOB CORKER, Chairman, Committee on Foreign Relations, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 15-81, concerning the Department of the Air Force's proposed Letter(s) of Offer and Acceptance to Indonesia for defense articles and services estimated to cost \$95 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

J.W. RIXEY, Vice Admiral, USN, Director.

Enclosures.

TRANSMITTAL NO. 15-81

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

- (i) Prospective Purchaser: Indonesia.
(ii) Total Estimated Value:

Table with 2 columns: Category, Value. Major Defense Equipment* \$ 80 million. Other 15 million. Total 95 million.

(iii) Description and Quantity or Quantities of Articles or Services Under Consideration for Purchase:

Major Defense Equipment (MDE): Thirty-six (36) AIM-120C-7 Advanced Medium-Range Air-to-Air Missiles (AMRAAMs), One (1) Missile Guidance Section.

Non-Major Defense Equipment (non-MDE): Control section support equipment, spare parts, services, integration activities, logistics, technical contractor engineering and technical support, loading adaptors, technical publications, familiarization training, test equipment, and other related elements.

(iv) Military Department: Air Force (X7-D-YAB).

(v) Prior Related Cases, if any: None.
(vi) Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: None.

(vii) Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold: See Attached Annex.

(viii) Date Report Delivered to Congress: March 9, 2016

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Indonesia-AIM-120C-7 Advanced Medium-Range Air-to-Air Missiles (AMRAAMs)

The Government of Indonesia has requested a possible sale of thirty-six (36) AIM-120C-7 AMRAAMs and one (1) Missile Guidance Section. Also included in this possible sale are: control section support equipment, spare parts, services, logistics, technical contractor engineering and technical support, loading adaptors, technical publications, familiarization training, test equipment, and other related elements. The total estimated value of MDE is \$80 million. The overall total estimated value is \$95 million.

This proposed sale contributes to the foreign policy and national security of the United States by helping to improve the security of a key partner that has been, and continues to be, an important force for political stability and economic progress in the Asia-Pacific region.

The proposed sale improves Indonesia's capability to deter regional threats and strengthen its homeland defense. Indonesia is able to absorb this additional equipment and support into its armed forces.

The proposed sale of this equipment and support does not alter the basic military balance in the region.

The prime contractor will be determined by competition. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any U.S. Government or contractor representatives to Indonesia.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

TRANSMITTAL NO. 15-81

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

Annex Item No. vii

(vii) Sensitivity of Technology

1. AIM-120C-7 Advanced Medium Range Air-to-Air (AMRAAM) is a radar-guided missile featuring digital technology and micro-miniature solid-state electronics. AMRAAM capabilities include look-down/shoot-down, multiple launches against multiple targets, resistance to electronic countermeasures, and interception of high flying, low flying, and maneuvering targets. The AMRAAM All Up Round is classified CONFIDENTIAL. Major components and subsystems are classified up to CONFIDENTIAL, and technology data and other documentation are classified up to SECRET.

2. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures or equivalent systems that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

3. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification. Moreover, the benefits to be derived from this sale, as outlined in the Policy Justification, outweigh the potential damage that could result if the sensitive technology were revealed to unauthorized persons.

4. All defense articles and services listed in this transmittal have been authorized for release and export to Indonesia.

REMEMBERING JUSTICE ANTONIN SCALIA

Mr. CASEY. Mr. President, today I wish to remember Justice Antonin