**Statement of the Honorable Timothy K. Lewis (ret.),**
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**United States Senate**
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I've often observed that we are still engaged in the "unfinished work" Lincoln referred to at Gettysburg. Having the decency to grant Judge Merrick Garland a hearing and a vote just might advance that work, and thus our common faith, a bit further. It also might restore some civility to a constitutional process that, while always political, must elevate the interests of the Court and the country above all else.

For anyone who questions, as most Americans do, the Senate's treatment of Judge Garland's nomination to the United States Supreme Court, I am living proof that it doesn't have to be this way.

I am living proof that a Senate of one party can confirm an opposing party's nominee to an appellate court not just in an election year, but within one month of a presidential election.

In the fall of 1992, on the eve of the election, I was nominated by a Republican president to a seat on the United States Court of Appeals for the Third Circuit. I had a hearing before a Democratic-controlled Senate Judiciary Committee and was unanimously confirmed by a Democratic-controlled United States Senate on October 8, three weeks before the election.

In this instance and many others, conservative, moderate and liberal senators were willing to cross party lines and, with a rational approach to governance, do the work they were sent here to do. And on election-day, the party that allowed that hearing to proceed didn't suffer: it retained

its majority in the House and Senate, and it took the White House. No harm, no foul, and the Republic survived.

I realize, of course, that my nomination was only for the Third Circuit. A Supreme Court nomination is always different. But like many Americans, I'm left wondering just what has gone so wrong in the twenty-four years since?

How did we arrive at this moment?

*Fifty-six minutes* after the official announcement of Justice Scalia's death, Majority Leader McConnell announced that the "vacancy should not be filled until we have a new president" because it's an election year and this President is at the end of his second term. "Let the people decide who the next Justice should be in November," he said.

Putting aside the fact that the President still had nearly a year left in his term when Justice Scalia died, there is no support for Senator McConnell's reasoning in either history or the Constitution.

The Senator also failed to consider the impact such a significant delay might have on our justice system.

When the Supreme Court is evenly divided, as it has been in important cases and will continue to be until a new Justice is sworn-in, it simply affirms the lower court and sets no binding precedent. This deprives courts of appeal throughout the nation of the guidance they need to make informed judgments in many difficult cases before them. It also deprives lawyers of the direction and insight they need to advise clients properly and to frame issues for litigation. Matters appropriate for a broad and sweeping decision are instead relegated to far narrower ones to avoid a tie. This was borne-out just two days ago in an important religious exemption case

and in a case involving Article III standing. These were clearly "compromise decisions" that flow directly from a vacancy on the Court. Fewer cases are taken, affecting businesses and liberty interests and the direction of the country. Some of these are literally matters of life and death.

These are some of the very real consequences of the overt politicization of a solemn constitutional duty. We should all be deeply concerned about the ways in which it has already begun to influence judicial decision-making. And this could continue for another full term, conceivably.

But all of this pales compared to the subversion of an undeniable truth: "*the people" have already decided* – twice, in fact: in 2008, and again in 2012.

So when Chief Judge Garland was nominated, I was hopeful. I know Judge Garland. I am familiar with his career and his work on the bench. I was already aware of his bi-partisan support among senators I respect and admire; senators whose conscientious appeal might stem the tide and help restore the orderly administration of an historic process; senators who, at an earlier time, had privately shared with me their appreciation for bipartisanship in a difficult Supreme Court nomination.

Here, I thought, is a consensus nominee: moderate in tone and temperament; exceptional in competence and judgment; wise and experienced; well-qualified by background and education; a former prosecutor who is tough on crime, follows established precedent, builds consensus, remains faithful to congressional intent, and is universally regarded as fair.

If ever this President could offer a candidate acceptable to both sides of the aisle, Merrick Garland is straight out of central casting. But more than two months later, the Majority Leader and the Chair of the Judiciary Committee continue to refuse even to grant Judge Garland the courtesy of a hearing, let alone an up or down vote.

Perhaps the naysayer's fear that once "the people" hear from Judge Garland at a hearing, they will insist that he be confirmed. But isn't that the essence of democratic government? Accountability is at its core, always, which explains why every Supreme Court nominee since 1875 has received either a hearing or a vote. This is a cherished tradition we must honor with even greater fealty in moments of political and ideological divide.

To suggest that "the people" should decide through their vote for the next president ignores another fundamental tenet of democracy: *elections matter*. And because Barack Obama is still President, it's the *last* election, not the next one, that matters – at least to the question whether or not to grant his nominee a hearing and a vote.

To hold otherwise is to engage in a dangerous political gamesmanship, rooted in an unfortunate ideological fervor, that ultimately harms each branch of government. It weakens the authority of the Executive. It further polarizes an already dysfunctional Legislature. And it dilutes the effectiveness and capacity of the Judiciary. Worse, it contributes to a growing dialogue among friend and foe who wonder aloud if they are witnessing the decline of the greatest democracy ever known.

We are better than this.

Ten years ago, I appeared before the Judiciary Committee to testify on behalf of my former colleague on the Third Circuit, Sam Alito, who had been nominated by President Bush to serve on the Supreme Court. As someone with an active commitment to civil rights, as a pro-choice supporter of feminist causes who believes in progressive approaches to social issues and problems, I took a lot of heat for standing up for Sam Alito. I still do. But it was the right thing to do. I did not share his conservative ideology. But we had worked together for years, and I found him to be a good person and a fine judge: intellectually honest, highly principled, and well-qualified to serve on the Court, whether I agreed with him or not.

Most important, "the people" had spoken: he was the choice of the duly-elected President of the United States, the one occupying the Oval Office at that moment, not some unknown future president. And I said at the time, "though we did disagree, it was always respectful . . . and no one has a corner on the marketplace of ideas in terms of what is best, what is right . . . and it is very important that we maintain different approaches in pushing forward our jurisprudence. They do not have to be the same. In fact, I think it is contrary to the best interests of democratic government for there to be some monolithic approach to judicial decision-making on the United States Supreme Court or any other court."

Shortly after Justice Alito was confirmed, I attended a reception in his honor at the White House. Republican members of the Judiciary Committee approached me, one after the other, to thank me for my testimony. Two of them told me that without it the vote would have been much closer, and possibly even lost. They said it gave some of their colleagues in close election states "cover" to vote for the President's nominee. That was not my intention, I told them. I was simply there to bear witness on behalf of someone I knew well and respected, disagreed with often, and who was the President's choice and was eminently qualified.

Some of those very members still serve on the Committee today. Sadly, they are some of the loudest voices opposing a hearing for Judge Garland. I hope that things have not devolved so far in the years since that they can no longer risk the consequences of bipartisanship, not even for the sake of the country and the Constitution.

I refuse to accept that. I believe we rise above our differences to carry out our responsibilities as citizens, and our sworn duties as office holders. I believe that at our best, we do so not for political advantage but because honor and principle, and decency, compel it.

I believe we are only as good as the traditions we value, traditions we sustain through a dedication to something larger than our petty self-interests.

And I believe that the United States Supreme Court must remain above the fray, a symbol of our greatest aspirations as a society, as a people – as "the people."

Our work to preserve this principle remains unfinished. I urge the Committee to proceed with a hearing and a vote to help further enshrine it as a defining feature of our democracy.