



Written by [Selwyn Duke](#) on February 17, 2016

## Bernie Sanders: Obama Has “Constitutional Right” to Appoint Scalia Replacement

The Left sure likes rights; so much so that it even invents them. The latest example is presidential contender Bernie Sanders’ (shown) claim that Barack Obama has a “constitutional right” to appoint the late Justice Antonin Scalia’s successor. Of course, governmental branches don’t have “rights” — they have *powers*. Obama certainly has the power to nominate a Supreme Court justice. And the Senate has the power to confirm that individual or not do so.



Senator Sanders made the comment in an interview with *Face the Nation*’s John Dickerson on Sunday (video below). Addressing a Republican intention to not consider any of Obama’s nominees so close to the November election, the avowed socialist [said](#), “The idea that Republicans want to deny the president of the United States his basic constitutional right is beyond my comprehension.” Sanders repeated this mistaken notion just one answer later, insisting that “we cannot allow the Republican majority in the Senate to deny the president his basic constitutional right.”

And apparently this threatens to become a leftist narrative. Politics USA, the source linked in the second paragraph, mindlessly echoed Sanders’ notion, calling the GOP stance an “absurd denial of President Obama’s basic constitutional right.” The online Huffington Post also chimed in; reporting on Hillary Clinton’s criticism of the Republicans, the site [wrote](#) that she “fiercely defended President Barack Obama’s constitutional right to appoint a replacement for Supreme Court Justice Antonin Scalia.”

Note that it doesn’t appear Clinton herself actually called the presidential power to nominate Supreme Court justices a “right.” Yet she still made some demagogic statements. As the *Post* wrote, “‘Barack Obama is president of the United States until Jan. 20, 2017, and that is a fact, my friends, whether the Republicans like it or not,’ the Democratic presidential candidate told Colorado Democrats at a dinner Saturday night. ‘Elections have consequences.’”

This is true. Yet the same can be said of senators: “They are representatives in the United States until Jan., and that is a fact, my friends, whether the Democrats like it or not. Elections have consequences.”

So it goes both ways. Inherent in the leftist narrative is that the president’s will should be viewed as the default and opposition to it as some kind of insurrection. In fact, many today call the latter “obstructionism,” as if Congress only exists to be a rubber stamp for the executive. But if that’s the case, what’s the point in even having a legislative branch? If unfettered executive rule is what Clinton, Sanders, and other leftists want, perhaps they should propose creating a constitutional amendment eliminating the branch(es) they consider superfluous.

Reality: There’s supposed to be “obstructionism.” The Founders gave us three *co-equal* branches of government precisely for the purposes of establishing a balance of power; thus, there will often be tugs-



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of-war among them. In the case at issue here, this again means that Obama can exercise his power to nominate a Court prospect, and the Senate can exercise its power to refuse to confirm the individual.

This, of course, is what representative government involves. One can certainly make the case that Obama speaks for millions who voted for him; likewise, however, senators speak for the millions who elected them. Yet Clinton, Sanders, and others seem to be proposing that only the will of those who elected Democrats should be actuated.

The *Post* also wrote, quoting Clinton, “The Republicans in the Senate and on the campaign trail who are calling for Justice Scalia’s seat to remain vacant dishonor our Constitution.[’] A former senator from New York, Clinton said the Senate ‘has a constitutional responsibility here that it cannot abdicate for partisan political reasons.’”

Actually, there is no “constitutional responsibility” here. The Constitution does not even state that there must be nine justices on the Court — it could be any number whatsoever. This is why Franklin Roosevelt could contemplate “packing the court” by increasing the number of justices. And there were fewer, and more, at one time. As the Federal Judicial Center [informs](#), prior to 1869, there was “a period of six years in which the number of authorized seats on the Supreme Court shifted from nine to ten to seven.”

Senate Republicans do have an ethical responsibility, however, to confirm only Court nominees who will abide by the Constitution.

Of course, some will cite “history” (what judges call “precedent”) as dictating that Justice Scalia must be replaced in a timely fashion. But let’s examine what the *Washington Post*’s David Bernstein [tells us](#) about this history:

Thanks to a VC commenter, I discovered that in August 1960, the Democrat-controlled Senate passed a resolution, S.RES. 334, [“Expressing the sense of the Senate that the president should not make recess appointments to the Supreme Court, except to prevent or end a breakdown in the administration of the Court’s business.”](#) Each of President Eisenhower’s SCOTUS appointments had initially been a recess appointment who was later confirmed by the Senate, and the Democrats were apparently concerned that Ike would try to fill any last-minute vacancy that might arise with a recess appointment.

And reporting on this, *American Thinker*’s Thomas Lifson [added](#), “The GOP opposed this, of course. Hypocrisy goes two ways. But the majority won. As it should this time.”

Then there’s left-wing New York senator Chuck Schumer. In 2007, when George W. Bush still had a year and a half remaining in his presidency, he [said](#) that we “should not confirm any Bush nominee to the Supreme Court, except in extraordinary circumstances.” Schumer’s statements were made while speaking to the leftist American Constitution Society and concluded with this promise: “I will do everything in my power to prevent one more ideological ally from joining [John] Roberts and [Samuel] Alito.” Now, of course, Republicans are making essentially the same vow.

And Schumer is calling it “obstructionism.”

Yet this issue really isn’t complicated. The Republicans should be clear that they will confirm an Obama appointee — provided the individual is a “strict originalist,” which is just a fancy way of saying “a justice who does his job.” If the candidate is anything but, he should get the boot, whether nominated by the current president or the next.

As with the Hippocratic Oath, it’s “First, do no harm.” It’s better to have a smaller, leaner and cleaner



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Court than one that considers the Bill of Rights the Bill of Suggestions.



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