Lugar	Risch	Thune
McCain	Roberts	Voinovich
McConnell	Sessions	Wicker
Murkowski	Shelby	

NOT VOTING—1

Vitter

The PRESIDING OFFICER. On this vote, the yeas are 61, the nays are 38. Three-fifths of the Senators duly chosen and sworn having voted in the affirmative, the motion is agreed to.

The majority leader.

Mr. REID. Mr. President, I ask unanimous consent that there now be 2 minutes of debate prior to a vote on the Murray motion to waive the applicable budget points of order, with the time equally divided and controlled between Senator GREGG and myself.

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

Mr. REID. I further ask unanimous consent that if the vote on the motion to waive is successful, then the Senate proceed to Executive Session to resume consideration of the Kagan nomination and that the time until 12 noon be equally divided and controlled between Senators LEAHY and SESSIONS or their designees; that beginning at 12 noon, there be 1 hour blocks of alternating time until 8 p.m. tonight, with the majority controlling the first hour block; with all time consumed on the Kagan nomination counting postcloture.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The Chair announces that the invocation of cloture renders the motion to refer out of order.

The majority leader.

Mr. REID. Mr. President, can we have order in the Senate? Senator GREGG wishes to be heard.

The PRESIDING OFFICER. The Senator from New Hampshire is recognized.

Mr. GREGG. Mr. President, I made a point of order dealing with the budget and the fact that this bill violates the budget, so I find myself once again rising with enthusiasm to defend the Democratic budget because that is what this bill violates. It is the Democratic budget that is violated in this bill. It increases the deficit in 2011 by $22 billion. That is not small change anywhere in this country. So $22 billion is what the budget deficit increase is next year as a result of this bill. That is why it violates the Democratic budget.

I congratulate my colleagues on the other side of the aisle for putting in place this point of order. I presume they would want to defend their own budget and defend this point of order because they do not want to run up the deficit by $22 billion in 2011.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. REID. Mr. President, my good friend, the senior Senator from the State of New Hampshire, whom I admire so much, had to be smiling when he said that. I think he was part of the time. This is paid for. He objects to how it is paid for. That is a new one here. So I ask that we overwhelmingly support the motion to waive by Senator MURRAY.

Mr. GREGG. Mr. President, I have a parliamentary inquiry.

The PRESIDING OFFICER. The Senator from New Hampshire will state it.

Mr. REID. Mr. President, the time is up. Time for a vote.

Mr. GREGG. Mr. President, a parliamentary inquiry is in order, isn't it?

The PRESIDING OFFICER. The Senator will state his inquiry.

Mr. GREGG. Did not the point of order lie? Is not the bill in violation of the Budget Act?

The PRESIDING OFFICER. The point of order would lie.

The question is on agreeing to the motion.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. KYL. The following Senator is necessarily absent: the Senator from Louisiana (Mr. VITTER).

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 61, nays 38, as follows:

[Rollcall Vote No. 225 Leg.]

YEAS—61

Akaka	Gillibrand	Nelson (NE)
Baucus	Goodwin	Nelson (FL)
Bayh	Hagan	Pryor
Begich	Harkin	Reed
Bennet	Inouye	Reid
Bingaman	Johnson	Rockefeller
Boxer	Kaufman	Sanders
Brown (OH)	Kerry	Schumer
Burris	Klobuchar	Shaheen
Cantwell	Kohl	Snowe
Cardin	Landrieu	Specter
Carper	Lautenberg	Stabenow
Casey	Leahy	Tester
Collins	Levin	Udall (CO)
Conrad	Lieberman	Udall (NM)
Dodd	Lincoln	Warner
Dorgan	McCaskill	Webb
Durbin	Menendez	Whitehouse
Feingold	Merkley	Wyden
Feinstein	Mikulski	
Franken	Murray	

NAYS—38

Alexander	Crapo	LeMieux
Barrasso	DeMint	Lugar
Bennett	Ensign	McCain
Bond	Enzi	McConnell
Brown (MA)	Graham	Murkowski
Brownback	Grassley	Risch
Bunning	Gregg	Roberts
Burr	Hatch	Sessions
Chambliss	Hutchison	Shelby
Coburn	Inhofe	Thune
Cochran	Isakson	Voinovich
Corker	Johanns	Wicker
Cornyn	Kyl	

NOT VOTING—1

Vitter

The PRESIDING OFFICER. On this vote, the yeas are 61, the nays are 38. Three fifths of the Senators duly chosen and sworn having voted in the affirmative, the motion is agreed to.

Mrs. MURRAY. Mr. President, I move to reconsider the vote.

Mrs. BOXER. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. LIEBERMAN. Mr. President, I supported cloture this morning on the bill to extend and phase out increases in the Medicaid funding for States, including Connecticut, and to provide additional money to help local school districts in Connecticut keep teachers in the classroom during the upcoming school year. This funding, which was fully offset, is necessary as we continue to recover from the recession that began in 2007.

However, I do have concerns with some of the rescissions from the Department of Defense budget that were used to pay for this funding, and I plan to work with Senator REID and others to ensure that, as this bill moves forward, none of the offsets affects the ability of our men and women fighting in Iraq and Afghanistan from carrying out their mission.

EXECUTIVE SESSION

NOMINATION OF ELENA KAGAN TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to executive session to resume consideration of the following nomination, which the clerk will report.

The assistant legislative clerk read the nomination of Elena Kagan, of Massachusetts, to be Associate Justice of the Supreme Court.

The PRESIDING OFFICER (Mr. DURBIN). The Chair announces that the time between now and 12 noon will be equally divided between the chairman of the Senate Judiciary Committee and the ranking Republican.

The Senator from Illinois is recognized.

Mr. BURRIS. Mr. President, over the last few weeks, many Americans have watched Supreme Court confirmation hearings that took place before the Senate Judiciary Committee. At times, the atmosphere was tense, but my colleagues on both sides of the aisle performed their solemn duty under the Constitution. They subjected the President's nominee to rigorous questioning and took a hard look at her qualifications.

At every turn, the nominee offered thoughtful testimony and proved herself to be a woman of powerful intellect and sound judgment.

Earlier this week I met with Solicitor General Elena Kagan in my office. I congratulated her on her nomination to the highest Court in the land. Then I asked her some tough questions of my own.

The power to advise and consent is not one this Senate should ever take lightly. As a trained lawyer and former attorney general of Illinois, I have a deep understanding of the Court's enormous impact on the lives of ordinary Americans. These nine individuals have the power to set binding precedent. They are trusted to navigate difficult legal ground, and in every case, they hand down rulings that carry the full weight of law.

There are no armies to back them up. There is no threat of violence; just a quiet force of a written opinion. That is what makes this country so remarkable. We are a nation of laws. We have dedicated ourselves to the principle of self-government. Although our legal landscape is consistently evolving, the Founders of this great Republic created a strong judiciary charged with interpretation of these laws and upholding the Constitution. So when this body considers a nomination to the Federal bench, it is a duty my colleagues and I take very seriously.

After speaking with Solicitor General Kagan on Tuesday, I am confident she will be a worthy addition to the Supreme Court. General Kagan's legal training is second to none, and her diverse experience will bring added depth to the highest Court in the land.

As a former law clerk, a private practice attorney, a professor, and dean of Harvard Law School, Elena Kagan has proven herself to be a world-class legal mind. As the current U.S. Solicitor General and as a former associate White House counsel, she possesses a keen understanding of current issues and a strong commitment to the values of public service.

As I take the floor today, she is poised to become the fourth female Justice ever to serve on the U.S. Supreme Court. More important, she will be the first Justice in many years who was not elevated to the Court from a lower court. I believe this will lend fresh perspective to the highest judicial body in our land that will bring new diversity to the Supreme Court and help to build debate rather than consensus.

It is our constitutional duty to shape a high Court that is inclusive of all considerations and points of view. Each ruling is grounded in tested reasoning and bound by the weight of precedent. If Elena Kagan is confirmed, I am confident she will help do just that. She will be a new, independent voice standing on the side of fairness and reason.

I urge my friends on both sides of the aisle to join me in supporting her timely confirmation.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Texas.

Mrs. HUTCHISON. Mr. President, I rise today to speak about the consequential vote the Senate is getting ready to take, probably tomorrow, on the nomination of Solicitor General Elena Kagan to the U.S. Supreme Court.

Without question, the advise-and-consent role of the Senate on Supreme Court appointments is very important. It is one of our most important constitutional duties. Like elections, Supreme Court appointments have consequences.

Nearly a year ago, this body considered the record, the judicial philosophy, and the statements of Justice Sonia Sotomayor. At the time, I vocalized my serious concerns about her second amendment views and her correlating judicial record on the Second Circuit Court.

When Ms. Sotomayor was questioned about these views during her confirmation hearing, she said:

> I understand the individual right fully that the Supreme Court recognized in Heller.

Which was the previous case that stated the second amendment is an individual right to keep and bear arms.

Because of her record in the Second Circuit on this issue, I was not convinced that she would uphold the Framers' intent that the right to keep and bear arms is, indeed, a fundamental individual right, and largely on her record on this issue I opposed her nomination.

Just last month, Justice Sotomayor voted with the minority on the McDonald v. City of Chicago case to uphold Chicago's gun ban. This minority opinion stated:

> I can find nothing in the Second Amendment's text, history, or underlying rationale that could warrant characterizing it as ''fundamental'' to protect the keeping and bearing of arms for private self-defense purposes.

That was a disappointment, but it was not a surprise. It reaffirms why we must thoroughly scrutinize the nominee's judicial philosophy and demonstrated adherence to the Constitution as we determine whether to support a nomination.

We have been faced with a somewhat unique confirmation process for Ms. Kagan. She has primarily worked in politics and academia rather than in the actual practice or adjudication of law. It is not a negative to me that she has not been a judge. I do think having a new perspective of a practicing lawyer or someone who has clearly stated and written extensively on their Constitutional views could be a good thing. But it also means that if you have someone who has not actually practiced law, there is not very much evidence on her methodology or viewpoints on major constitutional issues. We have to use the information we have to make a judgment.

I turn to the biggest incident in my mind that causes me to have great concerns about her nomination. It was Ms. Kagan's decision to ban military recruiters from Harvard's Office of Career Services when she was dean of the Harvard Law School. When my distinguished colleagues on the Judiciary Committee pressed her on this issue during her confirmation hearing, Ms. Kagan claimed that ''don't ask, don't tell'' violated Harvard's antidiscrimination policy. Thus, she denied our military equal access to some of the brightest new legal minds in the Nation, and she did so in a time of war.

This snub demeaned our military and defied Federal law. The U.S. Supreme Court unanimously disagreed with her actions in its 9-to-0 ruling on the Solomon Amendment.

In the Senate, we must strongly consider how Ms. Kagan's personal political views guided this and other decisions she has made while holding positions of authority. I am deeply concerned that Ms. Kagan will not exercise the impartiality that must be expected of any nominee seeking a lifetime appointment to our Nation's highest Court.

Another factor that troubles me is her apparent indifference to private property rights. During the confirmation hearings, my colleague from Iowa, Senator GRASSLEY, asked Ms. Kagan her view on the 2005 ruling on the eminent domain case Kelo v. the City of New London. Ms. Kagan evaded the constitutionality of private property rights and suggested that the goal of Kelo was to leave the issue to the States.

I do not believe the Supreme Court decision in Kelo did that. It actually empowered a local entity to trample private property rights that I believe are protected under the Constitution.

As I have already mentioned, we have less of a record to examine Ms. Kagan's qualifications because she has not been a judge. All Justices currently on the bench served as judges before their Supreme Court appointments. I do believe there is merit to bringing the perspectives of other sectors of the legal field to the Supreme Court. It is not a point against her at all that she was not a Federal judge.

However, Ms. Kagan also has had limited experience in actual legal practice, which provides us a very thin record on which to evaluate her judicial philosophy. Indeed, one statement she made that might give us a glimpse into her philosophy is from her Oxford graduate thesis in which she stated: ''It is not necessarily wrong or invalid'' for judges ''to mold and steer the law in order to promote certain ethical values and achieve certain social ends.''

She was a student when she wrote this, so I give her some leeway because she might have changed her views since then. But she did not say she changed her views when she had the opportunity to before the Judiciary Committee during her confirmation hearings. She has not disavowed judicial activism, which makes me think then perhaps that is a guiding principle in her thinking.

The experience we have to look at, specifically her tenure as dean of Harvard Law School, gives evidence of her personal views instructing her professional decisions in order to promote a social agenda.

I simply cannot reconcile Ms. Kagan's sparse record and my concerns about whether she can be an impartial arbiter of the law. I will say I think Ms. Kagan's academic record is excellent, and that is a major qualification we would expect of a Supreme Court nominee. She has certainly done good things with her life. But the areas where I am concerned, which would be the protection of the second amendment as an individual right, which was clearly the intent of the Framers of our Constitution and which the Supreme Court has already held to be the

doctrine of our country, I don't believe she is going to agree with that position from what she has said in her record, as thin as it is.

I have to say that I am very concerned about her position on the military, the respect for the military, the importance of the military in our great country, and the protection of freedom our military provides. To disallow military recruiters on the Harvard campus at the same location where everyone else offers their recruitment opportunities weighs heavily on me. In addition, her views on private property rights and the Supreme Court Kelo decision are directly opposite from mine and from what I believe are inherent Constitutional protections. I think the Supreme Court was wrong. Even people I have voted to confirm as a Senator on the Supreme Court, in my opinion, were wrong on the Kelo decision. I do think private property rights are part of the success of America and one of the strongest provisions in the Constitution that provides for our free enterprise system, as well as the rights of individuals.

I am not going to support Ms. Kagan's appointment.

Last but not least, I will say in weighing my responsibility as a Senator and looking at Supreme Court appointments and any Federal judicial appointment, but certainly for appointments to the highest Court in our land, Justices are there simply to be arbiters of the law. They are not elected and therefore have no real accountability to the people of our country. It is elected officials who make and implement the laws whom people always have had the ability to reject. That is part of the balance in our system. Our President is elected. Our Congress is elected. Congress makes the laws and the President signs or does not sign a law. The Supreme Court is a lifetime appointment. Because it is a lifetime appointment, the founders in their wisdom knew the Court should not be responsible for making law because they have not been elected by the people of our country and they will not have to face the electorate of our country. They need to have a judicial temperament and a view of the Constitution that says they are going to try to determine the intent, not try to change the intent, just because it differs from their particular views. Therefore, I am always very studied in my approach to Federal appointments that have a lifetime tenure because I think when they will not have to face any future electorate, when the people of our country will not have an opportunity to hold them accountable for what they have done, the Senate's advise and consent role is even more important. So I have to say that while I respect her as a person and as an academic, I cannot support her nomination to be a member of the U.S. Supreme Court.

Mr. President, I yield the floor, and I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. BURRIS). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. SPECTER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. SPECTER. Mr. President, I have sought recognition to comment on the reasons for my vote for the nomination of Solicitor General Elena Kagan to the Supreme Court and to comment more broadly on the status of the Court and the nomination process, which I have seen during my tenure in the Senate, where some 14 nominees have been submitted by Presidents.

I have sought 1 hour, which is the longest I can recollect asking to speak, because of the wide scope of issues which the Senate faces in its constitutional responsibility for the confirmation of Supreme Court Justices.

Early on, as I observed the nominees, I came to the conclusion that nominees would answer only about as many questions as they thought they had to to be confirmed. The nomination process during my tenure reached the most extreme point of nonanswers during the confirmation in 1986 of Justice Scalia.

Justice Scalia stated in advance that he would not talk about ideology or philosophy. I saw Justice Scalia at the 90th birthday party of a distinguished American, former Secretary of Transportation, Bill Coleman, and in a group of people I joked a little and I said: Mr. Justice Scalia, even prisoners of war have to give name, rank, and serial number. When your nomination was up you would only give your name and rank—which was in a light spirit, and he took it that way. But virtually no answers were given during the course of that proceeding, and he was confirmed unanimously, 98 to nothing.

At that time, Senator DeConcini and I were considering a resolution to establish standards for the Senate to require responses by nominees. But then, in 1987, the confirmation proceeding of Judge Bork occurred. In that proceeding Judge Bork answered many questions which, in fact, he had to because he had such an extensive so-called paper trail. He had written a very famous Law Review article in 1971 in the University of Indiana Law Review on the doctrine of original intent. If we look to original intent, for example, when the 14th amendment was adopted, equal protection, the galleries in this Chamber were segregated. That was hardly a standard that could be applied in an era of Brown v. Board of Education, and it was not. We have a Constitution which evolves in accordance with the changing values of our society, and Judge Bork was compelled to answer a great many questions.

So Senator DeConcini and I shelved our idea to try to find some standards, but then in the intervening nominations we had nominees revert to form, answering only as many questions as they thought they had to in order to be confirmed and not to have any significant disclosures on ideology or philosophy. I thought, when we had the nomination of Elena Kagan, that there would be an opportunity for greater insights because she had written a now famous Law Review article for the University of Chicago, in 1995, sharply criticizing Supreme Court nominees by name and sharply criticizing the Senate. She said in that article that Justice Ginsburg and Justice Breyer had stonewalled, had not given any meaningful answers. She criticized the Senate for, in effect, letting them get away with that.

But during the confirmation proceedings of Ms. Kagan, it was a repeat performance, and the issue was brought and I shall illustrate it with one line of questioning which I asked her. It was about what was the requisite record that Congress had to have to uphold the constitutionality of legislation it passes. The standard had been, for decades, that if there was a rational basis for the legislation, it would be upheld. That was the standard in the Wirtz case in 1968, articulated by Justice Harlan.

Then, in a sharp departure, in 1997 in a case captioned City of Boerne, the Supreme Court plucked out of thin air a new standard for the adequacy of a record. They said the standard had to be proportionate and congruent. Justice Scalia later criticized that standard as being a ''flabby test,'' which enabled the Court to in effect legislate. They decided it however their predilections would call for. In two cases under the Americans with Disabilities Act—in the case of Tennessee v. Lane and in the case of Alabama v. Garrett—the Supreme Court came to opposite conclusions, interpreting two sections of that same act which had a very voluminous record, which illustrates the vagueness of the standard and further illustrates the words of Justice Scalia that it was a ''flabby standard'' which enabled the Court to, in effect, legislate.

So the question which I asked Ms. Kagan was, What is the standard? In her Law Review article she had been explicit in saying that standards involving how you decide a case were well within the ambit of appropriate senatorial inquiry in a confirmation proceeding. I asked her the question, and she declined to answer, as she did repeatedly not just for my questions but for questions of other Senators.

I raised the issue in those confirmation proceedings as to whether we could find some way to get reasonable answers short of voting no.

I noted Senator KYL in his presentation yesterday cited that question, which is on his mind as well.

In the final analysis, as I stated during the course of the Judiciary Committee deliberations, I have decided to vote for Ms. Kagan because she was following an accepted pattern. That is what nominees have been doing, and it has been accepted by the Senate. I did not think it appropriate to cast a protest vote for her testimony. There were

facets about her nomination which I found very appealing. I found it very important that she cited Thurgood Marshall as a role model. With that in mind, and with the fact that she was replacing a Justice on the liberal wing, it seemed to me that her confirmation would maintain the current balance.

I am also impressed with the President's nominating another woman. I think that is very salutary. When I came to the Senate, prior to the 1980 election, we only had one woman Senator, Senator Nancy Landon Kassebaum. Now our body is much improved with the 17 women we now have in this body. I thought that was a desirable trait. I also thought it was good to have somebody on the Court who had not been on the circuit court of appeals. All of the other eight Justices come from the circuit courts of appeals, and I have urged Presidents in the past to nominate somebody with a broader background, broader diversity of experience. I think Ms. Kagan represents that quality and that attribute.

I have been asked about the distinction I make between my negative vote for Solicitor General contrasted with my affirmative vote for Supreme Court. It is based on the fact that I thought for the Solicitor General we were entitled to answers. In that proceeding in the Judiciary Committee she refused to answer questions which I thought were requisite.

I asked her what her position would be on the case involving an appeal by Holocaust victims to the Supreme Court of the United States. The Court looks to the Solicitor General for the position of the government. It seemed to me that case should have been heard by the Supreme Court. The argument was made that the courts ought to be foreclosed from deciding it because it ought to be governed by an international pact between governments. It seems to me the Holocaust victims were entitled to their day in court.

Ms. Kagan would not answer the question.

I similarly raised what position she would take as Solicitor General on an appeal taken by the survivors of victims of 9/11. The Court of Appeals for the Second Circuit had said there was not State-sponsored terrorism involved because Saudi Arabia was not on the list. This is in the face of voluminous evidence that Saudi princes and Saudi charities had financed the terrorists on 9/11. There is nothing in tort exception to the Foreign Sovereign Immunities Act which requires a country to be on the list of state sponsors of terrorists.

The Solicitor General said the Second Circuit was wrong but used the reason, well, the acts occurred outside the United States, which seemed to be insufficient when the consequences were devastating within the United States, with airplanes being flown into skyscrapers in New York City. Her refusal to answer those questions led to my negative vote in that situation.

The nominations which I have seen, especially the last four nominations, bring into very sharp focus two major problems which confront Senators in seeking to exercise our constitutional responsibility on confirmation. As I have already commented to some extent, one is the difficulty of getting answers to get some significant idea of the nominee's ideology or philosophy. The second problem is the factor that when nominees have testified in response to questions—as Justice Alito and Chief Justice Roberts did—on issues such as deferral to congressional factfinding and to stare decisis, what recourse do we have when the nominees, once seated, do a 180-degree reversal.

I believe there is an approach we can undertake on that, and that is to inform the public as to what is going on and to have a public understanding of those positions as a factor, which I think, realistically viewed, could influence Justices to stand by, at least in a respectable way, their testimony at the confirmation hearing.

The difficulty with the recent trend in the Supreme Court decisions, as I see it, is that there has been an abrogation of the fundamental doctrine, constitutional doctrine of separation of powers. When the Constitution was formulated, as is well known, there were three branches of government—article I, the Congress; article 2, the executive; and article 3, the court system.

The separation of powers was viewed as an indispensable element in appropriate governance, providing for the checks and balances.

But we have seen in recent decades that the decisions of the Court have taken a great deal of power from the Congress and a great deal of power has been shifted to the Court. There have been very significant cases where the Court has declined to act where significant power has shifted to the executive branch.

I will be very specific. In United States v. Lopez, decided in 1995, the Supreme Court altered 60 years of uniform interpretation of the commerce clause which has been the basis from the 1930s for declaring New Deal legislation unconstitutional. In the face of a Court packing plan President Roosevelt was articulating to raise the number of Justices to 15, the Court had given broader latitude to congressional authority under the commerce clause, and that was abruptly changed in the Lopez case.

The case of United States v. Morrison involved a further abrogation of congressional authority. That case involved legislation protecting women against violence. There, the Supreme Court of the United States, in the face of a mountain of evidence, as specified in the dissent by Justice Souter, ruled that the act was unconstitutional. The reason for the ruling, according to the opinion of the Court, written by Chief Justice Rehnquist, was the congressional ''method of reasoning.'' When I saw that in the opinion, I wondered what transformation there was on method of reasoning when a nominee stepped outside of the Senate hearing room on a nomination to walk across Constitution Avenue and sit on the Supreme Court. I wondered what was the method of reasoning which distinguishes what goes on in this Chamber from what happens a few hundred yards to the east in the Supreme Court of the United States. But that is what the Supreme Court decided—it was our method of reasoning which was faulty. Method of reasoning. Another way of saying: You are stupid. Method of reasoning. Another way of saying: You don't know what you are doing. Well, the Congress's power, under the Constitution, is to legislate, and it has been regarded for decades—really, centuries—that when Congress has a rational basis for what we do, it is upheld by the Supreme Court of the United States.

A few minutes ago, I referred to the cases of Tennessee v. Lane and Alabama v. Garrett, two cases which were decided under the Americans with Disabilities Act. Once again, there were hearings held in many States, enormous records, but the Supreme Court of the United States decided in Tennessee v. Lane, which involved access to public facilities—a paraplegic was unable to get to an elevated floor in a Tennessee courtroom. They had no elevator. The Supreme Court said that was a violation of the Americans with Disabilities Act under the standard of congruence and proportionality. Then in Alabama v. Garrett—same act, same kinds of voluminous hearings—which raised the issue of employment discrimination, the Supreme Court of the United States decided by five to four that it was unconstitutional.

It was in the Lane case that Justice Scalia articulated his now often quoted comment that congruence and proportionality is a ''flabby test'' which calls upon the Supreme Court to check the homework of the Congress. That is the way he put it. What we do over here requires someone else to check on our homework, as a parent would on a fifth grader, and Justice Scalia commented that was not the way to treat a branch of coordinate authority as the Constitution requires.

The Supreme Court in those cases has taken power to themselves to disagree with our factfinding and to declare acts unconstitutional under this standard which is not understandable on any rational basis, proved by the Court itself on those two cases, Garrett and Lane.

The Court has further significantly affected the balance of power and the separation of power by deciding not to decide certain cases. In exercising their discretion not to take cases, they have let rulings stand which have given an enormous amount of what is legitimately, in my opinion, congressional authority to the executive branch of government.

I cite first the situation involving the terrorist surveillance program—

warrantless wiretaps put into effect after 9/11—contrasted with congressional authority under the Foreign Intelligence Surveillance Act, which establishes, by act of Congress, that the exclusive means to invade privacy on a wiretap is by going to a court, having an affidavit stating probable cause, having judicial review and the judge deciding that the requirements of the fourth amendment prohibiting unreasonable search and seizures are satisfied. Well, the Supreme Court of the United States has declined to hear that case.

A Federal judge in Detroit declared the terrorist surveillance program unconstitutional. The case went on appeal to the Court of Appeals for the Sixth Circuit. The defense was interposed of lack of standing, and in a split decision—two to one—the Sixth Circuit decided that there was not the requisite standing. Well, standing is a very fluid doctrine, and it is used from time to time to avoid deciding an issue. Common parlance would say that is a good way to duck a case. The dissent in that case was powerful, I think by any fair reading, had much more legal authority behind it that there was standing to raise this issue.

Certiorari was sought from the Supreme Court of the United States, and they denied cert. As is the custom, they didn't say why. That inaction by the Supreme Court—and the Supreme Court has tremendous impact by its inaction, contrasted with cases it does decide—that leaves the President with the power which the President asserts under article II of the Constitution as Commander in Chief, contrasted with the authority of Congress under article I to legislate with the Foreign Intelligence Surveillance Act. That is a case which we really ought to have an answer to one way or another. The Court ought to make a decision in a case such as that.

Another case which illustrates the concession of legislative authority to the executive branch by inaction of the Court involves the lawsuit brought by survivors of the victims of 9/11 where the Government of Saudi Arabia was sued, as were Saudi princes, as was a Saudi charity, for financing the 19 Saudis who were among the 20 terrorists directing the planes which crashed into the Trade Centers in New York and in Somerset County in my State, Pennsylvania, and into the Pentagon in Virginia. And the evidence there was overwhelming.

Recently, the Judiciary Committee held a hearing, which I chaired, on legislation to cure the problems that were articulated by the Second Circuit and by the Solicitor General. But in that case, the Court declined to take jurisdiction, denied cert. So here you have the Congress of the United States, in a very important piece of legislation—the Foreign Sovereign Immunities Act—saying that foreign states were not immune for tortuous conduct, like crashing into a building.

As I had alluded to very briefly earlier, the Second Circuit found against the survivors of the victims on the grounds that Saudi Arabia was not a state which had been designated by the State Department as a terrorist state. Well, there is nothing in the legislative enactment which requires a state to be on the terrorist list in order to establish liability.

The Solicitor General said the Second Circuit was wrong but in opposing a grant of certiorari, came up with a different theory, and that was that the acts occurred outside of the United States in financing the terrorists. Well, how much more direct impact could conduct have than financing terrorists coming to the United States to hijack planes and to do what the 9/11 terrorists did? Well, that case remains unresolved, and we are looking for a legislative change to deal with that case. But here is another illustration where the Court, by not deciding a case, shifted a tremendous amount of authority to the Federal Government to decide as a matter of foreign policy not to anger the Saudis, under the great proposition, under the great legal holding of oil, oil, oil. But there we are—more power in the executive, less power in the Congress.

So these are issues which we really need to understand and get answers from nominees if we are to maintain the balance in the separation of powers, which is a very fundamental point in our system of constitutional governance.

In considering the nomination of Elena Kagan, as I said, concerned with maintaining the balance on the Court—and the Court has really become an ideological battleground. Chief Justice Roberts, in an interview with C–SPAN, recently said: We are not a political branch of government. We are not a political branch of government. I will return to that in some greater detail in a few moments.

Richard Posner, Judge Richard Posner, a distinguished judge on the Court of Appeals for the Seventh Circuit, in a very noted book on the judiciary, devoted an entire chapter, chapter 10—which the title is: The Supreme Court Is a Political Court. The Court decides political issues. The Court decides political governance, political values, political rights, and political power.

The status of an ideological battleground is illustrated by the decision of the Supreme Court of the United States in a case captioned Citizens United, which upset 100 years of precedents in permitting corporations to pay for political advertising. This is a case which came to the Court on a grant of certiorari to examine the McCain-Feingold Act to decide whether the application of that act was constitutional as it applies to a movie about Hillary Clinton. Well, that was under the standard of ''as applied.''

The case was argued in the Supreme Court. Then, sua sponte—the Latin expression which means ''on the court's own authority''—after the case was argued, the parties were then notified that the Court was going to consider the constitutionality of McCain-Feingold facially, which means whether it would be unconstitutional in any context. But that is an unusual reach by the Court.

Then, in a 5-to-4 decision, the Supreme Court decided to overrule a relatively recent case, the Austin case, and to overrule certain portions of McConnell v. the Federal Election Commission. The case was noteworthy in two respects. One is, the Court disregarded a 100,000-page record, which had been amassed in congressional hearings, showing the undesirable consequences of money in politics, how it raises the skepticism of the American people about the integrity of government and raises issues of corruption in government and the collateral issue of the appearance of corruption in government.

The case was especially problemsome from the point of view that Chief Justice Roberts and Justice Alito had testified at great length about deference to Congress on congressional findings, and all that was ignored in the Court's decision. Chief Justice Roberts and Justice Alito had testified extensively. Twenty-eight minutes of my first round of 30 minutes of the Roberts confirmation hearing was addressed to the issue of stare decisis. Chief Justice Roberts, as a nominee, was emphatic about respect for stare decisis, observing precedents, as was Justice Alito, and the stability of the law and, as Chief Justice Roberts said, not jolting the system but to have modest decisions.

In a concurring opinion—only Chief Justice Roberts and Justice Alito signed the concurring opinion; the other three Justices in the majority did not—but in that concurring opinion was a 180-degree reversal as to what both nominees had testified to during their confirmation proceedings.

I have said in discussing this issue in the past that I appreciate the difference between answers in a nomination proceeding and what a sitting Justice has a responsibility to do on the bench and in deciding cases and I do not, in any way, impugn the good faith of Chief Justice Roberts and Justice Alito. But from the perspective of a Senator asking questions about how nominees are going to approach judicial philosophy and judicial ideology, there ought to be some approach which would give some greater consideration to that testimony and those commitments made to Senators who then vote for their confirmation.

This issue was taken up by circuit judge Richard Posner, whom I quoted earlier on the proposition that the Supreme Court is, in fact, a political body and makes political decisions, makes decisions on political governance and political values and political rights and political power. This is what Judge

Posner had to say about the decisions of Chief Justice Roberts. The Chief Justice has ''demonstrated by his judicial votes and opinions that he aspires to remake significant areas of constitutional law.'' The ''tension'' between what he had said at his confirmation hearing and ''what he is doing as a Justice is a blow to Roberts' reputation. . . .''

The issue of who understands what happens in complex cases such as Citizens United—it has a very limited impact. For those who study the confirmation testimony closely and for those who study the opinions closely, there is an issue raised as to reputation, and I do believe it is a fact that Justices, similar to all the rest of us, are concerned about their reputations.

So the issue then is, What can be done to acquaint the public with what happens in the Supreme Court of the United States? What is going on with the balance of power and the separation of power? What is happening with the constitutional responsibility of Senators to ask questions, to use that as a basis for confirmation?

I believe one step which can be taken of real significance would be the televising of the Supreme Court. Is it an absolute answer? Well, of course not. But Justice Brandeis, in a very famous article written in 1913, said that sunlight was the best disinfectant, and he analogized the disinfectant quality of sunlight with publicity on solving social problems and social ills.

There was an article by Stuart Taylor which appeared in the Washington Post, captioned ''Why the justices play politics.'' This, I think, is very weighty in the observation of an astute commentator on the Supreme Court and what is happening on the precise issues which I am raising today about the Court taking over congressional power and the Court acting in a political way on the Court's decisions. This is what Stuart Taylor, Jr., had to say:

> The key is for the justices to prevent judicial review from degenerating into judicial usurpation. And the only way to do that is to have a healthy sense of their own fallibility and to defer far more often to the elected branches in the many cases in which original meaning is elusive.

Then, Mr. Taylor comments about nominee Kagan:

> Elena Kagan professed such a modest approach in her confirmation testimony. Yet so did the eight current justices, and once on the court, all eight have voted repeatedly to expand their own powers and to impose policies that they like in the name of constitutional interpretation.

So that is in line with the title of this article: ''Why the justices play politics.''

Mr. Taylor goes on to say this:

> Why so modest?

That is, why is the Court so modest?

> Perhaps because the justices know that as long as they stop short of infuriating the public, they can continue to enjoy better approval ratings than Congress and the president even as they usurp those branches' powers.

This is an interesting test—more even than interesting, it is intriguing—the test of infuriating the public. There have been substantial efforts made to acquaint the public with the gridlock in the Congress of the United States, that we are failing to act on matters of enormous importance because of raw, partisan politics. There is an effort in the New Yorker magazine, current edition, about what is happening in the Congress, which would infuriate anybody who reads it, and we are waiting for more of the mainstream press to tell the American people how raw the politics are here, how partisan it is, and the gigantic wall which separates the two parties here. We call it an aisle. Well, it would more accurately be called a wall, taller and tougher than the Berlin Wall. That wall has come down.

But we are undertaking enormous delays on extending unemployment compensation, in an economy where people cannot find jobs, and it is a matter of being sustained, avoiding eviction from their houses, buying groceries for their families. But I think what we have here, realistically viewed, is a test of infuriating the public before you get some response. But that is a pretty tough job to do, to infuriate the public.

Chief Justice Roberts was interviewed recently by C–SPAN and had this to say in elaboration on his contention of the Court is not a political body. On that point, Chief Justice Roberts may be right, or Chief Justice Roberts may be wrong. Judge Richard Posner and Stuart Taylor may be right in specifying political activity in the Court, and the observation of many of us is that it is an ideological battleground, a political ideological battleground. But this is what Chief Justice Roberts had to say on a C–SPAN interview a few months ago:

> I think the most important thing for the public to understand is that we are not a political branch of government. They didn't elect us. If they don't like what we're doing, it's more or less just too bad.

Well, it is true that ''they didn't elect us'' and that they don't have standing to legislate. That is up to the Congress. But I am not prepared to accept the statement ''if they don't like what we're doing, it's more or less just too bad.'' I am not prepared to accept that in a democracy. I am not prepared to accept that when we have the learning of Justice Brandeis and know from our own practical experience that sunlight is the best disinfectant. Publicity has a tremendous effect on the way government operates on all levels, including, I submit, the Supreme Court of the United States.

They made a drastic departure in the New Deal legislation in the 1930s in the face of overwhelming public opinion. When we have observers such as Judge Posner commenting about the impact on the reputations of Justices, I think if there were a general understanding as to what goes on, there could be an effect on that. We could get more out of nominees in the confirmation process, and we could have a greater likelihood of having Justices, once confirmed, follow what they have said during their confirmation hearings.

I have pressed this idea of televising the Court for a long time—more than a decade. I have introduced legislation calling for the Court to be televised unless in a specific case there is cause showing why, in that one case, there should not be television. The bill has been reported out of the Judiciary Committee on a number of occasions and is now on the agenda. I have reason to believe we will have a chance to vote on the Senate amendment. I have talked to the leadership in the House of Representatives and have gotten favorable responses there. The Judiciary Committee voted it out recently 13 to 6, so that is more than the 2 to 1. I believe there is adequate legal basis for the legislation.

Congress cannot tell the Court how to decide cases, but the Congress does have the authority to establish administrative matters in the Court. For example, the Congress has the authority to decide how many Justices will be on the Court. In response to the restrictive interpretations of the Supreme Court in the 1930s, President Roosevelt floated a court-packing plan to raise the number of Justices to 15. That was defeated, and I think wisely so.

I think the principle of judicial independence is the hallmark of our society governed as a rule of law, and I think we have to maintain that judicial independence within the existing framework. But I think televising the Court would still respect that.

Just as Congress has the authority to determine how many Justices there will be, Congress has the authority to decide what a quorum of the Court is, how many members must be present for the Court to act. We set that number at six. The Congress sets the date when the Court will start its session—on the first Monday in October. The Congress has established time limits on judicial decisions. Habeas corpus has been delayed tremendously; Congress has that authority. Congress has the authority to tell the Court what cases to hear—not how they decide them but what cases to hear—illustratively, on McCain-Feingold, part of the legislation on the flag burning case. The Congress has the authority to establish the jurisdiction of the Supreme Court on discretionary matters.

The Justices are frequently televised. Quite a number of them appear on television, on ''60 Minutes.''

I ask unanimous consent to have printed in the RECORD a listing of situations where Justices have appeared on television.

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

EXAMPLES OF TELEVISED PUBLIC APPEARANCES BY JUSTICES

Justice Scalia appeared on the CBS news program ''60 Minutes'' on April 27, 2008, for the entire program.

Justice Thomas appeared on the CBS news program ''60 Minutes'' on September 30, 2007.

Justice Thomas appeared in a series of interviews with ABC News over four days between October 1 and 4, 2007.

Justices Breyer and Scalia have engaged in several televised debates, including a debate on December 5, 2006, sponsored by the American Constitution Society.

Justices O'Connor and Stephen Breyer appeared on ABC News's ''This Week'' on July 6, 2003.

All of the Justices have sat for television interviews conducted by C–SPAN: J. Alito: Sept. 2, 2009; J. Breyer: June 17, 2009; J. Ginsburg: July 1, 2009; J. Kennedy: June 25, 2009; C.J. Roberts: June 19, 2009; J. Stevens: June 24, 2009; J. Scalia: June 19, 2009; J. Sotomayor: Sept. 16, 2009; J. Thomas: July 29, 2009.

Mr. SPECTER. Mr. President, there has been an objection by the Court on grounds that it would interfere with the collegial dynamics of the Court, that somebody might be reaching for a 30-second sound bite. Well, I think that, in the first place, is unlikely and wouldn't be very well received and wouldn't be repeated. Even so, the objections which have been raised to televising the Court are minimal, de minimis, contrasted with the advantages to televising the Court.

If the Court were televised, there would also be an understanding of the limited docket of the Court, and the Court could undertake the decision in more cases if the public understood how few cases they hear. In 1886, the Supreme Court decided 451 cases. In 1987, a little more than two decades ago, the Court issued 146 opinions. In 2006, that number was down to 78; in 2007, 67; 2008, 75; 2009, 73. When Chief Justice Roberts testified, he said the Court could undertake more decisions. He has been the Chief for 5 years and the number is at 73.

The Court, in its discretionary authority, leaves many circuit splits undecided. Most people don't have the foggiest notion of what a circuit split is, so for the few people who are watching on C–SPAN 2, a very brief explanation. The country is divided up into circuits, different courts of appeals. The Third Circuit, for example, has jurisdiction over my State, Pennsylvania, as well as New Jersey and Delaware. The Second Circuit has jurisdiction over New York and, I believe, Vermont. Frequently, the Third Circuit will differ from the Second Circuit. A matter arises in Philadelphia governed by different law than arises in New York City. An issue arises in the Sixth Circuit in Detroit, there is no definitive resolution. People there don't know what the law is. The Supreme Court could undertake those decisions. They have sufficient time.

These are matters of very substantial importance. For example, the circuit splits are left unresolved by the Court when a Federal agency may withhold information in response to a request under the Freedom of Information Act on the grounds that it would disclose the agency's ''internal deliberations.'' The Court has left undecided when a civil lawsuit must be dismissed or may be dismissed as involving a state secret. Left undecided circuit splits, should national community standards or local community standards be applied to Internet obscenity cases; left undecided circuit splits, does a constitutional decision regarding the exclusionary rule apply retroactively to evidence obtained from illegal searches undertaken prior to that constitutional decision.

I ask unanimous consent that a fuller list be printed in the RECORD at the conclusion of my statement.

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

(See exhibit 1.)

Mr. SPECTER. Mr. President, the authority which we are exercising in confirming Solicitor General Elena Kagan is a very important constitutional authority, and we take it very seriously. During my tenure on the 14 nominations which the President has made, we have found a pattern which has become the accepted standard of answering about as many questions as nominees believe they have to answer in order to be confirmed. If you can't get someone like Elena Kagan to answer questions after her forceful statement from the University of Chicago Law Review criticizing Justice Ginsburg and Justice Breyer for stonewalling and criticizing the Senate for not getting information, I think that is the standard which is going to prevail. And where you have nominees coming into the nominating process and testifying under oath about important philosophical underpinnings, ideological underpinnings of congressional authority on factfinding and stare decisis, and then doing a 180-degree turn, we need to look for some response.

I do not believe requiring the Court to be televised is a denigration of their authority. I think that is within the authority of Congress, as I have delineated on so many administrative matters such as the size of the Court, the quorum, when they convene, and what cases they must hear.

I approach the Court with more than respect. I approach the Court with reverence. I have had the privilege of arguing in that Court. I am the first to acknowledge—there is no one faster on acknowledging—the importance of the Court as the final arbiter under Marbury v. Madison and the importance of judicial independence.

I do not think this idea is on a level with what the Court had to say about Congress in the Morrison case, declaring the act protecting women against violence as unconstitutional because of our method of reasoning. As I said earlier, another polite way of calling us stupid or saying we don't know what we are doing—no polite way really to say that on method of reasoning. What wisdom accrues from walking across Constitution Avenue from the hearing room in the Judiciary Committee or what great wisdom lies across the green a few hundred yards to the east of this Chamber.

I do believe television would be a step in the right direction. Would it be a cure? No. But when we have someone such as circuit judge Richard Posner criticizing a named Chief Justice on reputation, I think that would have an ameliorating effect.

I thank the Chair and yield the floor.

EXHIBIT 1

INTERESTING CIRCUIT SPLITS

Can the Attorney General of the United States bypass the notice and comment period requirement of the Administrative Procedure Act in applying the Sex Offender Registration and Notification Act retroactively?

Do federal district courts have ancillary jurisdiction over expungement of criminal records?

May jurors consult the Bible during their deliberations in a criminal case and, if so, under what circumstances?

Must a civil lawsuit predicated on a ''state secret'' be dismissed?

May a federal court ''toll'' the statute of limitations in a suit brought against the federal government under the Federal Tort Claims Act if the plaintiff establishes that the government withheld information on which his claim is based?

Is a defendant convicted of drug trafficking with a gun subject to additional prison time under a penalty-enhancing statute, or is his sentence limited to the period of time provided for in the federal drug-trafficking law?

When may a federal agency withhold information in response to a FOIA request or court subpoena on the ground that it would disclose the agency's ''internal deliberations''?

Should national community standards or local community standards be applied in internet obscenity cases?

Which party has the burden of proof at a competency hearing?

Does state or federal law governs the inquiry into the enforceability of a forum selection clause when a federal court exercises diversity jurisdiction?

Does a constitutional decision regarding the exclusionary rule apply retroactively to evidence obtained from illegal searches undertaken prior to that constitutional decision?

Is pre-litigation notice and opportunity to cure necessary in cases alleging unequal provision of athletic opportunities in violation of Title IX?

Is a non-violent walkaway escape a violent felony for purposes of the Armed Career Criminal Act?

Does a defendant's robbery conviction count as a crime of violence, thus classifying the defendant as a career offender under the Sentencing Guidelines?

The PRESIDING OFFICER. The Senator from Nevada is recognized.

Mr. ENSIGN. Mr. President, I rise today to address the nomination of Solicitor General Elena Kagan to the Supreme Court of the United States.

The nomination of Ms. Kagan has stirred up an old debate in our country. There are some that say that our Constitution is outdated and the intent of our Founders when drafting it no longer relevant.

However, I am of the belief that the U.S. Constitution is the very foundation of our country and its words and the written intent of our Fathers are the cornerstone of our freedoms, our liberty, and our protection from radical actions and ideas.

Alexander Hamilton addressed this very issue when he said that, ''Our founders clearly revealed their central purpose was defending Americans' rights and liberties against encroachment, particularly by an overbearing national government. The Supreme Court's major purpose is preventing such overstepping. That requires following the Constitution as the highest law of the land in fact as well as on paper, because as George Mason put it, 'no free government, or the blessings of liberty, can be preserved to any people but by frequent . . . recurrence to fundamental principles.' If we are to be true to our heritage, the coming Supreme Court nomination debate must focus on those principles.''

It is with these words from Alexander Hamilton that I have thoroughly considered Ms. Kagan's qualifications and fitness to serve as the next Supreme Court justice. And specifically, whether Ms. Kagan will uphold the written word of the U.S. Constitution and the intent of our Founding Fathers or twist it to fit a favored political outcome.

I had the privilege of meeting with Solicitor General Kagan a few weeks ago and I, like most who met with her, was impressed by her intelligence and poise. There is no question that she has a vast knowledge of the law which stems from years of working as a Supreme Court law clerk, an adviser to President Clinton, dean of Harvard Law School, and through her current position as Solicitor General.

When I had the opportunity to ask Ms. Kagan about her views on the Founders' intent of the second amendment, she informed me that although she had read much analysis regarding the second amendment, she had never studied its history or origin. Certainly, this statement was surprising to me, especially given her documented history of hostility toward the second amendment.

This hostility became apparent for the first time as a law clerk for Justice Thurgood Marshall when she said, ''I'm not sympathetic'' to an individual's argument that the DC handgun ban violated his second amendment rights.

I have been rather vocal on this issue and I have advocated strongly against the District of Columbia's denial of this fundamental right for law-abiding citizens.

The case that Ms. Kagan was ''unsympathetic'' toward involved Lee Sandidge, an African-American business owner who was arrested and convicted in DC for possessing ammunition and an unregistered pistol without a license. He faced up to 10 years in prison, but received a suspended sentence of probation and $150 fine. Mr. Sandidge's second amendment claim that Ms. Kagan cared little for challenged the same restrictive DC gun control law that was struck down by the Supreme Court in the 2007 Heller decision.

In this instance, I believe that Ms. Kagan allowed for her personal beliefs and emotions to cloud the meaning of the U.S. Constitution, since she apparently did not care to look to the Founders' intent or cite legal precedent.

Her lack of sympathy for gun owners and gun rights was again apparent during her years at the Clinton White House where she coauthored two policy memos in 1998 that advocated for White House events and policy announcements on various gun proposals, including ''legislation requiring background checks for all secondary market gun purchases,'' a ''gun tracing initiative,'' and a call for a new gun design ''that can only be shot by authorized adults.''

Ms. Kagan also played a role in an executive order that required all Federal law enforcement officers to install locks on their weapons.

When it comes to the second amendment, I believe that Ms. Kagan shows a blatant disregard for the U.S. Constitution, and a feigned ignorance for the intent of our founders when crafting this amendment—however, this has not deterred her from providing advice to her superiors on an issue that she goes to great lengths to nullify.

Unlike Ms. Kagan, my colleagues and I, along with millions of Americans have studied the intent of our founders in regards to the second amendment.

The Founders looked to the writings of prominent philosophers when debating the importance of the right to keep and bear arms to protect the people of this country from tyranny and from a governing class that had a history of shown propensity for oppression. The second amendment was drafted to address an issue of trust, protection, and most of all, to establish individual rights over the government.

James Madison wrote in Federalist paper 46 that the Constitution, ''preserves the advantage of being armed which Americans possess over people of almost every other nation . . . where the governments are afraid to trust people with arms.''

St. George Tucker, the first commentator on the Constitution, wrote in 1803, that the second amendment was ''the true palladium of liberty'' and that, ''the right to self-defence is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.''

Ms. Kagan has stated, when asked whether she personally believes that there was a preexisting right to self-defense before the Constitution, she said she ''didn't have a view of what are natural rights independent of the Constitution.''

Ms. Kagan's shocking admission upholds my conclusion that she does not believe the second amendment codifies with the beliefs of our Founders who fervently believed the right to keep and bear arms was a natural right.

Ms. Kagan's failure to study the history surrounding the second amendment is in stark contrast to her emphasis on the importance of students studying international law at Harvard Law School. As dean, she mandated the study of international law, but made the study of the constitution optional. As an American, I find this thoroughly insulting.

When asked ''What specific subjects or legal trends would you like [Harvard] to reflect?'' Kagan responded: ''First and foremost international law . . . we should be making clear to our students the great importance of knowledge about other legal systems throughout the world. For 21st century law schools, the future lies in international and comparative law, and this is what law schools today ought to be focusing on.''

Her decision to not educate American law students on the cornerstone of American freedom, the U.S. Constitution, allows Harvard law students to graduate without ever taking a course in constitutional law. This I feel demonstrates her willingness to set aside the core principles of our democracy in favor of ''good ideas'' for an outcome favorable to her political beliefs.

In fact, Ms. Kagan need look no farther than the Declaration of Independence to understand our founders intent in regards to our second amendment when they wrote, ''We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.''

I am of the belief that our Constitution is what helps to make this country the best in the world and it's what stands between the United States of America and every other country on Earth.

Ms. Kagan's penchant for political activism was showcased in her treatment of military recruiting during her tenure as dean of the Harvard Law School and her decision to ban military recruiters from campus over objections to the don't ask, don't tell policy.

As dean of the Harvard Law School, Ms. Kagan barred the military from the campus recruiting office, even as our troops risked their lives in two wars overseas that stemmed from the deadliest terror attack on American soil, September 11, 2001. She did so in defiance of a Federal law, the Solomon Amendment, which requires that the military receive ''access . . . at least equal'' to that of other employers. In fact, Solomon's explicit equal access clause passed this Chamber unanimously in 2004, 1 month before Ms. Kagan began blocking recruiters.

Despite a clear record on this issue, Ms. Kagan testified during her hearing that the military had ''full,'' ''excellent,'' and even ''complete'' access during her tenure as dean. Documents

from the Pentagon, however, demonstrate that recruiters were ''stonewalled,'' and that banning them from the recruitment office was ''tantamount to chaining and locking the front door of the law school.'' During this contentious period, she filed briefs, spoke at protests, and sent campus-wide e-mails attacking the governmental policy.

Given Ms. Kagan's fierce opposition to the don't ask don't tell law, in her hearing for Solicitor General, she was specifically asked whether she would be able to set aside her personal political views and defend that law. She testified that she would defend the law with vigor. However, a review of her record reveals something different.

As Solicitor General, she chose not to challenge a Ninth Circuit ruling that significantly damaged and undermined don't ask don't tell. It is my belief that by neglecting to do this, she failed in her duty as Solicitor General and violated the pledge that she made to the U.S. Senate.

I wish I could say that her history of activism ended here, but we need only look back to her work as an advisor to the Clinton administration to see a demonstrated proclivity to inject progressive views and an activist agenda into all her work, a trait that I am afraid she is unlikely to abandon if confirmed.

Ms. Kagan's proclivity toward judicial activism is best highlighted in her inability to express a limit on the Federal Government's power.

At her hearing, she was unable to identify a single meaningful limit on Federal Government power under the commerce clause. As the Federal Government continues to expand both in scope and size, we need Justices who recognize and are willing to enforce the limitations the Constitution places on the Federal Government. Given that Ms. Kagan apparently does not recognize those limitations, it is clear that she would not enforce them.

As a Supreme Court Justice, Ms. Kagan is likely to rule in favor of the government as opposed to enforcing the vital role that the Supreme Court plays in keeping the overreaching arm of the government in check.

After thoroughly studying Ms. Kagan's record and after questioning her on my many concerns, I feel that I must remind Ms. Kagan on the intent of our Founding Fathers when establishing the United States as the world's leading democracy and symbol of freedom throughout the world:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.

If confirmed as a Supreme Court Justice, I fear that Elena Kagan will be unable to set aside her personal beliefs and uphold even these most basic tenets of the United States of America. I believe her reign as a Supreme Court Justice will lead to the interpretation of international law over the U.S. Constitution, will lead to a great assault on the second amendment, and will be marred by precedent of court cases rather than intent of Framers of the constitution. As the highest Court in the land, the Supreme Court plays this vital role in keeping the overreaching arm of the Federal Government in check.

That said, anyone nominated to sit on the bench of this Court must be willing to do the same—set aside personal politics and views and defer to the Constitution for the good of the country.

While I am impressed with her intellect and accomplishments, my meeting with Ms. Kagan and a review of her record did little to dispel my concerns as to whether she will adhere to the Framers' intent of the Constitution.

Ms. Kagan's lack of support for the U.S. military, demonstrated hostility toward the second amendment, and her propensity toward political activism signaled to me that her role on the Court will be one of liberal judicial activism.

For these reasons, I will respectfully oppose her nomination to the U.S. Supreme Court.

I yield the floor.

The PRESIDING OFFICER (Mr. CARPER). Who seeks recognition? The Senator from Alaska.

Ms. MURKOWSKI. Mr. President, on July 2, following the conclusion of the hearings on Elena Kagan's nomination to serve as an Associate Justice of the U.S. Supreme Court, I informed my colleagues and my constituents in the State of Alaska that I could not support her nomination. I decided to express my views at the time in summary form, knowing I would get many questions about Ms. Kagan in the course of my travels during the Independence Day recess, when I was up in the State.

Many of the Alaskans I encountered during that trip and in subsequent visits around Alaska indicated their concerns about Ms. Kagan's qualifications to serve and indicated they shared those same concerns. That said, Alaskans are certainly a diverse and an independent people who are accustomed to speaking their minds. It is fair to say I have also heard from those who strongly support Solicitor General Kagan's nomination. I respect both viewpoints. But I am required by our Constitution to make an up-or-down decision.

I regard a Senator's vote to confirm or not to confirm a Supreme Court nominee as one of the most important responsibilities bestowed on this body by the U.S. Constitution. I believe it is a Senator's responsibility to evaluate each nominee on his or her merits, consider the record with great reflection, and explain her conclusions to the body and to her constituents.

I come to the floor to expand the thoughts I expressed earlier about the Kagan nomination, as well as to offer some observations about the composition of the Court as we go forward.

As I observed in early July, there is no doubt—no doubt in my mind—that Elena Kagan is a gifted teacher of the law. Watching the confirmation hearings, I was impressed with her command of the Supreme Court's precedents and her ability to explain those precedents in a language nonlawyers can understand.

In the course of those hearings, Elena Kagan vowed to respect Supreme Court precedent. But she offered little insight into the circumstances that might lead her to overturn established precedent and even less insight into how she would approach those cases when precedent was not clearly established.

Most troubling, Ms. Kagan's responses to the questions posed to her in the Judiciary Committee indicated gaps in her understanding of the Constitution. Indeed, the most glaring of these gaps involved the right to keep and bear arms, guaranteed to law-abiding Americans under the second amendment. This is a matter of great significance to my constituents in Alaska. So I find myself compelled to discuss it at some length.

There was a colloquy between our colleague, Senator GRASSLEY, and Solicitor General Kagan that sticks very clearly in my mind. Senator GRASSLEY began his question by observing that the Supreme Court in the Heller case concluded that the second amendment involved an individual right to possess firearms, not a collective right conditioned by participants in a militia.

Senator GRASSLEY further noted that the Supreme Court ruled in McDonald that the individual right recognized in Heller is applied to the States through the doctrine of incorporation via the 14th amendment.

Senator GRASSLEY then went on to ask Ms. Kagan whether she personally believes that the second amendment includes an individual right to possess a firearm.

Elena Kagan did not answer the question. Her response was:

> I have not had myself the occasion to delve into the history that the courts dealt with in Heller.

Senator GRASSLEY went back again. He asked straight on:

> Do you believe the second amendment conveys an individual right?

Once again, Ms. Kagan ducked the question. She said that she lacked the wherewithal to grade Heller because the case is based so much on history she never had an occasion to look at. This is very similar to the comments she expressed to my colleague from Nevada who spoke before me.

I find it difficult to accept that an individual who occupied the role of dean of Harvard Law School and Solicitor General of the United States would never have had occasion to look at the history underlying the second amendment.

My constituents in Alaska have long understood this right to be fundamental, personal in nature, and binding on both the Federal Government and

the States, just as the courts in Heller and McDonald have held. I view our second amendment rights in the same way. Yet Elena Kagan evidently has not thought much about the question.

One has to wonder: Is this just a lack of preparation or does Ms. Kagan think the second amendment right is insignificant? Again, one has to wonder.

Ms. Kagan had fair and sufficient warning that she would be questioned vigorously about her views on the second amendment. Justice Sotomayor had very intense questioning on the same subject just a year ago.

I doubt Dean Kagan would accept an answer: Sorry, I am not prepared to answer the question, from one of her Harvard law students if posed the same question Senator GRASSLEY asked.

With all due respect for the nominee, I am not prepared to accept this kind of answer from a prospective Justice of the U.S. Supreme Court. To put it perhaps a bit more bluntly, I would have expected that a constitutional law expert of Ms. Kagan's stature would have devoted some serious intellectual attention to that question at some point in her career. Truthfully, I cannot be sure she does not hold strong personal views about the second amendment—views that she is unwilling to express because they might pose an impediment to her confirmation. This is, by no means, mere speculation.

While serving as a law clerk to Justice Thurgood Marshall in 1987, Ms. Kagan had an opportunity to comment on a petition for certiorari filed by a District of Columbia resident who was charged with the possession of an unregistered firearm. The petitioner asked the Supreme Court whether the DC gun control law violated his second amendment rights.

Ms. Kagan dismissed his argument. In a note devoid of any legal analysis, she simply told Justice Marshall: ''I am not sympathetic.'' Not sympathetic suggests some knowledge of the second amendment. If Ms. Kagan were uncertain whether she knew enough about the second amendment to make such a recommendation to Justice Marshall, perhaps she might have done more research.

One is also left to wonder whether Solicitor General Kagan was unsympathetic to the view that the second amendment applies to the States when the Justice Department decided it would not file a brief in the McDonald case. We may never know the answer to this question because the deliberations of the Solicitor General's Office are privileged.

The conclusion I draw from all this is that Ms. Kagan is, at best, uninterested in the second amendment at this point in her career. At worst, she is unsympathetic to the millions of Americans who, similar to this Senator, believe the second amendment is one of the most important of our constitutional liberties. On this basis alone, I cannot support her lifetime appointment to the highest Court in the land.

But this is not the only basis on which I find I must vote against the nominee. If confirmed to serve on the Supreme Court, Elena Kagan will be one of the least experienced Supreme Court Justices in our Nation's history. It is often observed that one need not have judging experience to sit on the Supreme Court. But all the Supreme Court Justices who did not have judging experience had extensive courtroom litigation experience, and Elena Kagan has neither. While it is true she spent a brief period of time as a junior associate in a prestigious Washington law firm, she has spent most of her professional career as a law professor, a university administrator, and as a political appointee focused on matters of public policy.

Ms. Kagan's extensive experience as a policy adviser, when compared with her sparse experience as a litigator, should concern all of us.

During her confirmation hearings, Ms. Kagan was asked repeatedly whether she could set aside her interest and experience in matters of public policy and refrain from legislating from the bench. She said she could. Time will tell whether the benefit of the doubt is justified. However, Ms. Kagan's answer to questions concerning her willingness to defer to unelected bureaucrats on questions of environmental law is quite troubling to me. History demonstrates that agencies at times are quite activist in interpreting the gaps Congress intended them to fill through regulations. It is well known throughout this body that I do not believe Congress ever intended for the EPA to set climate policy through Clean Air Act regulations.

On two occasions before the Judiciary Committee, Ms. Kagan expressed the view that it is legitimate for courts to give great deference to Federal agencies as they interpret congressional mandates.

I understand it is settled precedent for Federal courts to defer to administrative agencies in appropriate cases. However, I also think this administration's activism demands a more skeptical look at agency rulemaking exercises. Ms. Kagan, on the other hand, enthusiastically endorsed the position that the decisions of unelected bureaucrats deserve great deference because Federal agencies have expertise and are accountable to the elected Executive. I think this approach will continue to diminish the role of Congress in lawmaking and will result in less accountability to the electorate, not more, as Ms. Kagan suggests.

I am also concerned about the deference that a Justice Kagan might give to international law in interpreting the Constitution and the laws of the United States. Perhaps there is a limited role for the consideration of international or foreign law when the issues posed in the case unavoidably turn on the interpretation of a treaty or a foreign law. But unlike Ms. Kagan, I would not think that a Federal judge at any level should cite foreign and international law in their decision simply because the judge is open to ''good ideas wherever they may come from.''

When the Senate inquires as to whether a nominee is qualified for the Court, it is asking a very specific question: Does the nominee understand and is she prepared to assume the role of an impartial judge in our constitutional system?

I have reluctantly come to the conclusion that Elena Kagan does not rise to this standard. During her confirmation hearings, Ms. Kagan exhibited charm and wit, even as she weaved her way through the serious questions that were put before her. I would have preferred a bit less cleverness and a lot more serious reflection.

As I reflect back upon the record before me, as I think about the way Ms. Kagan answered the second amendment questions posed to her, her lack of substantive legal experience, her comfort with the judgments of unelected bureaucrats, her acceptance of the use of international law as persuasive authority in U.S. court decisions, I am not comfortable with this nominee.

I understand others of my colleagues may not share this view and that conventional wisdom holds that Elena Kagan will be confirmed to the Supreme Court. I would like to close with a few observations about the composition of the Court going forward.

Ms. Kagan, similar to this administration's last nominee, Justice Sotomayor, is a native of New York City. Although she spent a portion of her career in Chicago, most of her career has been spent inside the beltway of Washington, DC, and Cambridge, MA.

If Elena Kagan is confirmed, six of the nine Supreme Court Justices will be from the Northeast United States, and only 3 law schools of the 199 law schools accredited by the American Bar Association will be represented on the High Court.

Our colleague, Senator FEINGOLD, took note of this during the confirmation hearings. He made reference to a question he received from one of his constituents in a townhall meeting. That constituent asked why nominees to the Supreme Court always seem to be from the east coast when we have plenty of fine candidates in the Midwest. Senator FEINGOLD followed up by asking Ms. Kagan this question:

> How will you strive to understand the effects of the Supreme Court's decisions on the lives of millions of Americans who don't live on the east coast or in our biggest cities?

That same question is on my mind today, as it was last summer when I spoke on the nomination of Justice Sotomayor. I welcome the fact that this administration has substantially increased the representation of women on the High Court. Yet it is of greater significance to me that the administration has not increased the representation of people from the West or from rural backgrounds on the Court. I

would suggest that given the composition of the Supreme Court at this point in our history, it is important for the Justices to venture beyond the bench and the beltway. It is important that they get to know how Americans with different backgrounds than theirs think about their country. And I might suggest that they come and visit us in Alaska.

If Elena Kagan is confirmed to the Supreme Court, as I understand she likely will be, I wish her well in the discharge of her crucial duties. The liberties we treasure dearly will depend on her wise and thoughtful judgments.

With that, Mr. President, I thank the Chair, and I yield the floor.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. CHAMBLISS. Mr. President, I rise today to discuss the pending nomination of Solicitor General Elena Kagan to be an Associate Justice on the U.S. Supreme Court.

The constitutional role of the Senate in the confirmation process of Federal judicial nominees is to provide for ''advice and consent,'' and it is up to each individual Senator to determine what he believes that phrase means. As I have had an opportunity to participate in this process on several occasions, I have discovered this is more of an art than a science.

I believe there should be some level of deference granted to the President's nominees. Elections do matter, and the President has the constitutional duty to put forward nominees whom he would like to serve on the Federal judiciary. However, when the President nominates an individual whose record, in the eyes of some Senators, proves to be disqualifying, then it is incumbent upon those Senators to oppose that nominee.

Several weeks ago, Ms. Kagan was granted an opportunity to sit before the Judiciary Committee and respond to her critics and clarify her seemingly controversial positions. Years before she herself would face the requisite questioning of a confirmation hearing, Ms. Kagan criticized the confirmation process as lacking ''seriousness and substance.'' This is a criticism based on the notion that recent court nominees believe the surest path to confirmation is by providing milquetoast, evasive answers to any question involving a controversial topic. In this instance, Ms. Kagan chose to emulate those whom she had once criticized.

Through many hours of questioning regarding her past statements, positions, and actions, her answers proved evasive and unhelpful, and with many portions of her record having not been adequately addressed, I am left with far too many doubts to simply presume the President's nominee should be confirmed.

There is little doubt Ms. Kagan is intelligent and accomplished. She has excelled in both professional and academic pursuits. However, it is important to consider that many of her accomplishments have taken place in overtly political arenas and have involved extremely controversial issues. Many of the controversial positions she advocated in the past will almost certainly be litigated before the Supreme Court. It is, therefore, incumbent upon her to show us she will leave her role as an activist and advocate behind when assuming a position on the bench. Again, this is an area where her responses before the Judiciary Committee were found lacking.

I believe any judge who sits on the Nation's highest Court must understand that the correct venue for making policy is here in the legislative branch. After a thorough review of her record, I am simply not convinced Ms. Kagan will exercise that requisite restraint. While there are numerous issues I find troublesome in her record, there are a few I would like to focus on today.

I am especially concerned about her discriminatory actions against military recruiters—in clear violation of Federal law and which was ruled against unanimously by the Supreme Court—while she was the dean of Harvard Law School. This was an act of defiance designed to protest the military's don't ask, don't tell policy. It has been argued that this was simply a misunderstanding or that Ms. Kagan made a good-faith attempt to apply the law as she saw fit. I believe her actions show a dangerous hostility toward the military and a troubling disregard for duly-enacted statutes with which she disagrees.

Another issue where I remain concerned is on the topic of abortion. While not having a litmus test here and while I never anticipated this President would nominate someone who shares my pro-life views, I could not imagine him nominating someone with the extreme views Ms. Kagan's record indicates. This is not just a pro-life versus pro-choice dilemma for me. There is substantial evidence from her time clerking for Justice Thurgood Marshall and from her time in the Clinton White House that demonstrates an alarming agenda she has on the issue of abortion.

While clerking for the Supreme Court, Ms. Kagan was tasked with reviewing a lower court ruling that had found that prison inmates have a constitutional right to taxpayer-funded abortions. While she concluded that the lower court ruling had gone ''too far,'' she also described the decision as ''well-intentioned.'' While there may be substantial political disagreement on the topic of abortion, it is hard for me to reason that any effort to further the idea of taxpayer-funded abortions, particularly for prisoners, is ''well-intentioned.''

Further, when she served as senior advisor to then-President Bill Clinton, she was a key player in the White House efforts to keep partial-birth abortion—an abhorrent practice that was finally banned in 2003—from being outlawed by the Congress. Documents seem to show extensive efforts to prevent any restrictions being placed upon the procedure. In fact, it appears Ms. Kagan actually went so far as to participate in the redrafting of a report from a medical group—the American College of Obstetricians and Gynecologists—on the practice that served to dilute the findings of the report and bolster her position of not restricting the procedure. These efforts appear to show a position on life-related issues that is well outside the view of mainstream Americans and mainstream legal thought.

Such views are not limited to the topic of abortion. She has demonstrated hostility toward the second amendment and gun rights during her past tenures in the judicial and executive branches.

Again while serving as a Supreme Court clerk, she was tasked with writing a memo on the case of a man who had petitioned the Court, claiming the District of Columbia's handgun ban was unconstitutional because it deprived him of his second amendment right. Striking an interestingly personal note, Ms. Kagan wrote: ''I am not sympathetic.'' It is common knowledge that a similar challenge to the District's handgun ban was successfully considered by the Supreme Court in 2008. What we do not know is why Ms. Kagan did not believe a similar challenge brought in 1987 was worthy of consideration before the Court.

Documents made available from the Clinton Library show she was a key player in that administration's gun control efforts. She was a key advocate for multiple gun control proposals and even authored multiple Executive orders that placed restrictions on gun owner rights.

Ms. Kagan is a unique nominee for the Supreme Court, as she has no judicial experience. The last time we confirmed a Justice to sit on the Court without earlier having served as a judge was nearly 40 years ago.

While a lack of judicial experience should not be disqualifying for a Supreme Court nominee, it does increase the necessity for that nominee to be forthcoming and open during their confirmation hearings. With no prior judicial record to view, Senators are left with little guidance as to how a nominee will act once they become a Supreme Court Justice. This is where we would hope the nominee could fill in the gaps. Instead, in Ms. Kagan's case, we are left to look to the past and at her records, and we are forced to make an overwhelmingly important decision with significant questions unanswered.

I remain concerned that Ms. Kagan will carry the political agenda that is evident in her past to the Supreme Court. Many of her views are clearly outside those of mainstream America, and therefore I will vote against her nomination to the Supreme Court.

I will close by saying that all of us, as Members of this body, receive input

from our constituents, and anytime there is a significant or controversial issue before the Senate, the volume of those statements from our constituents increases. In the case of Ms. Kagan, it has been extremely unusual and extremely interesting. I have had one phone call and four e-mails from Georgians in support of Ms. Kagan. I have had thousands of phone calls and e-mails in opposition to her nomination. That is very unusual, and it is an indication of why the polls nationwide are showing that her approval for a Supreme Court nominee is so low.

Mr. President, with that, I yield the floor.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. THUNE. Mr. President, I rise today to speak about Solicitor General Elena Kagan's nomination to the Supreme Court of the United States.

As Members of this body are well aware, there is no other matter considered by the Senate which has such a profound impact on the constitutional landscape of our country than a lifetime appointment to the Supreme Court of the United States. When reviewing any nomination, I believe the Senate should be thorough, fair, and extensively cover a nominee's background, record, and ability to apply the Constitution and other laws as written.

To quote then-Senator Obama:

> There are some that believe that the President, having won the election, should have complete authority to appoint his nominee and the Senate should only examine whether the Justice is intellectually capable and an all-round good guy; that once you get beyond intellect and personal character, there should be no further question as to whether the judge should be confirmed.

He went on to say:

> I disagree with this view. I believe firmly that the Constitution calls for the Senate to advise and consent. I believe it calls for meaningful advice and consent, and that includes an examination of a judge's philosophy, ideology, and record.

I also believe the Senate's constitutional duty of advice and consent plays one of the most important rules in protecting the Constitution and an individual's constitutional rights. While nominees should not be rejected based on their personal or political ideology, the Senate must determine whether they are prepared to put those things aside when they assume the bench. Our country deserves a Supreme Court nominee who will judge cases on the constitutional bedrock rule of law, not on their own personal feelings or a desire to legislate from the bench.

After reviewing Ms. Kagan's record, her testimony at the confirmation hearings, and having met with her personally, I am unable to support her confirmation.

As many in this body have already noted, Ms. Kagan has no judicial experience and virtually no experience with the practice of law. Before being nominated by President Obama to be Associate Justice on the U.S. Supreme Court, Ms. Kagan had never tried a case to verdict or argued an appellate case. While judicial experience is not a prerequisite for serving on the Supreme Court, a record on the bench can provide important evidence that an individual understands that the role of a judge is to impartially apply the law.

Justices who have not previously served as a judge typically have deep experience in the courtroom as practical lawyers. That type of experience can also inform how an individual might approach serving on the bench. Ms. Kagan's resume and experience offer no such evidence. She has spent almost her entire career either in partisan staff positions or in academia.

Throughout, she seems to have been a forceful advocate for liberal positions. This consistently liberal world view started early. She once wrote: ''Where I grew up—on Manhattan's Upper West Side—nobody ever admitted to voting for Republicans.'' And when referring to the politicians in her neighborhood, she wrote they were ''real Democrats, not the closet Republicans that one sees so often these days, but men and women committed to liberal principles and motivated by the ideal of an affirmative and compassionate government.''

At Princeton, Ms. Kagan wrote a thesis lamenting the decline of the socialist movement in America and later at Oxford, in another paper, supported the activist Warren Court who ''time and time again . . . asserted its right to do no less than lead the nation.''

Her non-academic career is filled with purely partisan staff positions: the Michael Dukakis Presidential campaign, special counsel to Senate Judiciary Committee Democrats, and domestic policy aide to President Clinton.

Even both of her clerkships were for strongly liberal judges: Judge Abner Mikva of the DC Circuit Court of Appeals and Justice Thurgood Marshall.

There is nothing wrong, of course, about having strong political views. The question before the Senate is whether Ms. Kagan is the type of person who can set aside those views when she puts on the black robe of a judge.

Unfortunately, her record shows that when she has found an objective reading of the law, or even medical science, that conflicted with her political goals, Ms. Kagan would choose her political goals.

A good example of this was when she led efforts to keep the brutal practice of partial-birth abortion legal, while serving as an adviser to President Clinton.

While there are many different opinions on abortion policy, an overwhelming majority of Americans believe that the gruesome procedure is one that is not acceptable and in fact federal law bans this practice with the exception of saving the mother's life.

After President Clinton vetoed Congress's first attempt at a ban and Congress was again debating the procedure, Ms. Kagan urged the President to support an alternative she believed was unconstitutional.

Additionally, when she was confronted with a draft scientific statement from a medical association that would undermine her preferred policy, she decided to rewrite the statement so that it aligned more with her preferred policy goals, as opposed to the association's medical judgment.

At her hearing Ms. Kagan confirmed she had no medical training when she rewrote their statement, but said she was merely helping the medical association more accurately state its own medical views.

Unfortunately, medical experts disagree with her assertion.

Former Surgeon General C. Everett Koop has said that ''no published medical data supported her amendment in 1997, and none supports it today.''

Further, he believes Ms. Kagan's rewriting of the opinion was in fact ''unethical, and it is disgraceful, especially for one who would be tasked with being a measured and fair minded judge.''

Ms. Kagan has even been unable to separate her partisan political viewpoint from her time in academia, most notably her time as dean of the Harvard Law School when dealing with military recruiters.

While dean, Ms. Kagan was confronted with the Federal law requiring schools receiving Federal funds to give equal access to military recruiters.

Instead of requiring Harvard Law School to comply with the plain reading of the law, she continued to deny the military access to Harvard's on-campus recruiting program, while accepting Federal funds.

She even signed on to an amicus brief to the Supreme Court which argued that noncompliance was in fact compliance.

This argument was so flawed, and based purely on her personal opposition to the law enacted by President Clinton and a Democratic Congress, that the Supreme Court unanimously rejected it and said her construction was ''clearly not what Congress intended.''

As Solicitor General, when faced with the proposition of defending the federally enacted don't ask, don't tell policy after the liberal Ninth Circuit Court of Appeals issued a decision against the policy and required a costly trial, Ms. Kagan again chose to follow her personal beliefs and allowed for the trial, which is unfavorable to the military and current law, to go forward.

At her confirmation hearings, when asked about this decision, she said she allowed the trial to go forward because it would allow for the development of a fuller record in support of the government's best interest.

The problem is that the district court records clearly contradict this position.

According to the plaintiff's lawyers in this case, Ms. Kagan herself told them ''loud and clear'' that further discovery would be bad for the government's interests.

It is clear to me that Ms. Kagan considers herself a ''real Democrat'' committed to liberal principles and has, at

no time, shown an ability to separate her personal beliefs from the job at hand.

Again, practical judicial and courtroom experience is not necessary, but what is critical is the ability to serve with impartiality.

Unfortunately, I have nothing but Ms. Kagan's word to indicate that she will be able to do so, nothing to show that she can apply the law to the facts and not her ideology to the law.

At this time in our Nation's history, when the size of government has exploded and spending is out of control, we need more than her word.

We need concrete evidence that she will be more than a politically motivated ideologue on our highest Court.

We need a Supreme Court Justice that is willing to apply the constitutional principles of a limited government with limited powers.

We need a Supreme Court Justice that does not believe Congress has the right to pass overreaching laws requiring Americans to eat three fruits and three vegetables a day, something she suggested at her hearing Congress has the power to do.

When pushed on the outer limits of federal power, Ms. Kagan said ''I would go back, I think, to Oliver Wendell Holmes on this. He . . . hated a lot of the legislation that was being enacted during those years, but insisted that, if the people wanted it, it was their right to go hang themselves.''

For our system of government to work as intended by the Framers, each branch of government must do its job.

It is the job of the courts to apply the law, including the constitutional limitations on Federal power.

When Ms. Kagan says that the people have ''the right to go hang themselves,'' she is suggesting that the Supreme Court should not do its job, that it should let Congress claim whatever power it wants.

That is not what the Constitution says and it is not what is in our Nation's ultimate interest.

Freedom and limited government must endure; they must not be cast aside because a temporary electoral majority finds them inconvenient.

Our Founders intended for our Supreme Court Justices to be more than a rubberstamp to a particular ideology, administration, or political party.

I cannot trust that Ms. Kagan will be more than this, and consequently am left with no other choice than to oppose her confirmation.

I yield the floor.

The PRESIDING OFFICER (Mr. CASEY). The Senator from Mississippi.

Mr. COCHRAN. Mr. President, as the Senate considers the nomination of Solicitor General Elena Kagan to be an Associate Justice on the United States Supreme Court, I want to thank Senators LEAHY and SESSIONS for their work in the Judiciary Committee on this nomination. The hearings were informative and respectful, and they produced a hearing record that gives all Senators a better understanding of the nominee's background.

She graduated with academic honors from Princeton University and Harvard Law School. She clerked for Supreme Court Justice Thurgood Marshall, served as a White House policy advisor for the Clinton administration, and as dean of Harvard Law School. Last year, on March 19, she was confirmed by the Senate as U.S. Solicitor General.

She has not had much experience as a practicing lawyer, and she has had no experience as a judge. Her lack of legal and judicial experience is not a disqualification, but it does make our job of evaluating this nominee a bit different. We should ask ourselves whether Elena Kagan will perform the duties of a Supreme Court Justice with the requisite fairness, restraint, and respect for settled precedent under the laws and constitution of the United States.

After reviewing the record and her testimony, I believe serious questions about her respect for precedent have not been answered. General Kagan has a history of political advocacy, and she has not shown that she appreciates the critical distinction between political advocacy and neutral judicial decision-making.

As an example, General Kagan's prior work suggests that she would not protect an individual's constitutional right to bear arms. As a policy advisor to President Clinton, Kagan promoted several gun control proposals, including background checks for all gun purchases in the secondary market, a gun tracing initiative, and giving law enforcement the ability to retain background check information from lawful gun sales. She also drafted executive orders to restrict the importation of semiautomatic rifles and to require all Federal law enforcement officers to install locks on their weapons.

More recently, as Solicitor General, Ms. Kagan refused to submit a brief to the Supreme Court in support of the petitioner in the McDonald v. Chicago case. In June of this year, the Supreme Court ruled in favor of the McDonald petitioner, holding that the second amendment right to bear arms is binding on the States. Notably, McDonald was a 5-to-4 decision. It is the second Supreme Court decision in recent years to affirm the right to bear arms by a narrow, 5-to-4 majority. When asked whether she agrees with the four dissenting Justices in these two cases, General Kagan repeatedly declined to answer the question.

I am concerned that General Kagan is not committed to observing binding precedent in the area of second amendment rights. If she is confirmed to the Supreme Court, she could overturn the closely decided holdings of these recent cases.

General Kagan's record on military recruiting at Harvard Law School also is troubling to me. As dean of Harvard Law School, she disallowed military recruiting on campus during a time of war. Her actions were in violation of Federal law that requires schools accepting Federal funds to allow military recruiters access to campus. As justification for her actions, she referred to the military's ''don't ask, don't tell'' policy as a ''moral injustice of the first order,'' and she reaffirmed those views during her confirmation hearings. When she openly defied Federal law, she emailed the Harvard Law community to say she ''hoped'' the Federal Government ''would choose not to enforce'' the law. The Supreme Court later ruled unanimously that Harvard was, in fact, in violation of Federal law.

What is even more troubling is that Kagan was not candid about this incident during her recent confirmation hearings. When asked about this issue, she claimed that Harvard Law School was ''never out of compliance with the law.'' That is a quote from the record—''never out of compliance with the law.'' She also said that the military had ''equally effective substitute'' methods for recruiting students from Harvard and had ''full and good access'' to students during this time.

Her assertions are belied by several contemporaneous documents from military recruiters, showing that they encountered severe impediments to recruiting Harvard students. Internal Pentagon documents indicate that under Dean Kagan, ''[t]he Army was stonewalled at Harvard.'' The chief of recruiting for the Air Force's Judge Advocate General Corps wrote that ''Harvard is playing games.'' That's in quotes: '' Harvard playing games.'' And an Air Force recruiter wrote to Pentagon officials saying that, ''[w]ithout the support of the Career Services Office [at Harvard], we are relegated to wandering the halls in hopes that someone will stop and talk to us.''

I believe that the nominee's discriminatory treatment of military recruiters was both contrary to law and a disservice to the military during a time that America was at war. Her recent testimony that she acted within the law and that the military had equal access to students is less than candid and is directly contradicted by a unanimous Supreme Court ruling.

It is the responsibility of the Senate to make certain that those who are confirmed to the Supreme Court are not only qualified by reason of experience and training, but also are fully committed to upholding the rule of law. I cannot support Ms. Kagan's nomination to a lifetime appointment on the Supreme Court, based on the facts I have just described.

Ms. Kagan has a history of openly defying established Federal law and of being hostile to certain individual rights guaranteed by our constitution. Her recent hearing testimony did not show that she is prepared to relinquish the role of political advocate and to take seriously the oath to ''faithfully and impartially'' uphold the constitution and laws of the United States.

For these reasons, I cannot support her nomination.

The PRESIDING OFFICER (Mr. BEGICH.) The Senator from Maine.

Ms. COLLINS. Mr. President, I rise today to discuss the nomination of Elena Kagan to be an Associate Justice of the U.S. Supreme Court. The responsibilities of a Supreme Court Justice are weighty indeed. It is his or her task to interpret the Constitution, to protect our cherished rights, and to enforce the laws passed by Congress.

Justices entrusted with lifetime appointments also must avoid the temptation to usurp the legislative authority of the Congress or the executive authority of the President. As Chief Justice John Marshall famously wrote in the 1803 decision, Marbury v. Madison, the Court must ''say what the law is.'' That is, after all, the appropriate role of the judiciary. For a judge to do more would undermine the constitutional foundation of the separate branches of government.

Given this backdrop, disputes regarding the scope of the Senate's power of advice and consent are not uncommon, nor unexpected whenever a President puts forward a Supreme Court nominee for our consideration. More than 215 years after the Senate rejected President George Washington's nomination of John Rutledge to serve on the Supreme Court, Senators continue to grapple with the criteria to use to evaluate Supreme Court nominees and the degree of deference to accord the President.

The Constitution, after all, pronounces no specific qualifications for Supreme Court Justices. It does not require that a Justice possess judicial experience nor even be an attorney. The absence of such requirements in the Constitution allows the Court to be comprised of people from different backgrounds, but in carrying out our advice and consent role, the Senate must ensure that judicial nominees have qualities befitting the post.

Senators must examine each nominee's competence and expertise in the law, judicial temperament, and integrity as demonstrated throughout his or her professional career. Determining a nominee's fitness to serve a lifetime appointment to the Nation's highest Court is one of the most critical and consequential responsibilities any Senator faces.

In considering judicial nominees, I carefully weigh their qualifications, competence, professional integrity, judicial temperament, and philosophy. I believe it is also critical for nominees to have a judicial philosophy that is devoid of prejudgment, partisanship, and preference. Only then will the decisions handed down from the bench be impartial and consistent with legal precedents and the constitutional foundations of our democratic system.

I have applied these standards to Elena Kagan. Having analyzed her record, questioned her personally, and reviewed the Judiciary Committee's hearings, I have concluded that Ms. Kagan should be confirmed to our Nation's highest Court.

The American Bar Association's Standing Committee on the Federal Judiciary has unanimously rated Ms. Kagan as ''well qualified.'' Ms. Kagan's remarkable legal and academic career demonstrates amply her intellectual capacity to serve on the Court. Her writings, testimony, and my discussions with her all demonstrate not only a sweeping knowledge of the law, but also a love for the law, a passion for judicial reasoning.

Ms. Kagan reflected the judicial temperament and philosophy I am seeking in nominees when she said during her testimony, ''I will listen hard to every party before the court and to each of my colleagues. . . .And I will do my best to consider every case impartially, modestly, with commitment to principle and in accordance with law.''

In writing in support of Ms. Kagan, former court of appeals nominee Miguel Estrada said the following:

> Elena possesses a formidable intellect, an exemplary temperament and a rare ability to disagree with others without being disagreeable. She is calm under fire and mature and deliberate in her judgments. Elena would also bring to the Court a wealth of experience at the highest levels of our government and of academia. If such a person who has demonstrated great intellect, high accomplishments and an upright life, is not easily confirmable, I fear we will have reached a point where no capable person will readily accept a nomination for judicial service.

As many of my colleagues will recall, Mr. Estrada's own nomination to the U.S. Court of Appeals for the District of Columbia was the first appellate court nomination in history to be successfully derailed by a filibuster, even though a majority of Senators, including myself, supported his nomination. That was truly unfair.

With that experience as a guide, I take Mr. Estrada's endorsement of Ms. Kagan to heart, and I agree that the Senate must put aside partisanship, must avoid political considerations, and must evaluate Court nominees with great care and with great fairness. We must not do to Ms. Kagan what, unfortunately, many Members on the other side of the aisle did to Mr. Estrada, despite his qualifications.

To be clear, in her previous posts, Ms. Kagan has taken positions with which I disagree. It appears that her personal opinion on gun rights is at odds with my own. But, nevertheless, Ms. Kagan indicated in her testimony before the Judiciary Committee that she would follow the precedent established in the Heller and the McDonald cases, describing those decisions as settled law. These cases clearly establish that the right to bear arms is an individual right guaranteed by the Constitution.

I believe Ms. Kagan will respect the precedent established in these two important cases. Ms. Kagan's responses on several issues indicate that she appears to understand and embrace judicial restraint and the limits of when courts should and should not intercede in matters.

She rightly deferred on several issues as policy questions more appropriately resolved by Congress and the executive. Based on my review of Ms. Kagan's record, my assessment of her character, and my belief in her promise to adhere to precedent, Ms. Kagan warrants confirmation to our Nation's highest Court. She possesses the intellect, experience, temperament, integrity, and philosophy to serve our country honorably as an Associate Justice of the U.S. Supreme Court.

I yield the floor.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. Mr. President, I am very pleased to be here to speak in favor of Elena Kagan's nomination to the Supreme Court. Over the course of our Nation's history there have been 111 Justices of the U.S. Supreme Court. Only three of those have been women. They are outstanding women: Sandra Day O'Connor, Ruth Bader Ginsberg, and Sonia Sotomayor. There have never been more than two women serving on the Supreme Court at the same time.

But this week, Elena Kagan is poised to rewrite that history and set a new highwater mark for our country. My meeting with her is one that I will always remember. I will also remember my meeting with Justice Sotomayor.

We covered a lot of ground. Of course, it was generalized conversation because I cannot really ask how an individual will vote on a certain case. I asked her about privacy rights. I asked her about individual rights. I asked her how she felt about stare decisis.

I believe she was very strong in her view that there are precedents that have been set, that she would not use any type of agenda other than the Constitution of the United States to decide the cases that will come before her. When she is confirmed, we will have three incredibly talented women serving on the Supreme Court at the same time for the very first time in our country's history.

Why is that important? Of course, the most important thing is to have the best legal minds. But it is also important to have the diversity that reflects our Nation, and we know more than half our people are women, and the reach of the Court is enormous. It reaches to every citizen. I think it is important we begin to see more women on the Court who, of course, are as qualified as Elena Kagan.

She has broken barriers throughout her career. She was the first female dean of Harvard Law School. She is our Nation's first female Solicitor General. We are so fortunate to have a nominee who is as bright and respected and as committed to equality and justice for all Americans as Elena Kagan. I congratulate the President for this nomination, and I thank at least five of my

Republican colleagues who have already stated they are going to vote for her. I hope there will be more.

Elena Kagan was born into a family with a deep and abiding commitment to public service. Her mother was a public schoolteacher. Her dad was a tenant's lawyer. She followed in both her parents' footsteps, serving both as a teacher and a lawyer.

She brings a depth and richness of legal experience that will serve her well on the Supreme Court. She served as a law clerk for legendary Justice Thurgood Marshall. She has been an attorney in private practice. She has been a White House lawyer, a law school professor, a dean, and now she is the Nation's top lawyer. So when I hear a few of my colleagues come to the floor and say she is not qualified for this position, I wish to repeat her experiences: law clerk for legendary Justice Thurgood Marshall, an attorney in private practice, a White House lawyer, a law school professor, a dean of a law school, and the Nation's top lawyer before the Supreme Court.

I think that résumé speaks for itself. She has been in the real world in some of these jobs—practically all of them—and that is important. We want to make sure we have Justices who understand what life is all about.

As Solicitor General, the country's top lawyer before the Court, she has filed hundreds of briefs and successfully argued a broad range of cases, including defending Congress's ability to protect our children from pedophiles and protecting our Nation's ability to prosecute those who provide material support to terror groups. That is why she has the support of so many former Solicitors General, and that is why she received the highest rating from the American Bar Association: unanimously ''well qualified.''

She is widely respected for her exceptional intellect, her deep knowledge of constitutional and administrative law and she has a proven ability to build consensus. How important is that in today's world where there is too much shouting and not enough conversation. Her qualities are qualities that are critical for the Court at this time.

Let's hear what Elena Kagan's peers and colleagues in the legal profession say about her. There is a letter signed by eight former Solicitors General who served in both Democratic and Republican administrations. This is what they wrote:

> Elena Kagan would bring to the Supreme Court a breadth of experience and a history of great accomplishment in the law.

Then, there is a joint letter from former Deputy Solicitors General and Assistants to the Solicitor General. They write about her:

> [Her] intellectual ability, integrity and independence, personal skills, and broad experience promise to make her an outstanding Supreme Court Justice.

The National Association of Women Judges wrote:

> General Kagan's rich and varied legal career—as a private attorney, a White House lawyer, a professor, Dean and as the country's top lawyer—provides her with a unique constellation of experiences that will bring fresh ideas to the Court.

Sixty-nine law school deans wrote a letter on her behalf, and they wrote:

> She is an incisive and astute analyst of the law, with a deep understanding of both doctrine and policy.

The National District Attorneys Association wrote that they believe that ''Solicitor General Kagan's diverse and impressive life experiences will be a welcome addition to the Court.''

So if you look at these letters, what you see is a broad swath of support for this nominee, from Republicans and Democrats and Independents, from people who practice law to prosecutors. It is a very broad range of support.

So I think this is an important day for all Americans who believe every branch of our government—the Congress, the administration, and the judiciary—should reflect the diversity of our great country.

Justice Sandra Day O'Connor said in an interview last year:

> About half of all law graduates today are women, and we have a tremendous number of qualified women in the country who are serving as lawyers. So they ought to be represented on the Court.

I have had the extreme honor of speaking with the Honorable Sandra Day O'Connor, the former Justice of the Supreme Court, many times, and she always made the point to me, over and over, about how crucial it was in the Court to have a woman's voice. In a body of nine, it seems right that we move toward equal numbers, and we are doing that today. Again, the most important thing is, you have to get the best on the Court. Of course, that is No. 1. But as Sandra Day O'Connor has said clearly, since ''half of all law [school] graduates today are women, we have a tremendous number of qualified women . . . [s]o they ought to be represented on the Court.'' I am sure she is—I do not want to speak for her, but I am sure she is very pleased to see we are moving toward full equality in this country.

Elena Kagan is a role model for so many women entering the legal profession today. Her intellect, her broad range of legal experience, her sense of fairness, her profound respect for the law make her well qualified to serve as an Associate Justice of the Court.

I will be so honored to vote in favor of her nomination, and I hope we will have more than five Republicans, and I hope the one Democrat who said no might rethink it. We will see what happens. But I think, at the end of the day, this country will be better served because we will have a new Justice and her name will be Elena Kagan.

I yield the floor.

Mr. UDALL of Colorado. Mr. President, I rise today to speak on the nomination of Solicitor General Elena Kagan to be Associate Justice of the U.S. Supreme Court. As Senators, we have few responsibilities that have greater lasting impact on our country than providing advice and consent on the confirmation of nominees to serve on the high Court. In my 10 years in the House of Representatives, I witnessed the Senate consider just two Supreme Court confirmations, and now after serving only 19 months in the Senate, I have already had the distinct honor of considering two nominations. The historic importance of these appointments has not been lost on me, as we now consider confirming General Kagan to become the third female Justice on the current court, and only the fourth woman ever to serve on a court that was exclusively male for almost 200 years.

I take my advice and consent responsibilities seriously, and as I consider each Supreme Court nominee, I focus on their judicial temperament, experience, pragmatism and demonstrated ability to view the law in ways that go beyond ideology. When I met with Solicitor General Kagan 2 months ago, I was impressed with her thoughtfulness and her knowledge of constitutional law. After reviewing her testimony before the Judiciary Committee, studying her record and hearing from a wide range of Coloradans, I am convinced that General Kagan possesses the qualities and attributes of a nominee who is eminently qualified and will be an effective member of the highest Court in our land. I am confident that she is not a rigid ideologue and that her judicial approach will serve our country well.

I have not come to this decision lightly. I know that the judgments made by the Supreme Court have a real impact on the lives of Coloradans. From the right to equal pay to the freedom to keep and bear arms to so many other issues, the Supreme Court makes decisions that profoundly impact our rights and freedoms every year. I believe that General Kagan will provide a voice on the Court that will ensure fairness and adherence to judicial restraint and the rule of law.

As I told General Kagan when I met with her, I am particularly interested in ensuring that the Justices understand the weight and impact of issues uniquely important in the West, including water rights, natural resources and Federal lands. And I am convinced that she understands the complexity and unique importance of these issues to Colorado.

While I am comfortable with General Kagan's sensitivity to Western issues, I would be remiss if I did not add that I hope that after this confirmation process is complete, the White House will seriously consider the importance of geographic and educational diversity on the Supreme Court. Many of my colleagues have talked in the past about how a judge's personal background can help shape his or her understanding of the practical side of the issues that come before them. Similarly, I believe that the Court would be enhanced by the addition of Justices who come from west of the Mississippi.

But today we are considering the nominee that the President chose, and she is an excellent choice. This week, I plan to cast my vote to confirm Solicitor General Kagan to be the next Associate Justice of the Supreme Court, and I would encourage my colleagues to support her confirmation as well.

Mr. JOHNSON. Mr. President, I have often said that few decisions have a more lasting effect on our democracy than that of approving an individual's nomination to the Supreme Court. As you know, Supreme Court Justices enjoy lifetime tenure and answer some of the toughest questions facing our great Nation. For this reason, I take my constitutional duty of advice and consent very seriously.

This will be the fourth time that I have provided advice and consent for a Supreme Court nominee. My votes have reflected the belief that, while the Senate should not act as a rubber stamp for the President, it should afford him due deference for his judicial nominees. Accordingly, I was proud to support the nomination of Chief Justice Roberts, Justice Alito, and Justice Sotomayor—all of whom have served our country with candor and dignity. While these Justices differ in some aspects of their judicial philosophy, they are alike in several respects: each has an unwavering commitment to justice and the rule of law, a thorough understanding of American jurisprudence, and views that are within the broad mainstream of contemporary legal thought. I am confident that Ms. Kagan shares these characteristics, which are crucial for service on the high Court.

Ms. Kagan's distinguished career is a testament to her hard work, integrity, and intelligence. As her confirmation hearings made clear, Ms. Kagan is extremely well-respected in the legal community; her colleagues have spoken extensively of her keen legal sense and abilities as a consensus-builder. These are skills that will serve her well should she be confirmed by this body. Additionally, Ms. Kagan has exhibited a devotion to precedent and an understanding that, if confirmed, she will interpret, and not enact, the law. Importantly, Ms. Kagan received the highest rating possible from the American Bar Association. It is clear that she has an accomplished resume.

Earlier this summer, I had the privilege of meeting with Ms. Kagan to learn more about her judicial philosophy. I was impressed by her brilliant legal mind and her commitment to justice and the rule of law. Ms. Kagan assured me that she will strictly adhere to precedent and remain a neutral arbiter should she be confirmed to the Supreme Court. I reviewed her record and found nothing to deter me from that belief. I had the opportunity to ask Ms. Kagan about her treatment of military recruiters while dean of Harvard Law School. This issue is particularly important to me because my son Brooks is a military recruiter for the Massachusetts National Guard. Ms. Kagan assured me that military recruiters had full access to Harvard law students for the entire duration of her deanship. I was very satisfied with Ms. Kagan's responses to my questions, and believe her to have the utmost respect and gratitude for military service.

During our meeting, I asked Ms. Kagan about her understanding of tribal sovereignty. She told me that—while she has only a basic understanding of Native American legal issues—she would welcome the opportunity to visit Indian Country and learn more about tribal government. Upon reviewing her record, I was happy to learn that Ms. Kagan is an advisory board member of the American Indian Empowerment Fund, an organization that seeks to empower Native American children and families. After speaking with Ms. Kagan, I am confident that she will respect the right to tribal sovereignty. I look forward to her eventual visit to Indian Country.

I believe that Elena Kagan would make a tremendous addition to the Court. Her distinguished record and commitment to justice and the Constitution make her a well-qualified candidate. It is my hope that she receives the bipartisan support that she deserves.

The PRESIDING OFFICER. The Senator from Arkansas.

HEALTHY, HUNGER-FREE KIDS ACT

Mrs. LINCOLN. Mr. President, I come to the floor for the second week to continue to urge and compel my colleagues to pass the child nutrition reauthorization legislation before our child nutrition programs expire on September 30.

I know we have much to do. We are coming to the end of our work period before we go home to our States during August. But we all know when we come back in September our time will also be limited, and doing something now is critically important.

The bipartisan Healthy, Hunger-Free Kids Act will put our country on a path to significantly improving the health of the next generation of Americans. Congress has the opportunity to make a historic investment—the biggest investment in the history of our program—in our most precious gift and the future of this country: our children—all our children.

We are circulating a consent request right now that will require no more than 3 hours, at a maximum, of Senators' time to do this. Three hours is all we are asking of this body to be able to make a historic effort on behalf of our children.

Last week, I spoke multiple times on the floor about this bill. I talked about the very real threat of hunger and obesity in this country and how our bill works to address both these critical issues.

I talked about the cost of action. This bill is completely paid for and will not add one cent to the deficit. In fact, in my opinion, we have operated in this bill exactly how the American people want to see us operate. We have gone through the regular order of the committee. We have worked in a bipartisan way. We have worked in a fiscally responsible way to pay for this bill out of the actual areas in agriculture and in the Ag Committee where we could pay for this bill. It is completely paid for, as I said before, so adding to the debt is not an issue.

I also talked about the cost of inaction, about what it will mean to our States, to our schools, to our hard-working families, and to those families who, unfortunately, due to no fault of their own, have been caught in these economic crisis times, who are without work but whose children still go to school and still need to be fed.

Certainly, I have talked about the cost to the most important category; that is, our children—the fact that if we do not move on this bill, it is yet 1 more year in a child's life that is not going to see the evidence of good nutrition, its availability in schools through programs that we both have and we expand, and those programs which we can actually create more for in terms of afterschool meals instead of afterschool snacks. Another school year will start without nutritional standards for meals served in schools, meaning we will miss yet another important cycle in a child's life to instill good eating habits.

I think about not just younger children but older children, as my kids are moving into high school and starting football practice. I think about the ability to be able to see even those older children in afterschool programs, to be able to receive a full meal at the end of that day instead of just a simple snack.

Schools will lose out on the first increase in the reimbursement rate to school feeding programs since 1973.

I say to the Presiding Officer, think about where you were in 1973. I think about where I was in 1973. I think about what 1973 dollars purchased and what 2010 costs are today. How far do those 1973 dollars go when we go to the grocery store and pay 2010 prices? Think about what our school services are up against in using those 1973 dollars.

Our afterschool feeding programs will suffer, meaning Congress will fail to recognize that hunger does not end when the school bell rings and our children are done with their studies.

I simply do not think it is too much to ask. We can sacrifice 3 hours of our time for our children, for all our children in this great country, because they will be there as a workforce, as leaders, as teachers, as soldiers. They will be there for us as they grow up and become the next generation.

Yet we have an opportunity here, and if we let it pass us by, it will be certainly no one's fault but our own. We continue to spend a lot of time debating bills on the floor this week without seeing much in the way of actual results. This bill represents a real opportunity for us to actually get something

done and to breathe some fresh, new, bipartisan air into this Chamber for a change.

I think the American people are looking for us to do that. I think they are thirsty for results. They want us to roll up our sleeves, make the tough decisions, and get things done, which is what we were elected to do. They do not want to see us wasting precious time, putting each other's respective political parties in difficult positions. They want to see us spending our time wisely and seizing the opportunities where we have come together in a bipartisan manner to solve real problems.

Hunger and childhood obesity are real problems in the lives of our children today, and it is unfortunate. These are diseases for which we have a cure. It is simply that we must put that cure into place.

We are elected in this body to work together to pass legislation that addresses the very real issues our families all across this Nation face together in each and every one of our States. Although our rates for hunger or obesity may fluctuate and be different State to State, it is still a very real problem in all of our States.

This legislation allows us to do that. It allows us to address the very real issues that families are facing today and tomorrow and in the months ahead.

On Monday of this week, First Lady Michelle Obama wrote an op-ed that was published in the Washington Post that reminded us about the historic opportunity we have in front of us—an opportunity to make our schools and our children healthier by passing this bill. I happen to have a copy of the First Lady's op-ed with me right now, and I ask unanimous consent that the full text be printed in the RECORD following my remarks.

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

(See exhibit 1.)

Mrs. LINCOLN. Thank you, Mr. President. One clear call to action in the First Lady's article was her statement about how important it is for Congress to pass this bill as soon as possible. She recognizes that we are poised to do something truly historic, and I could not agree with her more. I applaud her for her initiative and for her passion about this issue, her willingness to elevate it every opportunity she has, and to focus on, again, our greatest resource—our children.

We also saw yesterday in the New York Times an op-ed published by our own Senator DICK LUGAR who has been working so diligently in his time here in the Senate to bring a tremendous focus on hunger which exists in this country and globally. Very few people can match his dedication and his passion to this issue, and I am grateful for his comments. I ask unanimous consent that his op-ed be printed in the RECORD following my remarks as well.

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

(See exhibit 2.)

Mrs. LINCOLN. Mr. President, I know we have a lot on our plate this week and certainly in the weeks to come, but I am determined to see this bill come up for a vote. I think people in this body have a great opportunity—and they know it—to make a difference not just in their children's lives but in the lives of their neighbors' children, or people whom they don't even know, but they do know that those parents love and care for their children as much as each one of us loves and cares for our own children. They know those parents want every opportunity for other children across this globe, but certainly across this Nation, to be able to reach their potential.

If you visit our schools, particularly in low-income areas, and you look in the eyes of those children, you know that one of the barriers for them in terms of reaching their potential unfortunately happens to be that they are hungry, that they are living in food insecurity, that they are struggling with obesity because of unfortunate cultural or poor eating habits. If there is anything we can solve that is a barrier to our children reaching their potential, it is something such as this which we know we have the cure for, we know we have the solutions for, and we have an opportunity this week to begin that process and make it happen through legislation we can pass here in the Senate. We can do it and we should.

I am going to continue to come to the floor or to my colleagues to bring up this issue and to talk about it. It is a bill that I think can make a difference. I am going to continue to talk about the real children and the real families out there across this Nation who would benefit from this legislation and who are depending on us to do the right thing. I am going to continue to hassle and press my colleagues, as I have been known to do, so we can get this very important bill done in a timely way.

I say to my colleagues, to this Nation, and to the opportunity that exists before us: Let's do it. In the words of the First Lady: Let's move. Let's get it going. Let's get it done. Let's not let this historic opportunity to change the lives of our children in this Nation—all of our children and, therefore, our future—let us not allow it to pass us by.

EXHIBIT 1

[From the Washington Post, Aug. 2, 2010]

A FOOD BILL WE NEED

(By Michelle Obama)

Last spring, a class of fifth-grade students from Bancroft Elementary School in the District descended on the South Lawn of the White House to help us dig, mulch, water and plant our very first kitchen garden. In the months that followed, those same students came back to check on the garden's progress and taste the fruits (and vegetables) of their labor. Together, they helped us spark a national conversation about the role that food plays in helping us all live healthy lives.

For years our nation has been struggling with an epidemic of childhood obesity. We've all heard the statistics: how one in three children in this country are either overweight or obese, with even higher rates among African Americans, Hispanics and Native Americans. We know that one in three kids will suffer from diabetes at some point in their lives. We've seen the cost to our economy—how we're spending almost $150 billion every year to treat obesity-related conditions. And we know that if we don't act now, those costs will just keep rising.

None of us wants that future for our children or our country. That's the idea behind ''Let's Move!''—a nationwide campaign started this year with a single and very ambitious goal: solving the problem of childhood obesity in a generation, so kids born today can reach adulthood at a healthy weight.

''Let's Move!'' is helping parents get the tools they need to keep their families healthy and fit. It's helping grocery stores serve communities that don't have access to fresh foods. And it's finding new ways to help America's children stay physically active.

But even if we all work to help our kids lead healthy lives at home, they also need to stay healthy and active at school. The last thing parents need or want is to see the progress they're making at home lost during the school day.

Right now, our country has a major opportunity to make our schools and our children healthier. It's an opportunity we haven't seen in years, and one that is too important to let pass by.

The Child Nutrition Bill working its way through Congress has support from both Democrats and Republicans. This groundbreaking legislation will bring fundamental change to schools and improve the food options available to our children.

To start, the bill will make it easier for the tens of millions of children who participate in the National School Lunch Program and the School Breakfast Program—and many others who are eligible but not enrolled—to get the nutritious meals they need to do their best. It will set higher nutritional standards for school meals by requiring more fruits, vegetables and whole grains while reducing fat and salt. It will offer rewards to schools that meet those standards. And it will help eliminate junk food from vending machines and a la carte lines—a major step that is supported by parents, health-experts, and many in the food and beverage industry.

Over the past year, I have met with community leaders and stakeholders from across the country—parents and teachers, school board members and principals, suppliers and food service workers—about the importance of making sure every child in America has access to nutritious meals at school. They all want what's best for our children, and they all know how critical it is that we keep making progress.

That's why it is so important that Congress pass this bill as soon as possible. We owe it to the children who aren't reaching their potential because they're not getting the nutrition they need during the day. We owe it to the parents who are working to keep their families healthy and looking for a little support along the way. We owe it to the schools that are trying to make progress but don't have the resources they need. And we owe it to our country—because our prosperity depends on the health and vitality of the next generation.

Changes like these are just the beginning, and we've got a long way to go to reach our goals. But if we work together and each do our part, I'm confident that we can give our children the opportunities they need to succeed—and the energy, strength and endurance to seize those opportunities.

EXHIBIT 2

[From the New York Times, Aug. 3, 2010]

THE SENATE'S IMPORTANT LUNCH DATE

(By Richard G. Lugar)

With federal child nutrition programs due to expire Sept. 30, the Senate should approve reauthorization legislation this week, before the monthlong Congressional recess.

The bill was unanimously approved by the Senate Agriculture, Nutrition and Forestry Committee in March, and it has no significant opposition. It has simply been a victim of the crowded calendar of the Senate. But if we don't pass the bill immediately, we will imperil programs that have proved vital to our youth, families and schools for decades, and that are especially important during this time of economic stress.

Since the recession began in late 2007, the use of federal free and reduced-price school lunches has increased by 13.7 percent. Twenty-one million children—roughly two-thirds of the students eating school lunches—benefit from the program.

For many of these children, school lunches represent the bulk of the nutrition they receive during the day, and it is imperative that there are no gaps in providing these meals. The bill would also cut out a lot of red tape in the filing process, ensuring that more families and schools can participate. And it would increase the scope of the after-school meal program that currently operates in only 13 states.

Research shows that food insecurity and hunger rise during the summer, when children don't have regular access to school meals. The bill would continue to enlarge programs, operated through organizations like local recreation departments, that help feed young people when schools aren't in session.

Year-round child nutrition programs, on top of improving children's health and teaching them to eat better, are critical to academic success. The school breakfast program has been directly linked to gains in math and reading scores, attendance and behavior, and speed and memory on cognitive tests.

By passing the legislation, we would expand access to the supplemental nutrition program that makes certain that low-income women, infants and children are provided healthy foods, information on eating well and referrals to health care. The supplemental program already helps almost half of all infants and about one-quarter of all children ages 1 to 4 in the United States; this legislation would provide millions of dollars worth of further support.

The new bill would also make great strides in reducing junk food in schools and improving the nutritional quality of meals. Nearly one-third of our children are either overweight or obese, which is telling evidence of greater social problems. Indeed, it's become a national security issue—27 percent of 17-to 24-year-olds weigh too much to enlist in the military, according to a recent study by a group of retired generals and admirals. This cannot continue.

I have been through many battles on child nutrition, from my days on the Indianapolis Board of School Commissioners to my time as the chairman of the Agriculture Committee. We have debated local and state control, nutritional mandates, the scope of the lunch programs and the unhealthy food choices in school vending machines.

This bill, though, is as close to a moment of consensus as can be achieved. There is bipartisan agreement, thanks to the efforts of the Agriculture Committee's Democratic chairwoman, Blanche Lincoln of Arkansas, and its ranking Republican member, Saxby Chambliss of Georgia. Our only hurdle is the Senate schedule, which we would do well to surmount this week.

Given our economic climate and tradition of bipartisan support for child nutrition, we should pass this meritorious bill now. It would be a success that both parties can claim.

Mrs. LINCOLN. Thank you, Mr. President. I yield the floor and note the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant editor of the Daily Digest proceeded to call the roll.

Mr. SHELBY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. SHELBY. Mr. President, I rise today in opposition to the nomination of Solicitor General Elena Kagan to the U.S. Supreme Court.

Upon President Obama's nomination of Ms. Kagan, I stated that I would base my decision on what I could ascertain about her judicial philosophy from other components of her record, in light of her lack of judicial experience. What little information she offered during her confirmation hearings did not accrue to her credit, in my judgment.

I am unconvinced that the hostility Ms. Kagan demonstrated toward the second amendment as clerk to Justice Marshall, counsel for the Clinton sdministration, and as Solicitor General under President Obama has changed or would not drive her legal opinions on the matter.

Ms. Kagan has spent her career implementing antigun initiatives and evidence of her antagonistic attitude towards the second amendment can be found from the beginning of her legal career.

As a U.S. Supreme Court law clerk in 1987, Ms. Kagan stated she was ''not sympathetic'' toward a man who contended that his constitutional rights were violated when he was convicted for carrying an unlicensed gun. Think about that.

In a memorandum to Justice Marshall regarding Sandidge v. United States, Ms. Kagan wrote that Mr. Sandidge's ''sole contention is that the District of Columbia's firearm statutes violate his constitutional rights to keep and bear arms.' I'm not sympathetic.'' She recommended that the Supreme Court not even hear the case, thereby allowing Mr. Sandidge's conviction to stand.

When Ms. Kagan served as a political adviser to President Clinton, she played a key role in the gun control efforts that were a trademark of the Clinton administration. Ms. Kagan took a lead role in a series of efforts to respond to the Supreme Court's 1997 ruling in Printz v. United States, which struck down parts of the 1993 Brady handgun law.

Ms. Kagan drafted proposals that would have effectively prohibited the sale of guns without action by a ''chief law enforcement officer.'' She authored a draft executive order requiring ''all federal law enforcement officers to install locks on their weapons'' and one to restrict the importation of certain semiautomatic rifles. Ms. Kagan drafted two memorandums in 1998 that advocated for policy announcements on various gun control proposals, including ''legislation requiring background checks for all secondary market gun purchases,'' and a ''gun tracing initiative.''

As Solicitor General for President Obama, Ms. Kagan failed to find a Federal interest in the McDonald v. Chicago case and did not even file a brief in the case.

Assaults on the second amendment will not end with the McDonald v. Chicago ruling. Therefore, the overarching question remains will Ms. Kagan's attitude as a Supreme Court Justice radically change from her clear and extensive anti-second amendment record?

I firmly believe the right to bear arms is a fundamental right. This has been enunciated through the courts. I do not believe Ms. Kagan's political record and prejudiced background in opposition to the second amendment shows that she is prepared to uphold this core constitutional guarantee as a Supreme Court Justice.

In fact, Ms. Kagan's record has demonstrated a disregard for those laws and constitutional rights she disagrees with. This is also clearly evidenced in her affront to our men and women in the military. I will explain.

As a vocal critic of the military's don't ask, don't tell policy, Ms. Kagan barred military recruiters from Harvard's campus during her time as dean of Harvard Law School. She made her personal feelings unmistakable by repeatedly stating that she abhorred the military's don't ask, don't tell policy, calling it a ''moral injustice of the first order.''

By barring recruiters, Ms. Kagan's actions violated the Solomon Amendment, which requires that the military receive equal access to that of other employers on campus or jeopardize their Federal funding. Ms. Kagan joined a brief before the Supreme Court arguing that Harvard should be able to keep military recruiters off campus but still receive Federal funds—although that was in violation of the law.

She refused to permit ordinary campus access to military recruiters during a time of war, yet still wanted to cash in on Federal funding.

This position was unanimously rejected in 2006, with the Supreme Court stating that this was clearly not what Congress intended.

I find it ironic that we are asked to replace the only Justice with wartime experience with a nominee who willingly obstructed our military during a time of war.

It is unacceptable to limit the ability of our Armed Forces to recruit on campus at a time when the United States is fighting two wars.

I have serious concerns about her actions against the military and her willingness to prevent access to potential recruits during a time of war.

This incident illustrated her liberal agenda superseding her professional judgment.

I have highlighted only two issues of many that exemplify Ms. Kagan's well-defined political record. Put simply, she is a political activist, not a jurist.

Throughout her confirmation hearings, she failed to explain where her political philosophy ends and her judicial philosophy begins.

Mr. President, we need a legal mind on the Supreme Court, not a political one.

We need an impartial arbiter, not a partisan political operative.

Therefore, I firmly oppose Ms. Kagan's nomination to be an Associate Justice on the Supreme Court.

The PRESIDING OFFICER. The Senator from Ohio is recognized.

Mr. BROWN of Ohio. Mr. President, I ask unanimous consent to speak for up to 10 minutes as in morning business.

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

HONORING OUR ARMED FORCES

LIMA COMPANY BATTALION, 25TH MARINES

Mr. BROWN of Ohio. Mr. President, I rise today to honor some 30 members of the Armed Forces who were killed in action serving our country. Five years ago this week, 19 marines from the 3rd Battalion, 25th Marine Regiment lost their lives while serving in Iraq. It was one of the most catastrophic IED attacks on our forces up until that time in the war. Eleven of those marines were from the Lima Company, an Infantry Reserve company with marines from Cincinnati, Chillicothe, Tallmage, Willoughby, Delaware, and Grove City, OH.

Headquartered in Brook Part, OH, the 3rd Battalion, 25th Marine Regiment, known as the 3/25, deployed to Iraq on February 28, 2005. Upon arriving in Iraq, they were indispensable. They trained Iraqi security forces. They conducted critical stability and security operations in and around the cities of Iraq's Al Anbar Province.

From May to August of that year, 5 years ago, they tracked down insurgents, disrupted enemy transportation routes, and seized weapons caches.

They participated in Operation Matador to eliminate an insurgent sanctuary north of the Euphrates River. In doing so, they disrupted a major insurgent smuggling route and gained valuable intelligence.

During Operation New Market, the Lima Company of 3/25 swept a hostile area near Haditha, Iraq.

In June of 2005, during Operation Spear, they helped clear the city of Karabila and recovered Iraqi hostages and destroyed several weapons caches.

From August 1 to 3, 2005, the Lima Company participated in the Battle of Haditha, a code-named Operation Quick Strike. This operation was launched after a marine unit of the 3/25 was attacked and killed by a large group of insurgents on August 1, 2005.

On August 3, 2005, the 3/25 were en route to the initial attack when their amphibious assault vehicle hit a pair of double-stacked antitank mines. The vehicle was completely destroyed in the explosion, and 15 of the 16 marines inside the vehicle died. All of the marines killed were assigned to the 3/25; 11 belonged to the Lima Company. At the time, the Lima Company was one of the hardest hit marine units in the war. In the span of 72 hours—from August 1 to August 3, 2005—19 marines with the 3/25 were killed by insurgents or insurgent-made IEDs.

Yet in the wake of losing their fellow marines, the Lima Company continued to carry out their mission to disrupt the militant presence in the surrounding areas.

Returning from Iraq, the Lima Company was welcomed by family members, friends, and communities. Many families, however, tragically were unable to welcome home their son, husband, father, or loved one.

Over the course of their 7-month deployment, the marines of the 3/25 participated in 15 regimental and battalion operations; 33 of them were killed in action.

We should again honor these heroes. I have met the families of many of these men—they were all men—many of these marines who were killed in action. I spent time talking with many of them about their sons or their husbands or their fathers or their loved ones.

Five years after the Lima Company's single greatest loss, we remember the marines who lost their lives early in those days of August 2005. I wish to share the names with my colleagues in the Senate:

Cpl Jeffrey A. Boskovitch, 25, of Seven Hills, OH;

Sgt David Coullard, 32, of Glastonbury, CT;

LCpl Daniel Deyarmin, Jr. 22, of Tallmadge, OH;

LCpl Brian Montgomery, 26, of Willoughby, OH;

Sgt Nathaniel Rock, 26, of Toronto, OH;

LCpl Christopher Jenkins Dyer, 19, of Cincinnati, OH;

LCpl William Brett Wightman, 22, of Sabina, OH;

LCpl Edward August ''Augie'' Schroeder II, 23, of Columbus, OH. His parents live in Cleveland.

LCpl Aaron Reed, 21, of Chillicothe, OH;

Cpl David Stewart, 24, of Bogalusa, LA;

Cpl David Kenneth Kreuter, 26, of Cincinnati, OH;

Sgt Justin Hoffman, 27, of Delaware, OH;

LCpl Eric Bernholtz, 23, of Grove City, OH;

LCpl Timothy Bell, Jr., 22, of West Chester, OH;

LCpl Michael Cifuentes, 25, of Fairfield, OH.

The families and communities of the Lima Company, 3rd Battalion, 25th Marine Corps Regiment have since banded together to immortalize the lives of their fallen heroes.

Two years ago, a set of eight life-size paintings was unveiled at the Ohio Statehouse in Columbus, with each marine's boots and an eternal flame placed below his likeness. The memorial is currently on display at the Museum of the Marine Corps just outside Washington, DC, in Quantico, VA. These men are remembered and they are honored through a standing granite memorial at Lima Company's headquarters at Rickenbacker Air National Guard Base just outside of Columbus.

Most notably, these fallen men are immortalized in the hearts, minds, and lives of their families and fellow marines.

When I talk still with family members, they are so interested in our continuing to memorialize and remember in our hearts and our minds and in public displays, such as this when possible, the sacrifice of their relatives.

Today we remember and we honor these courageous men. Their sacrifice has not gone unnoticed by the people of a proud State and a grateful nation.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, I thank Senator BROWN for his important comments, and I join him in expressing my sympathy for their loss and my appreciation of the courage and dedication of our men and women in uniform.

I rise to speak of my concerns over Ms. Elena Kagan's refusal as Solicitor General of the United States to defend Federal laws—laws with which she clearly did not agree and with which her President, President Obama, did not agree. Her handling of this matter alone, in my opinion, as one who spent 15 years in the Department of Justice, who loves the Department of Justice, who believes in the rule of law in America, is a disqualifying act by her and should disqualify her from serving on the Supreme Court.

I laid out my concerns at her confirmation hearings and asked her to respond. I gave her at the hearing almost 10 minutes to do so. It was the only time I noticed she actually used notes. Her explanation was not satisfactory.

It is well known by anyone who followed the process that Ms. Kagan has personally opposed the don't ask, don't tell law—a law passed by a Democratic Congress and signed into law by President Clinton. It was not merely a military policy but a Federal law. She served 5 years in the administration of President Clinton in the White House. I am not aware that she ever protested to him about signing that law.

The law says, in effect, that openly homosexual persons may not serve in the U.S. military—don't ask, don't tell. Ms. Kagan was a fierce critic of that law when she was dean of Harvard Law

School. She justified her decision while at Harvard to ban military recruiters from the campus Career Services Office—in clear defiance of subsequent Federal law, the Solomon Amendment—on the basis of her opposition to don't ask, don't tell. The Congress passed four separate Solomon Amendments to make sure people such as Dean Kagan were not treating our military on campus as second-class citizens, which is how they were being treated.

She argued while at Harvard that don't ask, don't tell was a ''moral injustice of the first order.'' I accept that as her opinion. I do not agree with it, but I accept that as a legitimate opinion. But I do not accept her actions blocking military recruiting as legitimate.

Given her strong personal opposition to don't ask, don't tell, she was specifically asked when she appeared before the Senate Judiciary Committee on her nomination to be Solicitor General of the United States—the position in the Department of Justice that defends Federal law before the Supreme Court of the United States, the greatest lawyer job in the world, some say—whether she would be able to fulfill her duty as Solicitor General by defending this very law she had opposed.

She promised the committee under oath that she could and that she would defend the law. She said that her ''role as Solicitor General . . . would be to advance not my own views, but the interests of the United States.'' That is absolutely correct. That is the duty of the Solicitor General. It is a duty, not a matter of discussion. She stated she was ''fully convinced'' that she could ''represent all of these interests with vigor, even when they conflict with my own opinions.''

She said she would ''apply the usual strong presumption of constitutionality'' to the don't ask, don't tell law as reinforced by ''the doctrine of judicial deference to legislation involving military matters.''

There was no doubt about what Ms. Kagan's duty was as Solicitor General if, as was expected, she would be confronted with legal challenges to the don't ask, don't tell law. She had a clear duty under the law and in her duty as Solicitor General to defend this law of the United States. In addition, she had explicitly promised the Senate under oath that she would defend this specific law, even though she disagreed with it.

As it happened, Ms. Kagan was, indeed, faced with the opportunity to defend the don't ask, don't tell law immediately after she took office. Right after she took office, there it was.

In the months leading up to her confirmation, two Federal courts of appeals had decided cases challenging don't ask, don't tell. In one decision, the First Circuit—is in the Northeast of our country—upheld the law. They said it was lawful and constitutional. In the other case, called Witt v. Department of Air Force, the Ninth Circuit, on the west coast, considered to be the most liberal circuit in America, refused to uphold the law.

The Ninth Circuit's decision in the Witt case basically did two things. I hope my colleagues will pay attention to this because it is important. Did the Solicitor General, who now wants to be on the Supreme Court, fulfill her duty or did she not?

The Ninth Circuit ordered the military to go back down to the district court. This is the Court of Appeals, one step below the Supreme Court. They said: No, we want this case to go back to the district court to be decided after a trial, during wartime, I might add. The military would be required to justify the don't ask, don't tell law under a new legal standard that the court had invented out of whole cloth.

The Ninth Circuit said the government would not be allowed to defend the law as a rational, uniform policy that applies to all Armed Forces, as had been done in the First Circuit where the law was affirmed. The First Circuit affirmed it as a matter of law, without any big trial. Was this statute, this congressional action setting military policy, unconstitutional? The First Circuit said it was not. It was lawful. But the Ninth Circuit said the military would have to prove that the application of don't ask, don't tell ''specifically to [this individual plaintiff—Witt] significantly furthers the government's interest and [that] less intrusive means would [not] achieve substantially the government's interest.'' That was a devastating standard. It was very problematic.

After that unprecedented decision in mid-2008, the Solicitor General's Office then in the Bush administration immediately recognized the seriousness of the decision and authorized an appeal to the full Ninth Circuit en banc and asked the full circuit to overrule this three-judge panel decision.

The court did not agree to take the case and overrule the panel. But there were strong objections from several judges of the Ninth Circuit who thought their colleagues had clearly gotten the case wrong, as I truly believe they had.

At that point, the government was faced with a decision: Should they appeal the Ninth Circuit decision directly to the Supreme Court? By that time, the Obama administration had come into office and, Ms. Kagan, who believed this law was immoral and an injustice of the first order, had been confirmed as Solicitor General. It fell to her to decide whether to take the appeal to the Supreme Court. She refused.

Instead, she decided to let the Ninth Circuit decision stand and allow the case to go back down to the trial court for a prolonged trial. In so doing, she failed in her fundamental responsibility as Solicitor General and to her sworn promise to the Senate to defend the statutes of the United States regardless of her personal policy views.

I make that statement with care. I gave her 10 minutes, virtually uninterrupted, to explain why she made this decision, because it troubled me, as someone who understands the importance of the duties of the Solicitor General. If you do not fulfill your duties of Solicitor General, should you then be promoted to the U.S. Supreme Court, I ask? This was a very bad decision, in my view.

Her long answer I thought was hollow and at many points disingenuous. She gave three reasons why she acted the way she did.

First, she said she concluded it would be better to wait to appeal to the Supreme Court until after trial because a trial would build a ''fuller record'' of the case. Once the facts were better developed, she claimed, the government might be in a better position before the Supreme Court.

Second, she said that allowing the case to go back to the district court would help the government in a future appeal because it would be able to ''show what the Ninth Circuit was demanding that the government do'' in order to defend the don't ask, don't tell statute. Going through a disruptive trial, she said, would allow the government to tell the Supreme Court just how invasive and ''strange'' were the demands of the Ninth Circuit on the government. Well, they were invasive and strange. There is no doubt about that.

Third, she said, the appeal in the Witt case would have been ''interlocutory''—that is an appeal in the middle of a case rather than at the end, after a final judgment—and the Supreme Court prefers not to hear these kinds of appeals.

None of her explanations are credible, in my view. If you analyze this fairly, I do not believe any one of those explanations can be sustained. Another explanation, however, can be sustained.

It is true that appellate courts, including the Supreme Court, prefer to hear appeals at the end of a case rather than at the middle, but that is a decision the Court can make for itself and does make for itself. It is not something the Solicitor General should decide on the Court's behalf and not to take up a case when they have a good legal basis to take it up and to avoid an incredibly burdensome trial would undermine military policy in 40 percent of the country. The Ninth Circuit includes 40 percent of America under its jurisdiction.

At the very least there would have been no harm to the government in asking the Court to review the case early. No harm whatsoever. If the Court refused to take the case at that time—interlocutorily—the government could always take a later appeal. Any concerns about avoiding early appeals were clearly outweighed in this case. There already had been a split among the circuit courts of appeals. The Ninth Circuit ruling squarely conflicted with the First Circuit, and it was also at

odds with the decisions from four other circuit courts on similar issues. The Ninth Circuit opinion presented clean questions of law: Should this matter be decided as a matter of law, as the First Circuit said, or should it be decided only after some prolonged trial, as the Ninth Circuit said? This was a critically important matter that I think the Supreme Court, recognizing we are a Nation at war, recognizing this is an important Defense Department policy, would have agreed to hear.

Ms. Kagan's second explanation—that letting the case go to trial would allow the government to just show how painful a trial would be—makes no sense. The Ninth Circuit made it very clear in their opinion that the government was going to have to justify the application of don't ask, don't tell to this specific plaintiff—Ms. Witt—to prove that this specific plaintiff was going to harm the military if she were to be allowed to remain in the Air Force. It was also obvious that such a trial was going to be disruptive to the military and that it would harm the ''unit cohesion'' that Congress had set out to protect when it passed don't ask, don't tell.

Ms. Kagan's predecessors in the Department of Justice and in the Solicitor General's Office immediately recognized the damage that would result from allowing the Ninth Circuit decision to stand. That is why they asked for a rehearing immediately. At that time, this is what they said:

> [The Ninth Circuit decision] creates an inter-circuit split . . . a conflict with Supreme Court precedent, and an unworkable rule that cannot be implemented without disrupting the military.

I think they were exactly right on that. The Ninth Circuit decision, they went on to say, made the constitutionality of a Federal law setting military policy for the entire Nation ''depend[] on case-by-case surveys, taken by lawyers, of the troops in a particular plaintiff's unit.'' And that is true. Immediate review, they insisted, was ''needed now to prevent this unprecedented and disruptive process.''

Most importantly, Ms. Kagan's first explanation to the Judiciary Committee for her decision to send this case back to trial—that she thought the government's case would benefit from a fuller factual development of the case—was simply false. The records of this case on remand to the District Court show that Ms. Kagan knew—knew—at the time she decided to let the case go back to trial that such a trial was going to be massively disruptive.

I have studied the record in the case as it headed for trial, where lower ranking lawyers in the Department of Justice are now trying to defend the case at trial. These lawyers have been fighting desperately to avoid or to limit this open discovery process. According to these career attorneys, the discovery process is ''threatening'' and ''jeopardizing the unit morale and cohesion.''

Remember, Ms. Kagan told us—the members of the Judiciary Committee, during her confirmation testimony—that building a factual record would be good for the government's case. But here the career lawyers who are defending the case are contending that building this factual record is bad for the government, and these lawyers are right.

The plaintiff in this case has asked for and received, by virtue of the Ninth Circuit order—and this was plainly predictable from reading that order—access to the personnel records of the entire military unit of the plaintiff. They have demanded depositions of other soldiers who served with the plaintiff before she was separated from the military. They have demanded the right to interview soldiers about their private lives, their personal views of their former colleague, and their private thoughts about sexuality.

As I have said before, this is not just a case in which Ms. Kagan showed bad legal judgment. She did not send her client, the U.S. Air Force, down this path by mistake, it seems to me. She knew this was going to happen, and I believe she had reasons other than a strategic plan to defend the law as her reasons in making this decision.

We know Ms. Kagan realized a trial would harm the military's interests because she said so to the lawyers on the other side of the case in the weeks before she made the final decision not to appeal. Once the case was back in this trial court, in this district court, the plaintiff's lawyers in one of the hearings made this statement to the trial judge there:

> [T]he government just doesn't want any discovery. I have heard that message from the government clearly—loud and clear. [We] were asked to meet with the Solicitor General of the United States in April, and we heard that message loud and clear that discovery is a big problem.

So they had been asked, these lawyers, to go to Washington to meet with the Solicitor General to discuss the case and were told at that meeting that discovery was bad. Yet she testified in our hearing just a few weeks ago that she thought it was good for the government.

In May of 2009, as Solicitor General, she made a decision to block an appeal to the Supreme Court. Before she made that decision, she had already met with these opposing counsel. And who were these lawyers? They were lawyers from the ACLU who were committed to the defeat and the elimination of this don't ask, don't tell law. She told them ''loud and clear'' that developing a factual record would be bad for the government. Yet she told us just a few weeks ago that it was good; that it was going to help the government's case.

It appears to me that the most plausible—almost the only—conclusion that one can reach is that Ms. Kagan and the Obama administration generally were trying to keep the Supreme Court from deciding the constitutionality of don't ask, don't tell. Ms. Kagan, like the President, is personally opposed to don't ask, don't tell. The President has asked Congress to repeal don't ask, don't tell, and there is legislation pending now in the Senate that would repeal that law.

But given the record of the Supreme Court on questions of military personnel policy, I am confident that the Ninth Circuit's radical decision would have been overturned had the Solicitor General taken the appeal. And given the timing of the case, we would likely have been reading a few weeks ago of a Supreme Court opinion holding that don't ask, don't tell was a constitutionally legitimate exercise of Congress's power over military affairs. If you think about it, you can see why such a ruling—upholding the constitutionality of a law that the administration wants to repeal—might not be politically helpful to them in that process.

As I said earlier, there was another case dealing with don't ask, don't tell where the First Circuit had upheld the law. Of the 12 plaintiffs involved in that First Circuit case, 11 of them decided to abandon their case and not appeal. In other words, they lost, they could have appealed to the Supreme Court, but hey abandoned their appeal and accepted the loss.

Why would they do that? Why would their lawyers allow them to do that? Because, it appears to me, those defendants and their lawyers—and included among some of those lawyers were Ms. Kagan's former colleagues from Harvard Law School—knew that the Supreme Court would likely uphold don't ask, don't tell if they took an appeal. That is what they did not want.

Only one of the plaintiffs insisted on appealing to the Supreme Court—1 of the 12—in the face of much resistance from his legal advisers who, as you can see, were less interested in vindicating the right of those specific defendants than they were trying to create the best possible strategy to undermine or to defeat don't ask, don't tell. Interestingly, Ms. Kagan, again, did what the lawyers attacking the law wanted.

One of the defendants wanted to appeal the First Circuit case. She could have allowed that appeal to go forward and gotten a definitive Supreme Court ruling. But she wrote the Supreme Court that they should not hear the appeal of the First Circuit; they should not accept that case for Supreme Court review. By urging the Court not to hear an appeal from that decision she denied the government a definitive decision from the Supreme Court, which I think was within their grasp.

Actually, one of the reasons she urged the Supreme Court not to take the appeal in the First Circuit case was because she said the Ninth Circuit case would be a better case for the Court to review. Then, when the Ninth Circuit case was ripe, she did not appeal it. In

effect, Ms. Kagan prevented the Supreme Court from ruling on the constitutionality of this law—a law she so strongly opposed.

So I think it is clear. It would seem to me to be clear. If I am wrong about this, I would like to see my colleagues explain it. I offer them an opportunity. I don't think I am wrong. I have tried a lot more cases than Elena Kagan ever tried—since she has never tried one. I think it is clear her strategy was to avoid a Supreme Court ruling—because she thought the Supreme Court would uphold don't ask, don't tell—and to drag out the proceedings in the lower court in hopes that maybe the administration would be able to convince Congress to repeal the law before the Supreme Court ruled. The record shows she was willing to do so, even if it meant this military unit would be turned upside-down by the lawyers from the ACLU.

Remember, in each case—even in the First Circuit case, where they had lost—the ACLU lawyers did not want that case to go on appeal. And in the Ninth Circuit case they did not want the case to go on appeal to the Supreme Court. Why? To me, that is the final argument. Why did the Solicitor General acquiesce and adopt the very policy the ACLU lawyers wanted—not to appeal to the Supreme Court—other than that she did not want a definitive ruling and agreed with them it was likely the Supreme Court would affirm the law? I think that is what we are talking about.

I hate to say that. That is why, in an unprecedented way—I don't think it has ever happened since I have been in the Senate, certainly for a Supreme Court nominee, that they were given a full 10 minutes to answer uninterrupted why they made that decision.

Her answer was unsatisfactory for the Solicitor General, the lawyer for the United States of America, whose duty and explicit promise was to defend don't ask, don't tell, even though she and her President did not agree with it.

I have expressed my concern in this process, that Ms. Kagan's background and her record is more that of a political lawyer than a real lawyer. She certainly has never been a judge. She has never been, for any real period of time, a real lawyer. She went right out of law school, had 2 years in a private law firm and 14 months as Solicitor General.

These political lawyers, sometimes they do not grasp the responsibility and duty and the power and the beauty and the majesty of the American legal system. They think it is all politics. They have not been before judges as I have been, as have many other lawyers by the hundreds of thousands in America, and seen justice rendered day after day—and sometimes seen injustice rendered—and know how to admire and appreciate justice and objectivity and legal acumen.

Ms. Kagan's willingness to advance a political agenda without regard for her duty strikes at the very root of the rule of law in America, our greatest strength. As the hymn says, our liberty is in law. A person who cannot constrain herself to her proper role, to fulfill her duty to defend law, even when it runs contrary to her personal views, is no more likely to follow a law she dislikes if she is elevated to the Supreme Court. I suggest that is a threat to justice in America.

I do think this is another incident—there are others in the record of this nominee—that indicates this is a political lawyer, an agenda-driven lawyer, someone who has never served as a judge and never truly practiced law. The horrendous decision in not pursuing the opportunity to get a final decision from the Supreme Court on don't ask, don't tell, I believe, was made for reasons other than faithfully fulfilling her responsibilities as Solicitor General to defend these laws. And I believe it is disqualifying for one who seeks to serve on the highest Court in the land.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

Mr. MCCAIN. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. MERKLEY). Without objection, it is so ordered.

Mr. MCCAIN. Mr. President, I rise to discuss Solicitor General Elena Kagan's nomination to the U.S. Supreme Court. During my time in Congress, I have had the honor to vote in support for the nominations of several Associate Justices put forward by both Democratic and Republican Presidents. Presidents are due a great amount of deference in the evaluation of his or her nominees to be members of the highest Court in the land, and elections, I understand very well, do have consequences. However, in this case I am not able to provide such deference to President Obama's nominee who has shown such a public unwillingness to follow the law.

When Ms. Kagan was dean of the Harvard Law School, she unmistakably discouraged Harvard students from considering a career in the military by denying military recruiters the same access to Harvard students that was granted to the Nation's top law firms. She barred military recruiters because she believed the Federal Government's don't ask, don't tell policy to be ''a profound wrong—a moral injustice of the first order.''

Ms. Kagan is entitled to her opinion of whether the policy is wrong. She is not entitled to ignore the law that required universities to allow military recruiters on campus or forgo Federal funds.

The chief of recruiting for the Air Force Judge Advocate General Corps was repeatedly blocked from participating in Harvard's spring 2005 recruiting season and wrote to Pentagon leaders: ''Harvard is playing games and won't give us an on-campus interviewing date.''

The Army's report from the 2005 recruiting season was even more blunt, stating: ''The Army was stonewalled at Harvard.''

Ms. Kagan sought a compromise by asking the law school's Veterans Association to host military recruiters, but the association responded: ''Given our tiny membership, meager budget, and lack of any office space, we possess neither the time nor the resources . . . of duplicating the excellent assistance provided by the Harvard Law School Office of Career Services.''

The association was right and an Air Force Judge Advocate General recruiter wrote Pentagon officials, and I quote from his letter: ''Without the support of the Career Services Office, we are relegated to wandering the halls in hopes that someone will stop and talk to us.''

That was a remarkable statement from a military recruiter. According to the Solomon Amendment, any institution that barred recruiters from their campus would therefore not be eligible for Federal funds. Ms. Kagan and Harvard University, in general, and the law school in particular, were, according to this Air Force officer, doing that. ''Without the support of the Career Services Office we are relegated to wandering the halls in hopes that someone will stop and talk to us.''

The university that portrays itself as the premier institution in America relegated our officers and recruiters for honorable service in the military of the United States of America to ''wandering the halls in hopes that someone will stop and talk to us.''

Ms. Kagan had a direct role in seeing that military recruiters were ''relegated to wandering the halls in hopes that someone will stop and talk'' to them. Ms. Kagan's claim that she was bound by Harvard's antidiscrimination policy is belied by the fact that her predecessor allowed military recruiters full official access, a policy Ms. Kagan changed.

While Ms. Kagan barred military recruiters access to the school, Harvard continued to receive millions of dollars in Federal aid. I will not go into my opinion of Harvard University's behavior throughout this whole issue of whether recruiters should be allowed on their campus. There are members of the ROTC who are still condemned to go to a neighboring institution for their training. But we are speaking of Ms. Kagan.

During her confirmation hearing last month, Ms. Kagan asserted that Harvard law school was ''never out of compliance with the law . . . in fact, the veterans' association did a fabulous job of letting all our students know that the military recruiters were going to be at Harvard. . . .''

She went on to state: ''The military at all times during my deanship had full and good access.''

Absolutely false statement. Facts show that these statements are false, and recruitment for our Nation's military suffered due to her actions.

Well, I strongly disagree with Ms. Kagan. I take no issue in terms of her nomination with her opposition to President Clinton's don't ask, don't tell policy. She is free to have her own ownership. Ms. Kagan was not free to ignore the Solomon Amendment's requirement to provide military recruiters equal access because she opposed don't ask, don't tell. In short, she interpreted her duties as dean of Harvard to be consistent with what she wished the law to be, not with what the law was as written.

In the end, Ms. Kagan's interpretation of the Solomon Amendment was soundly rejected by the U.S. Supreme Court. By changing the policy she inherited and restricting military recruiter access when the prevailing law was to the contrary, Ms. Kagan stepped beyond public advocacy in opposition to a policy and into the realm of usurping the prerogative of the Congress and the President to make law and the courts to interpret it. It is precisely for this reason that I cannot support her nomination.

I have previously stated that I do not believe judges should stray beyond their constitutional role and act as if they have greater insight into the meaning of the broad principles of our Constitution than representatives who are elected by the people. These activist judges assume the judiciary is a superlegislature of moral philosophers. It demonstrates a lack of respect for the popular will that is fundamental to our republican system of government.

Regardless of one's success in academic and government service, an individual who does not appreciate the commonsense limitations on judicial power in our democratic system of government ultimately lacks a key qualification for a lifetime appointment to the bench. For Ms. Kagan, given the choice to uphold the law that was unpopular with her peers and students or interpret the law to achieve her own political objectives, she chose the latter.

I cannot support her nomination to the Supreme Court, where, based on her prior actions, she is unlikely to exercise judicial restraint and respect the roles of the coequal branches of government.

I am sure my colleague from Alabama, who has done so much work on this issue, probably recalls that during her confirmation process, Peter Hegseth, who is the executive director of Vets for Freedom, a veteran of the Iraq war, and currently an infantry captain in the Massachusetts Army National Guard, testified: ''I have serious concern about Elena Kagan's actions toward the military and her willingness to myopically focus on preventing the military from having institutional and equal access to top-notch recruits at a time of war.''

He went on to say: ''I find her actions toward military recruiters at Harvard unbecoming a civic leader and unbefitting a nominee to the U.S. Supreme Court.''

Another veteran, Flagg Youngblood, ROTC graduate from Princeton, testified at the same hearing: To defend the barriers Dean Kagan erected by saying military recruiting did not suffer misses the point. Just imagine how many more among Harvard Law's 1,900 young adults would have answered the Defense Department's call.

Lastly, retired Air Force COL Thomas Moe, a veteran with 33 years of service to our Nation, testified: ''Ms. Kagan knowingly defied a particular law and treated military recruiters as second-class citizens. How can our warriors look at such people when they are poised at the tip of the sword, ready to sacrifice everything for their country, while a cloistered clique in ivory towers eats away at their institution for the sake of narrow ideological interests.''

I know the Senator from Alabama was present at these hearings. I ask unanimous consent to engage in a short colloquy with the Senator from Alabama.

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

Mr. MCCAIN. Mr. President, Ms. Kagan stated that she—I understand her words were ''reveres the military;'' is that correct?

Mr. SESSIONS. She did use that word.

Mr. MCCAIN. Is it a bit contradictory that you would want to treat the military as ''separate but equal,'' condemning them—the Air Force Judge Advocate General military person said they were condemned to wandering the halls of Harvard Law School in hopes that someone would stop and talk to them. Is that, I wonder, in keeping with the actions of someone who claims they revere the military?

Mr. SESSIONS. I certainly do not believe it is. As the Senator has noted repeatedly—and we serve on the Armed Services Committee together—this was not a military policy; this was a law passed by this Congress and signed by President Clinton, with whom she worked for 5 years. But she was punishing these young officers, many of them, demeaning them, making them be treated in a second-class way because she did not agree with that policy.

Mr. MCCAIN. May I ask the Senator, is there any doubt in your mind, given the testimony of other witnesses, including letters such as from the Air Force Judge Advocate General recruiters and others, that Ms. Kagan—then Dean Kagan—did take these actions restricting the access of recruiters to the Harvard Law School?

Mr. SESSIONS. There is absolutely no doubt about it. She openly sent an e-mail to all students and said she considered this policy that Congress adopted a moral injustice of the first order.

On one occasion a military recruiter was apparently working in one building, and she spoke to a protest rally outside the next-door building, creating a climate that was certainly hostile to the good efforts of that military officer.

Mr. MCCAIN. But at the same time, then-Dean Kagan never asked to return the Federal funds that were flowing into the university?

Mr. SESSIONS. No. In fact, it took the president of Harvard, Larry Summers—now President Obama's chief financial economic adviser; he was then president of Harvard—he had to reverse her decision when he was faced with the loss of Federal funds. The entire recruiting season, however, was lost before the military realized they were systematically being blocked. And they protested to the university, and finally she was overruled by the president.

Mr. MCCAIN. So then-Dean Kagan's actions, which she believed—and I respect her views that it was a moral imperative, and basically she chose what she viewed as a moral imperative—i.e., her opposition to the don't ask, don't tell law—as overriding compliance with the law, which then brings into question her qualifications and what her future actions will be as a member of the U.S. Supreme Court.

Mr. SESSIONS. Absolutely. I think that is the essence of what happened. She eventually acknowledged that at no time was the Solomon Amendment not in force at Harvard when she was there.

I know Senator MCCAIN remembers that we passed four versions of the Solomon Amendment because every time one was passed, these law schools or others figured out a way to get around it. We finally wrote one they couldn't get around. This was systematic obstruction by universities that I think does not speak well of them.

She also filed a brief with the Supreme Court attacking the law, and, as the Senator noted earlier, the Supreme Court rejected that brief 8 to 0.

Mr. MCCAIN. So we are not discussing the merits or demerits of a law that was passed by Congress; we are discussing then-Dean Kagan's actions in opposition to this law which were absolutely in contradiction to the law.

Mr. SESSIONS. Absolutely. Harvard had agreed to follow this law. Her predecessor as dean, Dean Clark, had agreed to do so. She seized upon an opportunity, without legal authority, to cease to comply with that law, denied the military full access to the campus as the law required, and eventually had to be reversed by the president of Harvard.

Mr. MCCAIN. Could I finally ask my colleague from Alabama, do you ever think the day will come when we have a nominee for the U.S. Supreme Court who didn't go to Harvard Law School?

Maybe that might be healthy for America.

Mr. SESSIONS. Well, you know, I think it might. If they have good judgment and are good people, I am not so worried where they come from. But when you have five people on the Supreme Court—and we will have that if she is confirmed—all from one of the boroughs of New York and most of them from Harvard or Yale, then I think it does raise questions about it. Maybe someone from Arizona could handle that job.

Mr. MCCAIN. Or perhaps Alabama.

Mr. SESSIONS. Perhaps so.

With regard to those young officers who were on the Harvard campus, my understanding of the military—and the Senator's experience is far greater than mine—is that many of those officers may well have just returned from Iraq or Afghanistan. You don't just serve all your career as a recruiter. I mean, they may have been combat officers or helicopter pilots or convoy leaders putting their lives at risk. I wonder how the Senator thinks they felt when they faced this kind of discrimination.

Mr. MCCAIN. Frankly, I would say to my colleague from Alabama, obviously it is not related to Dean Kagan, but treatment at these elite institutions in the Ivy League, going all the way back to the Vietnam war—you know, they are entitled to their views and their opinions and their opposition, but to treat people who were designated by the President of the United States to be recruiters, to motivate other young men and women to join what I believe is a very honorable profession, most honorable, to put impediments in their way and intentionally block their ability to do so is something that I guess they will have to answer for in the future.

I thank my colleague from Alabama for his leadership on this issue on the Judiciary Committee. He has worked tirelessly, night and day, on this issue for a long period of time now. I thank the Senator from Alabama for his outstanding work and leadership. I appreciate it. I know Americans do too.

Mr. SESSIONS. I thank the Senator. I would note that one of the arguments that has been made—and my time is about up—has been that: Well, nothing was really done at Harvard. We asked a veterans group, a veterans organization to take care of all of these things we were refusing to allow the military to have through the Career Services Office.

And this is what the veterans group said at the time. They sent an e-mail to everybody on campus because it offended them that they were being asked to do a job that should have been done through the Career Services Office. They sent this e-mail:

> Given our tiny membership, meager budget, and lack of any office space, we possess neither the time nor the resources to routinely schedule campus rooms or advertise extensively for outside organizations, as is the norm for most recruiting events. . . . [Our effort] falls short of duplicating the excellent assistance provided by the Office of Career Services.

So this argument has been repeatedly made: Don't worry about it; the veterans groups were taking care of all of this. It is bogus. It is incorrect. And she repeated that. I am not surprised to get that kind of statement from the White House spin doctors, but a nominee under oath——

The PRESIDING OFFICER. The Republican time has expired.

Mr. SESSIONS. Should not have made the statement she did in that regard.

I yield the floor.

Mr. LEAHY. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. LEAHY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. FRANKEN). Without objection, it is so ordered.

Mr. LEAHY. Mr. President, on July 1 of this year, the Judiciary Committee received a letter from LT Zachary W. Prager. He serves in the U.S. Navy Judge Advocate General's Corps. He writes:

> I was a student at Harvard Law School under Ms. Kagan and commissioned into the Navy. . . . I am grateful to Dean Kagan for her leadership on military recruiting, as well as the myriad of other positive impacts that she had on my law school experience. I would not be serving today—

Referring to the military—

> without it. She has earned my most heartfelt support for her nomination.

This is a member of the military who felt Dean Kagan helped greatly with him joining the military.

As the dean of Harvard Law School, Elena Kagan worked hard to find ways to both enforce the school's nondiscrimination policy and allow the military to recruit Harvard students.

Mr. President, I ask unanimous consent that Lieutenant Prager's letter be printed in the RECORD.

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

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary, Washington, DC.

DEAR CHAIRMAN LEAHY: I write in support of Solicitor General Elena Kagan's nomination to the United States Supreme Court. I am a lieutenant in the U.S. Navy Judge Advocate General's Corps. I was a student at Harvard Law School under Ms. Kagan and commissioned into the Navy upon graduation in 2007. Without Ms. Kagan's leadership and evenhandedness as Dean, I would not have joined the military,

Dean Kagan set a standard at Harvard of respect for military servicemembers, while still expressing her opposition to the Don't Ask, Don't Tell policy. She made it clear that Harvard Law School would fight the policy, but never impugn the soldiers, sailors and airmen who came to Harvard to recruit. Her guidance on this issue permeated throughout her administration, from the Dean of Student's Office to the Office of Career Services. Like many students, I was reticent to join an institution that practices overt discrimination. The environment they established opened the door for me to consider the military as a career path. Their example helped clear my reservations.

My decision to join the Navy was welcomed by Dean Kagan's administration. Military service was valued the same as any other public interest job. At a dinner to honor those of us entering public service, I dined next to public defenders, federal prosecutors and human rights activists. Notably, I now serve in the Navy alongside another classmate, and alumni from my class serve in the Marine Corps and Army Judge Advocate General's Corps.

I am proud to serve in the Navy and I love my job. I completed a deployment to Iraq and leave soon for my next tour overseas in Japan. I am grateful to Dean Kagan for her leadership on military recruiting, as well as the myriad of other positive impacts that she had on my law school experience. I would not be serving today without it. She has earned my most heartfelt support for her nomination.

Very Respectfully,

ZACHARY PRAGER.

Mr. LEAHY. Mr. President, on that subject, I would like to note a letter of support the Judiciary Committee received from 1LT David Tressler. He was at Harvard Law School when Solicitor General Kagan served there as dean. He is currently serving in harm's way in Afghanistan, and he strongly supports Solicitor General Kagan for this nomination.

Here is what the lieutenant writes:

> I believe that, while dean of Harvard Law School, [Elena Kagan] adequately proved her support for those who had served, were currently serving, and all those who felt called to serve, including those like me who joined upon graduation as well as those patriots who were not permitted to do so under the policy of "Don't Ask, Don't Tell."

Mr. President, I ask unanimous consent that Lieutenant Tressler's letter of support be printed in the RECORD.

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

JUNE 30, 2010.

Re: Nomination of Elena Kagan.

Hon. PATRICK LEAHY,
Chairman, Senate Committee on the Judiciary, Dirksen Senate Office Bldg., Washington, DC.

Hon. JEFF SESSIONS,
Ranking Member, Senate Committee on the Judiciary, Dirksen Senate Office Bldg., Washington, DC.

DEAR CHAIRMAN LEAHY AND SENATOR SESSIONS: From Afghanistan I have read about the criticism being leveled at Elena Kagan during the confirmation hearings for her nomination as an Associate Justice of the Supreme Court over her decisions and positions while dean of Harvard Law School with regard to military recruiters on campus and the military's "Don't Ask, Don't Tell" (DADT) policy. Senator Sessions issued a statement that Kagan "stood in the way of devoted, hardworking military recruiters," and Senator Jon Kyl said that "[h]er tenure . . . was marred, in my view, by her decision to punish the military and would-be recruits for a policy—'don't ask, don't tell' and the Solomon Amendment. . . ." I am one of those recruits and write to share with the

Committee my experience as a law student at Harvard between 2004 and 2006 when the controversy over military recruiters on campus unfolded. Shortly after my 2006 graduation I enlisted in the Army Reserve and I am currently serving as a civil affairs officer at a remote combat outpost in eastern Afghanistan.

I am focused on my mission here, but as a citizen, lawyer, and military officer who swore to defend the Constitution, I care also about the integrity of the Supreme Court selection process and disagree with efforts to paint Elena Kagan as unsupportive of the military.

Like most Americans I want to see a nomination process focused on Kagan's qualifications and judicial philosophy, not on empty political theater. The details and chronology of her decisions with regard to military recruiters on campus have been well-reported by the media and described again by Ms. Kagan, but I will recount them briefly from my experience as a student who was there at the time considering enlistment in the military. I remember her decisions and the tenor of her messages about the military, DADT, and military recruiting.

There was a legitimate legal debate taking place in the courts over the Solomon Amendment, and when court decisions allowed it in 2004, Kagan made a decision to uphold the school's anti-discrimination policy. Military recruiters were never barred from campus. During the brief period when recruiters were not given access to students officially through the law school's Office of Career Services, they still had access to students on campus through other means. Immediately following this period, in 2005 more graduating students joined the military than any year this decade, according to the Director of the Law School's Office of Career Services.

Kagan's positions on the issue were not anti-military and did not discriminate against members or potential recruits of the military. Nor do I believe that they denied the military much-needed recruits in a time of war. There are only a few of us each year who joined the military while attending, or after graduation from, Harvard Law. Kagan's decision to uphold the school's anti-discrimination policy for a brief period of time and express disagreement with DADT did not prevent us from talking with recruiters and joining.

I heard Kagan speak several times about this issue. She always expressed her support for those who serve in the military and encouraged students to consider military service. It was clear she was trying to balance the institution's values underlying its anti-discrimination policy with her genuine support for those who serve or were considering service in the military. Indeed, her sense of DADT's injustice seemed to grow out of her belief in the importance and value of military service. I remember that she repeatedly said as much while dean. More recently while speaking to cadets at West Point, she explained that, ''I personally believe that the exclusion of gays and lesbians from the military is both unjust and unwise. I wish devoutly that these Americans too could join this noblest of all professions and serve their country in this most important of all ways.''

I believe she was right. But Senator Sessions recently suggested, referring to Ms. Kagan's positions, that ''to some in the elite, progressive circles of academia, it is acceptable to discriminate against the patriots who fight and die for our freedoms.'' With due respect, as a Soldier who serves side by side in a hostile combat zone with patriots who are subjected to the discrimination imposed by DADT policy, I see it differently.

Like most servicemembers serving in a combat theater, when we go outside the wire, I care more about the fitness, experience, and tactical proficiency of the Soldiers around me than who they might want to date or marry when they get home. Out here on the ground in Afghanistan, when we are attacked—which happens often at and around my outpost—it does not matter who is straight or gay any more than it matters who is white or black or who among us can drink legally and who is still underage. We come under fire together. And when it's over, we pick ourselves up and continue on with the mission together. Yet contrary to the military's code of leaving no comrade behind, DADT continues to selectively discriminate against some of these servicemembers who put their lives at risk for this country.

Nevertheless, reasonable, well-intentioned and equally honorable people disagree about the wisdom of DADT. To attack Ms. Kagan for a principled position she took as a law school dean that had no practical effect on military recruitment looks, from where I stand, like a political distraction. What the country deserves instead is a substantive debate over Elena Kagan's judicial philosophy and her qualifications to interpret the Constitution and decide cases as a member of this nation's highest court.

I urge you to maintain that focus for the remainder of the hearings and refrain from further hyperbole questioning Ms. Kagan's support for the men and women of the U.S. military. I believe that, while dean of Harvard Law School, she adequately proved her support for those who had served, were currently serving, and all those who felt called to serve, including those like me who joined upon graduation as well as those patriots who were not permitted to do so under the policy of ''Don't Ask, Don't Tell.''

Respectfully,

DAVID M. TRESSLER,
First Lieutenant, Civil Affairs, United States Army Reserve, Khost Province, Afghanistan.

Mr. LEAHY. I might say what a red herring this question is of where a recruiter's office is. If you have people who want to serve in the military, they can usually find them.

Our youngest son joined the U.S. Marine Corps directly out of high school—a brilliant young man who wanted to serve his country. So I asked him again the other day, just to be sure.

I said: Mark, now, was that recruiter at the high school or on campus?

He said: Oh, no, Dad. We didn't have anything like that.

I said: How did you find it?

He said: Well, I got out the telephone book. I looked up the address: downtown Burlington. He told me exactly where it was. I know the area. I walked down there and joined the U.S. Marine Corps.

Frankly, and obviously, my wife and I are very proud of him. He served honorably. I cannot help but think for just about everybody I know who joined the military, if you asked them: How did you do this, they would say: Oh, I checked where the recruiter was and went and joined or I was at an event somewhere where somebody was speaking, and I heard about it and joined.

So this is probably the biggest red herring. I have been here for debates and votes on every single member currently serving on the Supreme Court and some who have since retired from the Supreme Court. I have heard a few red herrings over the years, never one like this.

Mr. President, during the 3 months that this nomination has been pending, Senators have made many statements about Solicitor General Elena Kagan. I wish to commend the statements made yesterday and today by the majority leader, Senator CARDIN, Senator FEINSTEIN, Senator KOHL, Senator FRANKEN, Senator DURBIN, Senator LIEBERMAN, Senator DORGAN, Senator GILLIBRAND, Senator SHAHEEN, Senator KLOBUCHAR, Senator HAGAN, Senator MIKULSKI, Senator BINGAMAN, Senator CARPER, Senator LEVIN, Senator WHITEHOUSE, Senator GRAHAM, Senator BURRIS, Senator SPECTER, Senator COLLINS, and Senator BOXER. They were outstanding in describing the qualifications of a nominee who should be confirmed with a strong bipartisan majority.

If I might, seeing the distinguished Presiding Officer, I wish to acknowledge the extraordinary contributions of his colleague, Senator KLOBUCHAR. She spoke eloquently. She organized a group of Senators, and she persevered, despite the personal loss she suffered this week.

When President Obama set out to find a well-qualified nominee to replace retiring Justice John Paul Stevens, he said he would ''seek someone who understands that justice isn't about some abstract legal theory or footnote in a casebook. It's also about how laws affect the daily realities of people's lives—whether they can make a living and care for their families, whether they feel safe in their homes and welcome in our nation.'' In introducing Solicitor General Kagan as his Supreme Court nominee, President Obama, whose 49th birthday is today, praised her ''understanding of the law, not as an intellectual exercise or words on a page, but as it affects the lives of ordinary people.''

President Obama is not alone in recognizing the value of judges and Justices who are aware that their duties require them to understand how the law works and the effects it has in the real world. Within the last few months, two Republican appointees to the Supreme Court have made the same point. Justice Anthony Kennedy told a joint meeting of the Palm Beach and Palm Beach County Bar Associations that, as a Justice, ''You certainly can't formulate principles without being aware of where those principles will take you, what their consequences will be. Law is a human exercise and if it ceases to be that it does not deserve the name law.''

In addition, Justice David Souter, who retired last year and was succeeded by Justice Sotomayor, delivered a thoughtful commencement address at Harvard University. He spoke about judging, and explained why thoughtful judging requires grappling with the

complexity of constitutional questions in a way that takes the entire Constitution into account. He spoke about the need to ''keep the constitutional promises our nation has made.'' Justice Souter concluded:

If we cannot share every intellectual assumption that formed the minds of those who framed that charter, we can still address the constitutional uncertainties the way they must have envisioned, by relying on reason, by respecting all the words the Framers wrote, by facing facts, and by seeking to understand their meaning for living people.

Justice Souter understood the real world impact of the Supreme Court's decisions, as I believe does his successor, Justice Sotomayor. Across a range of fields including bankruptcy, the fourth amendment, statutory construction, and campaign finance, Justice Sotomayor has written and joined opinions that have paid close attention to the significance of the facts in the record, to the considered and longstanding judgments of the Congress, to the arguments on each side, and to Supreme Court precedent. In doing this she has shown an adherence to the rule of law and an appreciation for the real world ramifications of the Supreme Court's decisions.

Given America's social and technological development since we were a young nation, interpreting the Constitution's broad language requires judges and Justices to exercise judgment. In the real world, there are complex cases with no easy answers. In some instances, as Justice Souter pointed out in his recent commencement address, different aspects of the Constitution point in different directions, toward different results, and they need to be reconciled. Acknowledging these inherent tensions is not only mainstream, it is as old as the Constitution, and it has been evident throughout American history, from Chief Justice John Marshall in the landmark case of McCulloch v. Maryland to Justice Breyer this past June in United States v. Comstock.

Chief Justice John Marshall wrote for a unanimous Supreme Court in the landmark case of McCulloch v. Maryland in 1819, writing that for the Constitution to contain detailed delineation of its meaning ''would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.'' He understood, as someone who served with Washington, Jefferson, Adams and Madison, that its terms provide ''only its great outlines'' and that its application in various circumstances would need to be deduced. The necessary and proper clause of the Constitution entrusts to Congress the legislative power ''to make all laws which shall be necessary and proper for carrying into execution'' the enumerated legislative powers of article I, section 8, of our Constitution as well as ''all other powers vested by this Constitution in the Government of the United States.'' In construing it, Chief Justice Marshall explained that the expansion clause ''is in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.'' He went on to declare how, in accordance with a proper understanding of the necessary and proper clause and the Constitution, Congress should not by judicial fiat be deprived ''of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to human affairs'' by judicial fiat. Chief Justice Marshall understood the Constitution, knew its text and knew the Framers. He rejected stagnant construction of the Constitution.

McCulloch v. Maryland was the Supreme Court's first interpretation of the necessary and proper clause. The most recent was this past June, in United States v. Comstock. That case upheld the power of Congress to enact the Adam Walsh Child Protection and Safety Act, which included provisions authorizing civil commitment of sexually dangerous Federal prisoners who had engaged in sexually violent conduct or child molestation and were mentally ill. Quoting Chief Justice Marshall's language from McCulloch, Justice Breyer wrote in an opinion joined by a majority of the Supreme Court, including Chief Justice Roberts, about the ''foresight'' of the Framers who drafted a Constitution capable of resilience and adaptable to new developments and conditions.

Justice Breyer's judicial philosophy is well known. A few years ago, he authored Active Liberty in which he discussed how the Constitution and constitutional decisionmaking protects our freedoms and, in particular, the role of the American people in our democratic government. When he writes about how our constitutional values apply to new subjects ''with which the framers were not familiar,'' he looks to be faithful to the purposes of the Constitution and aware of the consequences of various decisions.

During the Civil War, in its 1863 Prize Cases decision, the Supreme Court upheld the constitutionality of President Lincoln's decision to blockade southern ports before a formal congressional declaration of war against the Confederacy. Justice Grier explained that it was no less a war because it was a rebellion against the lawful authority of the United States. Noting that Great Britain and other European nations had declared their neutrality in the conflict, he wrote that the Court should not be asked ''to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race.'' That, too, was judging in the real world.

In the same way, the Supreme Court decided more recently in Rasul v. Bush, that there was jurisdiction to decide claims under the Great Writ securing our freedom, the writ of habeas corpus, from those in U.S. custody being held in Guantanamo. Justice Stevens, a veteran of World War II recognized that the United States exercised full and exclusive authority at Guantanamo if not ultimate, territorial sovereignty. The ploy by which the Bush administration had attempted to circumvent all judicial review of its actions was rejected, recognizing that ours is a government of checks and balances.

Examples of real world judging abound in the Supreme Court's decisions upholding our individual freedoms.

Real world judging is precisely what the Supreme Court did in its most famous and admired modern decision in Brown v. Board of Education—a landmark decision that ended the scourge and the shame of segregation in this country. I recently saw the marvelous production of the George Stevens, Jr., one-man play, ''Thurgood,'' starring Laurence Fishburne. It was an extraordinary evening that focused on one of the great legal giants of America. In fact, at one point, Justice Marshall—the actor playing Justice Marshall—reads a few lines from the unanimous decision of the Supreme Court in 1954 that declared racial discrimination in education unconstitutional. Chief Justice Warren had written:

In approaching this problem, we cannot turn the clock back to 1868, when the [Fourteenth] Amendment was adopted or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Understanding the facts in context, the entire Court helped to end a discriminatory chapter in our history, and they did it unanimously, the Court, made up of people such as a former Senator from Alabama who had been a member of the Ku Klux Klan, to Earl Warren, a former Attorney General and Governor, and just about every other possible permeation in between.

The Supreme Court did not limit itself to the Constitution as it was written in 1787. At that point in our early history, ''We the People'' did not include Native Americans or African-American slaves, and our laws failed to accord half the population equality or the right to vote because they were women. Do any one of us want to go back to 1787 and say this should be the rules of the game?

Real world judging takes into account that the world and our Constitution have changed from 1788, beginning with the Bill of Rights. It takes into account not only the Civil War but the Civil War amendments to the Constitution, adopted between 1865 and 1870, and every amendment adopted since then.

Would anyone today, even Justice Scalia, read the eighth amendment's limitation against cruel and unusual punishment to allow the cutting off of ears, a practice employed in colonial times? Of course not, because the

standard of what is cruel and unusual punishment was not frozen for all time in 1788. Does anyone dispute that most of the Bill of Rights is correctly applied today to the States through the due process clause of the 14th amendment? Our Bill of Rights freedoms were expressed only as limitations on the authority of Congress. Does anyone think the equal protection clause of the 14th amendment cannot be read to prohibit gender discrimination? Remember, when it was written, the drafters obviously did not have women in mind. But does anybody think this does not make it very clear that our laws should apply equally to men and women today?

The Constitution mentions our Armed Forces, but there was no Air Force when the Constitution was written. Does anyone doubt that our Air Force is encompassed by the Constitution, even though no Framer had them in mind when the Constitution was being ratified? Of course not.

Likewise, in its interpretation of the commerce clause and the intellectual property provisions providing copyright and patent protection for writings and discoveries, the Supreme Court has sensibly applied our constitutional principles to the inventions, creations, and conditions of the 21st century. Thomas Jefferson and James Madison may have mastered the quill pen, but they did not envision modern computers or phones or smart phones or satellites.

The first amendment expressly protects freedom of speech and the press, but the Supreme Court has applied it, without controversy, to things that did not exist when the first amendment was written, such as television, radio, and the Internet. Our Constitution was written before Americans had ventured into cyberspace or outer space. It was written before automobiles or airplanes or even steamboats. Yet the language and principles of the Constitution remain the same as it is applied to new developments. Our privacy protection from the fourth amendment has been tested, but it has survived because the Supreme Court did not limit our freedom to tangible things and physical intrusions but decided to ensure privacy consistent with the principles embodied in the Constitution.

There are unfortunately occasions in which the current conservative activist majority on the Supreme Court departs from the clear meaning or purpose of the law and even its own precedents. One such case, the Ledbetter case, would have perpetuated unequal pay for women, by using a rigid, cramped reading of a statute which defied congressional intent. We corrected that decision by statute. Now there is the Gross case that would make age discrimination virtually impossible to prove. That erroneous decision, which disregarded the court's own precedent, should also be corrected.

And, of course, the Citizens United case wrongly reversed 100 years of legal developments to unleash corporate influence in elections. A number of us are trying to correct some of the excesses of that decision with the DISCLOSE Act, but Republicans have filibustered that effort, and will not allow the Senate to consider corrective legislation to add transparency to corporate electioneering.

Frankly, I am left to wonder whether some of the current members of the conservative activist majority on the Supreme Court would have supported the decision in Brown v. Board of Education had they been members of the Supreme Court in 1954. They turned that decision upside down with their decision just a few years ago in the Seattle school desegregation case. Theirs was an ideological decision not based on that magnificent precedent, but undermining it.

It took a Supreme Court that, in 1954, understood the real world to see that the seemingly fair-sounding doctrine of ''separate but equal'' was in reality a straightjacket of inequality and offensive to the Constitution. All Americans have come to respect the Supreme Court's unanimous rejection of racial discrimination and inequality in Brown v. Board of Education. That was a case about the real world impact of a legal doctrine.

But just 3 years ago, in the Seattle school desegregation case, we saw a narrowly divided Supreme Court undercut the heart of the landmark Brown v. Board decision. The Seattle school district valued racial diversity, and was voluntarily trying to maintain diversity in its schools. By a 5–4 vote of conservative activists on the Supreme Court, this voluntary program was prohibited. That decision broke with more than a half century of equal protection jurisprudence and set back the long struggle for equality.

Justice Stevens wrote in dissent that the Chief Justice's opinion twisted Brown v. Board in a ''cruelly ironic'' way. Most Americans recognize that there is a crucial difference between a community that does its best to ensure that its schools include children of all races, and one that prevents children of some races from attending certain schools. Experience in the real world tells us that. Justice Breyer's dissent criticized the Chief Justice's opinion as applying an ''overly theoretical approach to case law, an approach that emphasizes rigid distinctions . . . in a way that serves to mask the radical nature of today's decision. Law is not an exercise in mathematical logic.''

Chief Justice Warren, a Justice who came to the Supreme Court with real world experience as a State attorney general and Governor, recognized the power of a unanimous decision in Brown v. Board. The Roberts Court, in its narrow desegregation decision 2 years ago, ignored the real world experience of millions of Americans, and showed that it would depart from even the most hallowed precedents of the Supreme Court.

Considering how the law matters to people is a lesson that Elena Kagan learned early in her legal career when she clerked for Justice Thurgood Marshall. In her 1993 remarks upon the death of Justice Marshall, she observed: ''Above all, he had the great lawyer's talent . . . for pinpointing a case's critical fact or core issue. That trait, I think, resulted from his understanding of the pragmatic—of the way in which the law acted on people's lives.''

If confirmed, Elena Kagan will be the third member of the current Supreme Court to have had experience working in all three branches of the government prior to being nominated. Some criticize her work during the Clinton administration as political. I suggest that a fair reading of her papers indicates that she has the ability to take many factors into account in analyzing legal problems and that her skills include practicality, principle, and pragmatism. These were all used in their service to the American people by Justice O'Connor, Justice Souter, and Justice Stevens—each one nominated by a Republican President, each one being Justices I voted for. There is more to serving the country as a Supreme Court Justice.

I reject the ideological litmus test that Senate Republicans would apply to Supreme Court nominees. Unlike those on the right who drove President Bush to withdraw his nomination of Harriet Miers and those who opposed Justice Sotomayor, I do not require every Supreme Court nominee to swear fealty to the judicial approach and outcomes ordained by adhering to the narrow views of Justice Scalia and Justice Thomas. I expect judges and Justices to faithfully interpret the Constitution and apply the law, and also to look to the legislative intent of our laws and to consider the consequences of their decisions. I hope that judges and Justices will respect the will of the people, as reflected in the actions of their democratically elected representatives in Congress, and serve as a check on an overreaching Executive.

It seems some want the assurance that a nominee to the Supreme Court will rule the way they want, so they will get the end results they want in cases before the Supreme Court. Lack of such assurances was why they vetoed President Bush's nomination of Harriet Miers, only the third woman to be nominated to the Supreme Court, and the only one not to be confirmed. They forced Ms. Miers to withdraw even while Democrats were preparing to proceed with her hearing. They do not want an independent judiciary. They demand Justices who will guarantee the results they want. That is their ideological litmus test. As critics level complaints against Elena Kagan, I suspect the real basis of that discontent is that the nominee will not guarantee a desired litigation outcome. That is not what I want. I want an independent judiciary. I do not want a

judiciary that will tell me way in advance exactly how they will rule. I want them independent.

Of course, that is not judging. That is not even umpiring. That is fixing the game, and that is wrong. It is conservative activism plain and simple. It is only recently that some Republican Senators conceded that judicial philosophy matters. I hope this means that they will abandon the false premise that all a Justice does is mechanically apply obvious legal dictates to reach preordained outcomes. Solicitor General Kagan was right to reject that as ''robotic.''

It is the kind of conservative activism we saw when the Supreme Court in the Ledbetter case disregarded the plain language and purpose of title VII. It is the kind of activism we saw when, this past January, a conservative activist majority turned its back on the Supreme Court's own precedents, the considered judgment of Congress, the interests of the American people and our long history of limiting corporate influence in elections in their Citizens United decision.

We can do better than that. In fact, we always have done better than that. In reality, we can expect Justices who are committed to doing the hard work of judging required of the Supreme Court. In practice, this means we want Justices who pay close attention to the facts in every case that comes before them, to the arguments on both sides, to the particular language and purposes of the statutes they are charged with interpreting, to their own precedents, and to the traditions and longstanding historical practices of this Nation.

Applying these factors would reflect an appreciation for the real world ramifications of their decisions. Judging is not just textual and it is not just automatic. If it were, we could have a computer do the judging. If it were, important decisions would not be made 5 to 4. A Supreme Court Justice is required to exercise judgment but should appreciate the proper role of the courts in our democracy.

The resilience of the Constitution is that its great concepts, these wonderful phrases in the Constitution, are not self-executing. There are constitutional values that need to be applied. Cases often involve competing constitutional values. So when the hard cases come before the Court in the real world, we want—and we actually need—Justices who have the good sense to appreciate the significance of the facts of the case in front of them as well as the ramifications of their decisions in human and institutional terms.

I expect in close cases that hardworking and honest Justices will sometimes disagree about results. I don't expect to agree with every decision of every Justice. I understand that. I support judicial independence. I noted I voted for Justice Stevens and Justice O'Connor and Justice Souter, who were all nominees of Republican Presidents. I knew I would not agree with all of their decisions but I respected their approach to the law and their independence.

A few days before Independence Day, the Senate Judiciary Committee was able to complete its hearing on the nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States. After opening statements on Monday afternoon, June 28, we were able to complete the questioning of the nominee on Tuesday, June 29, and Wednesday, June 30. We proceeded for 10 hours on Tuesday, and were able to complete most of the first round. We returned on Wednesday to complete the remainder of the first round, a second round, and a third round for those who requested additional time to question Solicitor General Kagan. We also held the traditional closed session and held the hearing record open for members of the committee to submit additional questions to Solicitor General Kagan.

Out of respect for the Senate observances honoring Senator Byrd, we reconvened at 4 p.m. on Thursday, July 1. We heard testimony from representatives of the American Bar Association, and 14 members of the public invited by the Republican minority and 10 invited by the majority. I especially thank Senators CARDIN, KAUFMAN, and SCHUMER for sharing the duty of chairing our proceedings on Thursday, which extended past 8 p.m., long after the last Senate vote of the week.

In my opening statement at the hearing, I urged the nominee to engage with the Senators and she was, in fact, engaging. I also urged Solicitor General Kagan to answer our questions about her judicial philosophy. I think that she was more responsive than other recent nominees, and that she provided more information than was shared at other Supreme Court hearings in which I have participated. Of course, some of the questions attempted to solicit indications as to how she would rule in cases likely to come before the Supreme Court. Solicitor General Kagan appropriately avoided such attempts but displayed a keen understanding of the complex set of legal issues that come before our highest Court.

I was disappointed that one line of attack against Elena Kagan was to disparage Thurgood Marshall. I appreciated the statements of Senators CARDIN and DURBIN in defense of this towering figure of American law. I commend the columns written by Stephanie Jones, the daughter of Judge Nathan Jones; Frank Rich; Dana Millbank; Margaret Carlson; Carol Steiker; and, of course, Thurgood Marshall, Jr. In addition, editorial pages, blogs and reports rejected this ill-advised efforts. It is a strength and a blessing that Elena Kagan clerked for Justice Thurgood Marshall.

I remember Justice Marshall. The caricature of him by some at the Kagan confirmation hearing was wrong. Knowing him, I suspect that when he told his clerks that his philosophy was to do the right thing and let the law catch up, he was most likely referring to his precedent-setting career as the leading advocate of the time and not strictly defining a judicial philosophy or approach. To the contrary, in Elena Kagan's tribute to Justice Marshall in 1993 in the Texas Law Review, she recalled his commitment to the rule of law. She described, as did Carol Steiker in her column in The National Law Journal, how Justice Marshall's law clerks had tried to get him to rely on notions of fairness rather than the strict reading of the law to allow an appeal to proceed on a discrimination claim. She wrote that the 80-year-old Justice referred to his years trying civil rights cases and said: ''All you could hope for was that a court would not rule against you for illegitimate reasons. You could not expect that a court would bend the rules in your favor. That is the rule of law.''

Just as Sir Thomas More reminded his son-in-law in that famous passage from ''A Man for All Seasons'' that the law is our protection, Justice Marshall reminded his clerks that the existence of rules and the rule of law is the best protection for all, including the least powerful. Justice Thurgood Marshall was a man of the law in the highest sense. He understood the Constitution's promise of equality to his core. He relied on the law and the American justice system to overcome racial discrimination.

So I was deeply disappointed to see the manner in which his legacy was treated by some during the recent confirmation hearing and to read that there are Republican Senators currently serving who recently said that they would vote against Thurgood Marshall's confirmation to the Supreme Court. He was disparaged at his confirmation hearing to the Supreme Court. His confirmation to the United States Court of Appeals to the Second Circuit, to be Solicitor General, and to the U.S. Supreme Court were delayed and made difficult at the time, but I had hoped and thought those dark days were behind us.

The attacks on Justice Marshall during Elena Kagan's confirmation hearing were particularly striking. On the first day of the hearings Republican members of the Judiciary Committee mentioned Justice Marshall 35 times. They did not do so to praise him or his contributions to America's historic effort to overcome racial discrimination. Rather, they pilloried him as if someone who functioned outside the mainstream of American constitutional law. In fact, he did as much as any American in the last century to make sure America lived up to its promise. He moved America forward, toward a more perfect union. On that day, however, they were trying to penalize Elena Kagan because as a young lawyer she clerked for him on the U.S. Supreme Court.

Two current Justices also clerked for Supreme Court Justices—Chief Justice John Roberts and Justice Stephen Breyer. That Chief Justice Roberts clerked for then-Justice Rehnquist was viewed by Republicans as a credential and a positive just a few years ago. Judge Douglas Ginsburg of the DC Circuit and Judge Ralph Winter of the Second Circuit each clerked for Justice Marshall as young lawyers. They were not criticized during their confirmation hearings for having done so; far from it.

Thurgood Marshall was perhaps the most influential lawyer of the 20th century. He dedicated his life to the rule of law. He, and the dedicated and talented team of lawyers with whom he worked at the NAACP, did not engage in violent protests but sought to ensure the full equality of all Americans by appeal to American justice and our Constitution. They brilliantly and courageously argued their claims on behalf of their clients. They bettered America's soul. Beginning in the late 1930s, their cases eventually led to the overturning of the misguided 1896 decision in Plessy v. Ferguson and the dismantling of State-mandated segregation of the races in public facilities. When the Supreme Court unanimously agreed with Thurgood Marshall's argument in the landmark case of Brown v. Board of Education that State-mandated segregation of the races in public school violated the Constitution, it was vindication of the rule of law. Brown was one of the 29 cases that Thurgood Marshall won out of the 32 cases that he argued as a Supreme Court advocate. Justice Marshall's record of advocacy before the Supreme is unsurpassed and not likely to ever be matched.

Thurgood Marshall's life was lived in the law, not outside it. As a Justice, he was the embodiment of what the rule of law can achieve. He was a giant in the law. For good and enduring reason, Thurgood Marshall is a hero not just to Solicitor General Kagan, but to countless American lawyers, judges, Presidents, and hardworking Americans. He should be a hero to us all.

I am concerned that the younger Americans who waited in line to attend our confirmation hearings or who tuned in to watch them may not understand what the mischaracterization of Justice Marshall by some at our hearing how important it was four decades ago for President Lyndon Johnson to nominate then-Solicitor General Marshall, to the Supreme Court. As President Johnson said at the time, ''He is the best qualified by training and by valuable service to the country. I believe it is the right thing to do, the right time to do it, the right place.''

Justices Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas, all Republican appointees, have acknowledged Justice Marshall's greatness as a lawyer and judge. Shortly after Justice Marshall's passing, Justice O'Connor, who had served on the Court with him, wrote:

> His was the eye of a lawyer who had seen the deepest wounds in the social fabric and used law to help heal them. His was the ear of the counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them voice.

Justice Scalia remarked that Justice Marshall ''could be . . . a persuasive force just sitting there. . . . He was always in the conference a visible representation of a past that we wanted to get away from and you knew that, as a private lawyer, he had done so much to undo racism or at least its manifestation in and through government.'' During his own confirmation proceedings, Justice Thomas praised Justice Marshall, as ''one of the greatest architects of the legal battles to open doors that seemed so hopelessly and permanently sealed and to knock down barriers that seemed so insurmountable to those of us in Pin Point, Georgia.'' These Justices recognize and respect Justice Thurgood Marshall and his enduring impact on American law. He made this a stronger and more inclusive Nation.

At least two Republican members of the Senate Judiciary Committee recently said that they are not sure whether, if given the chance, they would vote to confirm Thurgood Marshall as a Justice on the Supreme Court. Though he had to face humiliating questioning during his own confirmation hearings for the Court, he was confirmed by a vote of 69 to 11 in 1967. I would have hoped that as a nation we would have progressed to acknowledge Thurgood Marshall's fitness to serve on the Supreme Court but I am sad to acknowledge that is not so. If there are Republicans who would now vote against the nomination of Thurgood Marshall to the Supreme Court, it is a sign of just how far the former party of Lincoln has changed and just how much some would like to undo the progress made over the last century.

We 100 men and women in this body are the ones who are charged with giving our advice and consent on Supreme Court nominations. We 100 stand in the shoes of 300 million Americans, and we should consider whether those nominees have the skills and the temperament and the good sense to independently assess in every case the significance of the facts and how the law applies to those facts. I believe Elena Kagan does meet that test.

The more judges appreciate the real world impact their decisions have on hard-working Americans, I believe the more confidence the American people have in their courts, and I think it is important for the American people in a democracy to have confidence in their courts. I have been in the Senate now with seven Presidents. I have urged Presidents, both Democratic and Republican, to nominate people from outside the judicial monastery because I think real world experience is helpful to the process. The American people live not in an abstract ivory tower world but a real world with great challenges.

We have a guiding charter that provides all Americans great promise. The Supreme Court functions in the real world that affects all Americans. Judicial nominees need to appreciate that simple, undeniable fact, and they must promise to uphold the law that Americans rely on every day for their continued safety and prosperity.

Mr. President, I see the distinguished Senator from Rhode Island, Mr. REED, on the Senate floor, and I yield the floor.

The PRESIDING OFFICER. The Senator from Rhode Island.

Mr. REED. Mr. President, we are debating the President's nomination to succeed Justice John Paul Stevens, who has served this country admirably and with great distinction. I rise in wholehearted support of Solicitor General Elena Kagan's nomination to be our next Supreme Court Justice. She has had an illustrious legal career that includes clerking for Judge Abner Mikva on the U.S. Court of Appeals for the D.C. Circuit and Justice Thurgood Marshall on the U.S. Supreme Court; obtaining tenure at two of the top law schools in the country, the University of Chicago and Harvard; serving as an associate counsel in the Clinton administration; becoming Dean of Harvard Law School; and now serving as Solicitor General of the United States. Casting a vote on a nominee to the Supreme Court is one of the most consequential votes we face as Senators because no court can review the decisions of the Supreme Court. They are the ultimate arbiters of the law and the Constitution in this country.

The Constitution includes the Senate as an active partner, along with the President, in this process of confirming Justices to the Supreme Court. As stated in article II, section 2, clause 2 of the Constitution, nominees to the Supreme Court shall only be confirmed ''by and with the Advice and Consent of the Senate.'' This confirmation process and the Senate's role in it serves as a vital democratic check on America's judiciary, particularly in a case where a Supreme Court Justice will serve for a life term.

Indeed, one of the Senate's greatest opportunities and responsibilities to support and defend the Constitution of the United States is achieved through upholding our duty as Senators to give advice and consent on the nominations of the President to the Federal bench.

As I have stated before, my test for a nominee is simple and is drawn from the text, the history, and the principles of the Constitution. A nominee's intellectual gifts, experience, judgment, maturity, and temperament are all important, but these alone are not enough. I need to be convinced that a nominee to the U.S. Supreme Court will live up to both the letter and the spirit of the Constitution. The nominee needs to be committed not only to enforcing laws, but also to doing justice.

The nominee needs to be able to make the principles of the Constitution come alive—equality before the law, due process, full and equal participation in the civic and social life of America for all Americans; freedom of conscience, individual responsibility, and the expansion of opportunity. The nominee also needs to see the unique role the Court plays in helping balance the often conflicting forces in a democracy between individual autonomy and the obligations of community, between the will of the majority and the rights of the minority. A nominee for the Supreme Court needs to be able to look forward to the future not just backwards. The nominee needs to make the Constitution resonate in a world that is changing with great rapidity.

Elena Kagan passes this test. She is extraordinarily qualified on the basis of her intellectual gifts. But what is most striking about Solicitor General Kagan, in both her academic work and her life work, is her commitment to the Constitution.

In a speech she gave in October 2007 at my alma mater, West Point, well before she was considered for Solicitor General or for the Supreme Court, she stated that our Nation is most extraordinary because we, in her words, ''live in a government of laws, not of men or women.'' She used as a touchstone for her speech a place on the West Point campus called Constitution Corner, which was a gift from the West Point class of 1943, who not only served our Nation but defended the Constitution through the rigors of World War II and beyond.

There are five plaques at this sight. One of the plaques is titled ''Loyalty to the Constitution,'' one of the principal tenets by which every professional soldier must abide. It basically states what those who serve in the military are keenly aware of and points to the fact that the United States broke with an ancient tradition when it was created. Instead of swearing loyalty to a military leader, the American military swears loyalty to the Constitution. Interestingly enough, although Elena Kagan never wore the uniform of the United States, she has demonstrated this same loyalty to the Constitution throughout her life.

I am confident she will continue to uphold and defend our Constitution as she assumes her next role as a Justice of the Supreme Court. During her confirmation hearings, on the role of a judge, she said:

> As a judge, you are on nobody's team. As a judge, you are an independent actor, and your job is simply to evaluate the law and evaluate the facts and apply one to the other as best, as prudently and wisely as you can. You know, the greatness of our judicial system lies in its independence, and that means when you are on the bench, when you put on the robe, your only master is the rule of law.

Supreme Court Justices matter, and their impact on the lives of Americans from all walks of life can be profound. We only need to look at a couple of the recent Supreme Court decisions to understand how profound that impact can be.

More than four decades ago, Congress passed laws to protect women and others against workplace discrimination. However, five Justices in the case of Ledbetter v. Goodyear Tire gave immunity to employers who secretly discriminate against their workers. Thankfully, we passed the Lilly Ledbetter Fair Pay Act of 2009, which I cosponsored and President Obama signed into law, to ensure equal pay for equal work and to effectively and properly overturn this immunity granted by these five Justices.

This year, five Justices in Citizens United v. Federal Election Commission favored big corporations by ignoring precedent to bestow upon corporations the same power as any individual citizen to influence elections—in fact, some might argue much greater power through much greater spending. In his dissent, Justice Stevens, who is retiring and who will, I hope, be replaced by Solicitor General Elena Kagan, warned that the ''Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution.''

On this point, the words of Lilly Ledbetter are particularly relevant. The plaintiff in the famous case said:

> We need Justices who understand that law must serve regular people who are just trying to work hard, do right, and make a good life for their families . . . This isn't a game. Real people's lives are at stake. We need Supreme Court Justices who understand that.

Elena Kagan understands this point, and she will bring this understanding to the U.S. Supreme Court.

In addition, I am confident that Solicitor General Kagan's tenure as Dean of Harvard Law School will serve her well as she works with her colleagues on the Court. As Dean, she drew acclaim as a pragmatic problem solver who could bridge ideological divides among the faculty. Indeed, her success in leading and bringing together one of the most contentious legal faculties in the Nation is a testament to her interpersonal, oratory, and analytical skills—all of her skills. As someone who had the privilege of graduating from Harvard Law School, I can indeed confirm that it is one of the most intellectually contentious places in the country, as it should be, because it is there where the ideas of law, of Constitution, and of our relationships with one another in this democracy, are vigorously debated.

The fact that she has garnered wide bipartisan support is further evidence of her great standing. She has received the endorsement of eight former Solicitors General from both parties, including Ken Starr and Ted Olson; 54 former Deputy and Assistant Solicitors General of both parties; 69 law school deans; and more than 850 law school professors from across the country and across the political spectrum.

Just to give an example of how well regarded she is, here is what Professor Jack Goldsmith, former Assistant Attorney General during the George W. Bush administration, had to say:

> [Elena] Kagan possesses an extraordinary knowledge of the legal issues before the Supreme Court. Whatever else may be said about being a law professor, it is the profession that requires one to know legal subjects comprehensively enough to teach them . . . What I do know is that Kagan will be open-minded and tough minded; that she will treat all advocates fairly and will press them all about the weak points in their arguments; that she will be independent and highly analytical; and that she will seek to render decisions that reflect fidelity to the Constitution and the laws.

Clearly, she is not only well qualified, but she also has wide bipartisan support.

Before I conclude, I wish to make one final point regarding Elena Kagan's respect and admiration for the military. She has won praise from students who have served our country in uniform for creating a highly supportive environment for students who served in the Armed Forces of the United States and who were attending Harvard Law School. In my view, her respect and admiration for the military is sincere and proven.

America's courtrooms are staffed with judges not machines because justice requires human judgments. This is particularly so on the Supreme Court. Of all the hundreds of thousands of cases filed in American Federal courts each year, only a small percentage reach the Supreme Court. These are the hardest of cases—cases that have divided the country's lower courts. These are cases where one constitutional clause may be in conflict with another, where one statute may influence the interpretation of another, and where one core national value may interfere with another. These cases often divide the Justices of the Court by close margins.

Surely, the Justices on both sides of a 5-to-4 case can claim to be following the judicial process and respecting the precedents of the Court. What divides their opinions is the set of constitutional values they bring to the case. Elena Kagan, in my view, brings the set of constitutional values that, to quote the words of Lilly Ledbetter again, will make her a Supreme Court Justice ''who understand[s] that law must serve regular people who are just trying to work hard, do right, and make a good life for their families.'' As Elena Kagan herself put it, she will do her ''best to consider every case impartially, modestly, with commitment to principle and in accordance with the law.''

It is with great pleasure that I support the nomination of Elena Kagan to the highest Court in the land, and I urge my colleagues to do the same.

I yield the floor.

The PRESIDING OFFICER. The Senator from Hawaii is recognized.

Mr. AKAKA. Mr. President, I rise to speak in support of Solicitor General Elena Kagan to be an Associate Justice on the U.S. Supreme Court.

I am confident that Solicitor General Kagan is highly qualified for this prestigious position. She has worked hard and earned a place at the top of the legal profession.

During her career, she has held various positions across the Federal Government that have prepared her well for this new position.

As Solicitor General since 2009, she worked on many issues currently before the Court.

She has argued a broad range of issues—from defending Congress's ability to protect kids from child predators—to the United States' ability to go after those supporting terrorist organizations.

Through several different assignments in the Clinton White House, Elena Kagan worked for the President on the challenges facing our Nation.

She also has experience in the judicial branch, including clerkships in the U.S. Supreme Court as well as the U.S. Court of Appeals for the DC Circuit.

Solicitor General Kagan also spent many years as a professor of law at the University of Chicago Law School and Harvard Law School.

As dean of Harvard Law School, she worked with the student body to improve the quality of student life and encourage a spirit of public service.

She also worked as a lawyer in private practice. In all, she has spent years studying complex legal theories and debating issues.

Some of the most difficult issues end up at the Supreme Court and each Justice needs a thorough understanding of the law.

Elena Kagan has demonstrated her knowledge of the law and I believe she will be a successful jurist.

Her nomination to our Nation's Highest Court is something our entire country can be proud of.

In recent years, we have taken many positive steps to make our government a better reflection of the American people.

Solicitor General Kagan's confirmation as associate justice will continue that progress and mark the first time the U.S. will have three women on the Supreme Court at the same time. This is a wonderful milestone for our country.

I was very impressed with Elena Kagan when we met earlier this year.

We talked about Hawaii and the importance of reconciliation with Native Hawaiians.

I was impressed with her history of building consensus and bringing people together—as well as her knowledge of the law. I know that she will do a tremendous job upholding our Constitution as an Associate Justice on the U.S. Supreme Court.

After receiving many letters of support for Solicitor General Kagan's nomination—and seeing for myself her character, her intelligence, and her legal expertise—I am pleased to support her nomination—and urge my colleagues to do the same.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant editor of the Daily Digest called the roll.

Mr. WARNER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. WARNER. Mr. President, I ask unanimous consent to speak as in morning business for up to 8 minutes.

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

AUTHORIZING SETTLEMENT FUNDING

Mr. WARNER. Mr. President, I rise today, as this Chamber debates the nomination of Elena Kagan—someone I am looking forward to supporting when we vote—to raise another issue of ensuring justice in our country, an issue the Presiding Officer, I know, has been concerned about as well, and that is urging this Chamber to take action and approve funding for the settlement of racial discrimination claims made by thousands of African-American farmers.

This is an issue with which I have dealt for years, first as Governor of Virginia, now as a Senator. This issue was first brought to my attention by John Boyd, who is a fourth generation African-American farmer from Southside, VA. He founded the National Black Farmers Association in 1995.

He and a group of other African-American farmers brought forward a series of claims that were finally addressed in a lawsuit named Pigford v. Glickman. That lawsuit concerned allegations that the U.S. Department of Agriculture had denied farm loans and other services to African-American farmers between 1983 and 1997, although I think history will show those acts of discrimination long preceded 1983.

That case was settled in 1999. But due to very tight deadlines, thousands of farmers missed the deadline to file their complaints.

An estimated 74,000 Black farmers now await approval of funding by this body, following the announcement of a settlement of these additional claims by the USDA in February of this year. The USDA has acknowledged these claims. They have agreed to a settlement. These funds have been appropriated. This funding has been paid for.

According to Mr. Boyd, this effort, if we can get this funding approved, will mark the seventh time the Senate has tried to act on providing the Black farmers settlement money.

I have to say that as we debate the nomination of a very talented individual to serve on the Supreme Court and we hear folks on both sides of the aisle talk about American justice and American jurisprudence, it is a varnish on that record and, to a certain degree, on this body that we in the Senate have not acted to make sure that close to $1 billion in these settlement claims—again, that have been authorized by USDA—that those funds are not fully appropriated and approved by this Senate body for these farmers, many of whom have been struggling for decades, some who struggle due to the discrimination that has been acknowledged by our own Department of Agriculture. We have not acted. Senate procedure has gotten in the way of authorizing payment of these funds.

Now it is the time to act. This week the Senate has the opportunity to finally authorize funding of the settlement costs and turn the page on past discriminatory practices.

As I stated earlier, this legislation is fully paid for and there does not appear to be any substantive opposition to honoring the terms of this settlement.

I know we are all anxious to vote on Elena Kagan. I know many of us are anxious to vote on the small business legislation. I know we are all anxious, as well, for the August recess to start. As we go through this process on a matter that reflects on the integrity of this body, reflects on the value of our jurisprudence system, as we think through trying to get out of town and getting home, I hope our leaders can come together and act to make sure that these Black farmers, many times waiting literally for decades for the appropriate compensation that everyone throughout the judicial system has said is owed to them, that in this rush to get out and get back home, the Senate can finally take action in the Pigford case and these farmers can receive their appropriate compensation.

I again thank those involved in this action. I particularly thank Mr. John Boyd, as I mentioned, from Southside, VA, who has been a passionate and tireless leader on this issue for more than two decades.

I see my good friend, the Senator from Delaware, is here to speak on behalf of Elena Kagan. I know he and the Presiding Officer have also raised this issue making sure these Black farmers get—not their day in court; they have had their day in court, but they are waiting for the Senate to act on a noncontroversial issue so they can receive the funding that is long overdue.

I yield the floor.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. KAUFMAN. Mr. President, I associate myself with the remarks of the Senator from Virginia. He is right on point. This is not about a trial. This is about people getting what they justly deserve. It is time we do it. I thank him for coming to the floor and making that argument.

I wish to speak tonight in support of the nomination of Solicitor General Elena Kagan to be an Associate Justice on the Supreme Court.

On July 13, I first came to the floor and gave my reasons for supporting this outstanding nominee. She has a superior intellect, broad experience, superb judgment, and unquestioned integrity. Throughout her career, she has

consistently demonstrated a first-rate intellect and an intensely pragmatic approach to identifying and solving problems—two traits that are indispensable in any great judge, and she will be a great judge. I support her nomination with enthusiasm and without reservation.

I am here today not to repeat the basis for my support but to note briefly two aspects of this debate that I find particularly troubling.

First, I have heard some of my colleagues attack this nominee based on arguments she made and positions she took in her role as Solicitor General in a particular case when she made this argument on behalf of her client, the United States of America. That causes me great concern because I think these kinds of attacks—think about it for a minute now. She is not in a public forum. She is not giving a speech. She is not writing an article. What she is basically doing in court is representing the United States of America, making the argument that she thinks is the best argument to carry for the United States of America. And people pull that out on the Senate floor and read it and are critical of it.

I can understand why one disagrees with the Solicitor General on an argument they make. I can understand why one disagrees with the Supreme Court. But to pull that out and use that against a nominee is very troubling because it gets to the basic question of what is the job of a litigator, of a lawyer, of a solicitor in making the argument for their client.

Solicitors General are responsible for representing the United States before the Supreme Court. They should be free to make all appropriate arguments on their client's behalf without fear that those arguments might someday be held against them if they happen to be considered for another office.

The Solicitor General's role in selecting cases in which she must represent the government is very limited, particularly in the many cases in which the government is the respondent. We want lawyers representing the United States in any court to do so zealously, well within the bounds of the law. We should not give them reason to hesitate about doing so by later treating those arguments as reflecting their own personal, private beliefs, which they do not do.

I am reminded of the attacks we too often see on lawyers who represent unpopular clients, with the suggestion being that the lawyer's legal arguments must also reflect that lawyer's personal views. Think about that. A lawyer gets on a case, a lawyer is doing pro bono work, a lawyer has been assigned by a judge and makes an argument in court for their client, trying to get their client cleared, and we bring it back as if the lawyer is making that argument about themselves. I have heard it too often on this floor and in committee.

Let's not forget that the American tradition of representing unpopular clients is older than our Nation, dating at least as far back as John Adams' representation of British soldiers charged in the Boston Massacre. John Adams defended the British soldiers involved in the Boston Massacre. Would it be fair to bring that up on the floor of this body to say that he was in favor of the British soldiers and use that against him if, in fact, he had been nominated to a position?

The vigorous defense of the United States requires that we not limit its advocates to making only those legal arguments with which they personally agree. I am surprised I even have to make that statement on the floor.

More broadly, our adversarial system depends on advocates making all proper arguments that are in the interest of their clients. I feel as though I am in a lawyer 101 class. Why do I have to be saying this? It is simply wrong to assume a lawyer's arguments reflect his or her personal convictions. Again, lawyer 101. It is, therefore, also wrong to oppose a nominee based upon proper arguments that a nominee has made as a lawyer, regardless of whether an individual Senator regards those arguments to be legally correct.

My second concern relates to the repeated and unjustified comments by many of my colleagues regarding the word ''empathy,'' which they seem to regard as a trait deserving of recrimination. Empathy, empathy, empathy.

I commend to my colleagues a superb commentary on this point by Joel Goldstein, distributed by the History News Network. I ask unanimous consent to have this commentary printed in the RECORD.

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

[From History News Service]

HOW EMPATHY MAKES SUPERIOR JUDGES—AND JUSTICE

Critics ridiculed President Obama's statement that judges should be empathetic. But as the Senate prepares to vote on the Supreme Court nomination of Elena Kagan, legal historian Joel Goldstein argues that senators should be looking for that very quality.

In voting on President Obama's nomination of Elena Kagan for the Supreme Court this week, senators should consider her legal ability and constitutional vision, but also her capacity to be an empathetic justice.

Republicans mocked President Obama when he suggested that empathy was an important ingredient in a justice. In fact, the president was simply repeating the insight Theodore Roosevelt uttered more than a century ago when he explained to his close friend, Sen. Henry Cabot Lodge, why he was inclined to nominate Judge Oliver Wendell Holmes Jr. to the Supreme Court.

T.R. recognized that those who become judges invariably have had close association with wealthy and powerful people. Those relationships dispose them to understand perspectives of the successful classes. But would they give a fair shake to the less fortunate who were outside the professional or social circles that shaped and reflected their attitudes?

Roosevelt thought it ''eminently desirable'' that the Supreme Court show its ''entire sympathy with all proper effort to secure the most favorable personal consideration for the men who most need that consideration.'' He appreciated Holmes, who could ''preserve his aloofness of mind so as to keep his broad humanity of feeling and his sympathy for the class from which he has not drawn his clients.''

If anything, Obama's comment was more neutral than Roosevelt's. Roosevelt twice used ''sympathy'' which connotes identification with, or bias toward, another. ''Empathy,'' Obama's misconstrued word, simply implies an understanding of, and sensitivity to, the feelings or experiences of another, not any predisposition in favor.

In context Roosevelt and Obama were making the same point, that effective judging requires sensitivity to a wide range of experiences. It is relatively easy for judges, like other human beings, to relate to experiences and perspectives they have shared. What's difficult, for judges and for the rest of us, is to comprehend those to which we have not been exposed.

That reality sometimes inclines judges to favor those whose positions and circumstances are familiar. The bias may be unconscious but that does not make it any less real or decisive or unfair.

The Republican Roosevelt and the Democratic Obama recognized that empathy was an important corrective to these hidden preferences. Far from conferring favoritism or setting law aside, as Obama's critics contend, T.R. and Obama understood that empathy is often a prerequisite for impartiality.

Justice Holmes's great colleague, Justice Louis D. Brandeis, captured the Roosevelt-Obama insight when he wrote that ''knowledge is essential to understanding, and understanding should precede judging.'' A judge cannot fairly assess something he or she does not understand and they cannot understand that which is unfamiliar if they do not make a real effort to relate to it.

Whether Kagan is empathetic may determine how she will act when the court faces the watershed cases that often define the jurisprudence of a generation.

The quality of empathy, which Obama's critics ridicule, was critical in decisions which all now celebrate. Brown v. Board of Education declared racially segregated education a violation of the Equal Protection Clause because it created in African-American children a ''feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.'' By viewing the world from the perspective of black children, the court identified the moral wrong in segregation even while some strict constructionists saw the decision as lawless.

And imagine the national embarrassment America would have been spared in Korematsu v. United States, the case that sanctioned internment of loyal American citizens of Japanese descent during World War II, had the court followed Justice Robert Jackson's empathetic dissent, which, unlike the majority opinion, tried to understand the impact of imposing a racially motivated penalty on innocent Americans.

Although Roosevelt was a great Republican president of the 20th century and a hero to modern Republican luminaries such as George W. Bush, John McCain, Karl Rove and others, the idea's pedigree has not protected Obama from partisan caricature of his commonsense observation.

That's too bad. It has led some to distort as inconsistent with impartiality a quality that is really designed to help achieve it.

To their credit, Theodore Roosevelt and Obama recognized that a judge must make special efforts to understand the thoughts and perspectives of those whose experiences

she has not shared. It's time for Obama's critics to stop distorting his statement and pretending that this sensible insight is subversive to the law or judging.

Let's hope that senators of both parties include this bipartisan criterion as a desirable trait in a justice when they debate and vote on the Kagan nomination this week.

Mr. KAUFMAN. Mr. President, as Professor Goldstein points out, President Obama's interest in empathy in Supreme Court nominees follows in the path of President Theodore Roosevelt who chose to nominate Oliver Wendell Holmes in 1902 based in part on Holmes' capacity for empathy.

Roosevelt said it was ''eminently desirable'' that the Supreme Court make ''all proper effort to secure the most favorable personal consideration for the man who most needs that consideration.''

I can understand concern about sympathy. I do not have it, but I understand sympathy. But empathy? President Theodore Roosevelt was not suggesting that Justices should somehow favor or advantage the downtrodden; that is not what he was saying and that is not what President Obama was saying when he was a Senator, only that they make every effort to understand the position of the litigants from walks of life different from their own.

Likewise, President Obama's promotion of empathy is not, as his critics suggest, the advocacy of bias. ''Empathy,'' as a quick look at the dictionary will confirm, is not the same as ''sympathy.'' ''Empathy'' means understanding the experiences of another, not identification with or bias toward another. Let me repeat that. ''Empathy'' means understanding the experiences of another, not identification with or bias toward another. Words have meanings, and we should not make arguments that depend on misconstruing those meanings.

Let me quote several insightful paragraphs from Professor Goldstein's article about why empathy is important in judging. I quote Professor Goldstein:

In context, Roosevelt and Obama were making the same point, that effective judging requires sensitivity to a wide range of experiences. It is relatively easy for judges, like other human beings, to relate to the experiences and perspectives they have shared.

All of us can do that. We can relate to the people we know around us. We can relate to our experience. We can relate to people with whom we went to school. We can relate to all those things.

What's difficult, for judges and the rest of us, is to comprehend those to which we have not been exposed.

That reality sometimes inclines judges to favor those whose positions and circumstances are familiar.

We all know that. There but for the grace of God go I, reasons why juries will let someone go free.

The bias may be unconscious but that does not make it any less real or decisive or unfair.

To continue the quote:

The Republican Roosevelt and the Democratic Obama recognized that empathy was an important corrective to these hidden preferences. Far from conferring favoritism or setting law aside, as Obama's critics contend, T.R. and Obama understood that empathy is often a prerequisite for impartiality.

The quality of empathy, which Obama's critics parody, was critical in decisions which all now celebrate. Brown v. Board of Education declared racially segregated education a violation of the equal protection clause because it created in African-American children a ''feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone.''

The PRESIDING OFFICER. The hour controlled by the majority has expired.

Mr. KAUFMAN. Mr. President, I ask unanimous consent for 1 more minute.

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

Mr. KAUFMAN. I thank the Chair.

By viewing the world from the perspective of black children, the Court identified the wrong in segregation even while some strict constructionists saw the decision as lawless.

I happen to think Elena Kagan is an outstanding nominee. I respect the fact that others disagree. I truly do. I hope that as this debate continues, we take care to make arguments that are fair expressions of our very real disagreements and avoid arguments that chill legitimate advocacy or deliberately misconstrue the words of others.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. COBURN. Mr. President, I am here to talk about the nominee, Ms. Kagan, for the Supreme Court, but I thought I would put it in the context of how I view what we are doing.

As a physician, a father, and a grandfather taking a look at where we are as a nation, it is very worrisome to me. The 62 years I have lived have been fraught with great opportunity, great challenges, but never with a fear that what we have in this country may not last. I have to admit to my colleagues that I have that fear now. And it is not an unfounded fear. You see, this year we will borrow almost $1.6 trillion from our grandchildren. We will borrow in excess of $4 billion a day—money we don't have. At this moment, we owe $13.35 trillion. No question, we are the biggest economy in the world, being fast caught by other large economies.

The uniqueness of the American experiment could have been predicted by those who studied republics because freedom and liberty were the basis for such an explosion in growth and wealth and freedom and standard of living. The poor in our country live far in excess of half of the world's populations because of the great republic we are.

I believe we have a short period of time to right the ship for our country. We have large disagreements in this body on how we do that, and others' ideas have as much value as mine. But it is not debatable the kind of trouble we are in as a nation. It is indisputable. We have a mountain of debt, and we are going to have interest costs that are going to chew up our freedom and chew up our children's prosperity and opportunity over the years that lie ahead of us.

So we have great responsibility as we place somebody on the Supreme Court. Our constitutional responsibility is to advise and either give consent or not give consent. I have no doubts that my speech on the floor this afternoon will change any Senator's mind. It won't. But what I hope to do is to lay out the questions, as we put Ms. Kagan on the Court, of where we will be with the basis of her philosophy. I have served on the Judiciary Committee for almost 6 years. I have been through four Supreme Court Justice hearings. I have met with four—actually, more than four—prospective nominees to the Supreme Court, and the responsibility is heavy.

Elections do have consequences. They give the President of the United States the right to appoint, with advice and consent, all the judges in this country, as well as numerous other officials. But none is greater and none is more important than a Supreme Court Justice.

My concern with Ms. Kagan is whether she really believes in what our Constitution says, and by her own words she fails to meet that test. So I think it is time for an extra parameter to be considered in light of the difficulties we face when we give consent for somebody who is going to be in a lifetime position who will, I believe, have negative consequences for our future. And I am going to spell out why I believe that.

Ms. Kagan is a highly qualified woman who has attained much in her young life. She is highly intelligent, highly articulate, and quite pleasant. I believe she did the best job of at least letting us get to see some of what she thinks of any of the Supreme Court nominees we have heard, and I give her credit for that. But what I saw causes me to shake in my boots, and let me tell you why.

Ms. Kagan made two critical statements. She believes Supreme Court precedent trumps the original intent of our Founders. Think about that for a minute. We just heard the Senator from Delaware mention Brown v. Board of Education. Under that philosophy, reaching back to our Declaration of Independence and our Constitution, Brown v. Board of Education would never have happened. We would have had ''separate but equal'' had we relied on Supreme Court precedent and not the underlying body of our Constitution.

As I was reading recently, I came across something written by Calvin Coolidge. He is not very often quoted in this body, and for some of that I understand why.

But one of the other things Nominee Kagan did was she refused to embrace natural rights in her testimony before the committee. You see, the whole foundation for our country is based on the fact that the rights we have are not given to us by the Congress of the

United States or the Government of the United States or the Constitution of the United States; they are inherently ours. They are inalienable rights—the right of life, the right of liberty, the right to pursue happiness. We have a government to be a caretaker, to ensure our rights are not infringed upon. So lacking that understanding—and it wasn't just once that she was asked that; she was asked that in terms of Blackstone's principles on the right of an individual to defend their life. She does not embrace that concept. It was not only evident in her plain words that she spoke but in her answers indirectly to other questions.

So we have a Supreme Court nominee who believes that the wisdom of men today, outside of the Constitution, based on precedent, trumps the wisdom that was brought forth by our forefathers in both the Declaration of Independence and the Constitution of the United States. And there are other proofs for this that I will go through during my speech to explain.

Listen to what Calvin Coolidge had to say:

> About the Declaration there is a finality that is exceedingly restful. It is often asserted that the world has made a great deal of progress since 1776; that we have had new thoughts and new experiences which have given us a great advance over the people of that day, and that we may therefore very well discard their conclusions for something more modern. But that reasoning cannot be applied to this great charter.

Or the Constitution that followed it.

> If all men are created equal, that is final.

It can't be improved upon. It can only be lessened.

> If all men are endowed with inalienable rights, that is final.

It cannot be improved upon. It can only be lessened.

> If governments derive their just powers from the consent of the governed, that is final.

The power of the U.S. Government comes from the power we loan to the government as people and citizens of the United States.

> No advance, no progress can be made beyond these propositions. If anyone wishes to deny their truth or their soundness, the only direction in which he can proceed historically is not forward, but backward toward the time when there was no equality, no rights of the individual, no rule of the people. Those who wish to proceed in that direction cannot lay claim to progress. They are reactionary. Their ideas are not more modern, but more ancient, than those of the Revolutionary fathers.

Well said, Calvin Coolidge. Well said.

So we have before us a judge who said the following to me during our hearing:

> To be honest with you, I don't have a view of what are natural rights, independent of the Constitution.

Oh, really? So we are going to have a Supreme Court Justice who has no view of what our inalienable rights are other than what the Constitution says? Where can that take us? It can take us anywhere she wants to go, outside the bounds of the very liberties we loan to the government to have a civil society.

If you look at the Declaration of Independence, it says:

> We hold these truths to be self-evident—

Why aren't they self-evident to her? Why doesn't she hold an opinion on them—

> that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among men deriving their just powers from the consent of the governed . . .

We have inalienable rights. We have natural rights. Yet we are about to put a Justice on the Supreme Court for life who, by her own words, does not have a view of what are natural rights. I don't know anybody who is an adult in this country who doesn't have a view of what they think are their natural rights.

This is a quote from Elena Kagan:

> In some cases original intent is unlikely to solve the question, and that might be because the original intent is unknowable or might be because we live in a world that's very different from the world in which the framers lived. In many circumstances, precedent is the most important thing.

No, that is just the opposite of what Coolidge had to say about the Declaration of Independence, just exactly the opposite. More modern, we got it right. Natural rights do not matter. Our wisdom, our intellect, our arrogance—of a government and the governing body—has more import, has more value, has more to do with what we do today than the wisdom of those inalienable rights and the Constitution that came out of it.

Do you realize that in the Constitution, for every time it gives us a responsibility, it says four or five times what we can't do? Because the Framers were interested, and knowing the condition of men, that we would abandon—our tendency would be to allow the concentration of power to abandon those very principles they put into the Constitution.

What did Madison have to say, just on the general welfare clause of the Constitution? He anticipated the Elena Kagans of this world. He said:

> With respect to the words general welfare, I have always regarded them as qualified by the detail of powers connected with them. To take them in a literal and unlimited sense would be a metamorphosis of the Constitution into a character which there is a host of proofs was not contemplated by its creators.

You see, that is how we have gotten into trouble as a country. That is why our economic future is not secure—because the Congress has exceeded its authority under a limited Constitution and the courts have failed to rein us in. They have failed to recognize their obligation.

So we are going to have someone who believes that the precedent and wisdom of modern men is much more important than the original intent of our Founders to keep us free, to secure our liberty, to provide our inalienable rights to the pursuit of life, liberty, and the pursuit of happiness.

Here is another area. If we read the Constitution and we read where they have set up our judicial system, what they reference, they say:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. . . .

They gave no wiggle room for the utilization of foreign law in interpreting the U.S. Constitution—none. Here is Elena Kagan:

> It may be proper for judges to consider foreign law sources in ruling on constitutional questions.

Here is what the Constitution says. Here is what the nominee to the Supreme Court says—exactly opposite of what the Constitution says. In other words, it is OK to use any source of law you want, not the source that the Constitution says you will be bound by in your oath.

Let's take it a step further, same quote: ''Judges can get'' good ideas ''on how to approach legal issues from a decision of a foreign court. It may be proper for judges to consider foreign law sources in ruling on Constitutional questions.''

Here is their oath:

I do solemnly swear that I will faithfully and impartially discharge and perform all the duties incumbent upon me as a justice under the Constitution and laws of the United States. So help me God.

''Under the laws and the Constitution of the United States'' is not foreign law. That is the U.S. Constitution and our statutes. So as soon as she takes the oath, her very philosophy violates it because she honestly testified that it is fine to use foreign law to interpret our laws and our Constitution.

Again, how did we get in the trouble that we are in today? How did we get that 20 years from now every man, woman, and child in this country is going to be responsible for over $1 million worth of debt? How did we get to the point where $350 billion of waste, fraud, and duplication occurs every year in the Federal Government? How did we get to the point that we can take people's rights away because we deem so in the Congress, in our smart, modern wisdom that lessens liberty and freedom throughout this land?

We do it because we do not use the book, and we don't follow the oath that we are sworn to uphold; that is, the U.S. Constitution and the laws of this land.

Then it comes to the commerce clause. Elena Kagan:

> The commerce clause has been interpreted broadly. It's been interpreted to apply to . . . anything that would substantially affect interstate commerce.

When asked if a Federal law requiring Americans to eat three fruits and three vegetables every day would be unconstitutional, Ms. Kagan avoided the question by simply saying, ''That would be a dumb law.''

Madison had something different to say:

Ambition must be made to counteract ambition.

He is talking about us.

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it to control itself.

We have had this vast expansion since the late 1940s in this country in the commerce clause. It started with Wickard v. Filburn. A farmer raising chickens was raising his own wheat. But the Government didn't want him raising his own wheat because they had allotted limits during the 1930s, the Great Depression—limits to what you could grow. So he owns his own land, he has his own chickens, but the Supreme Court said: You can't raise your own feed. You have to buy it from somebody.

So here we started with the Supreme Court ruling and moving in to take away the freedom of an individual farmer to raise his own feed for his own chickens for a greater good—supposedly to control the price and availability of wheat.

What has happened to us since then? Look at the expansion of the commerce clause and how it is moving power away from those who are governed without their consent to a central government in Washington. What does Ms. Kagan complain about during the hearing? That she thinks the Supreme Court may be moving to reverse that—of which she adamantly disagrees. When asked about the Seminole case and the Lopez case, she worried that it moves us back to individual freedom and a more restrictive commerce clause, a commerce clause that says our rights are more important than those of the government.

That goes back to the basis that she doesn't believe we have natural rights. The fundamental question of whether an individual, free in a country, can walk on to the Supreme Court and disavow inalienable rights and natural rights, that is a very dangerous concept because if you don't believe in natural rights, you don't worry about taking them from those who are governed. You don't worry about the Congress taking them from those of the governed.

We are about to move to a point where we are going to put somebody in a lifetime position on the U.S. Supreme Court who believes in foreign law utilization to interpret the issues before it; who believes that precedent trumps original intent of the Founders—in other words, the arrogance is we are much smarter than they were, our wisdom is much better, we are more modern, therefore things have changed, therefore we have to ignore what they have said; that the commerce clause is boundless; even if Congress passes stupid laws, they have the right to do it and there is no obligation on the Court to look at the Constitution and the documents behind it and what our Founding Fathers had to say about the authority and what they intended and meant as they wrote that clause into the Constitution.

Then, finally, one last point. She does not believe in the individual natural right that you have as a person to defend yourself. She wouldn't embrace that—which implies, very rightly so, that the second amendment, even though we now have precedent, is at risk under Elena Kagan as a Supreme Court Justice.

So, summing up, we are going to put somebody on the Court that I see will further the problems we have versus starting to reembrace the principles that made this country great. Are we going to embrace what has gotten us into trouble? Are we going to embrace the $13.34 trillion worth of debt growing at $1.4 trillion to $1.6 trillion today, that is stealing the opportunity of the future? We are. We are going to put her on there, and her wisdom and her vision is very different from our Founders, our Constitution, and our natural rights.

This will be a huge mistake for this country if we want to solve the problems in front of us. As I said, I don't expect anybody to change their vote on the basis of my viewpoint. I will congratulate her for being more honest and open on her testimony than others would because normally we would not find out these things about judges.

With a worried heart, I yield the floor.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. ISAKSON. Mr. President, I am always reluctant to find out that I am following the Senator from Oklahoma on the floor of the Senate. He is always prepared and always eloquent. I commend the Senator on his speech.

But I want to commend him on his questioning in the hearing because he allowed us to gain, and Ms. Kagan to express, important points, important opinions, important judgments, and important statements for everybody in this body to make up their minds. That is really what this Senate is all about, and it is Senators like the Senator from Oklahoma who help us all to do our job, and I commend him very much for his work.

I also commend him for covering so many facts. My speech will be very brief. I announced about 4 weeks ago that I would not vote for the confirmation of Ms. Elena Kagan and expressed at that time the reasons. But I wanted to memorialize that on the Senate floor because it is a serious responsibility that we have to advise and consent on the nomination of the President of the United States.

In response to that, the advice and consent should always be thoughtful and should always be thorough, and mine is generally based entirely on the Constitution when it comes to the Supreme Court and the appointments the Presidents of the United States make because I am well aware my position, the President's position, and the position of all of us in this was a creation of those of our Founding Fathers who wrote the Constitution that created the government, that is the United States of America and the three branches of that government that will govern us as a nation: the executive, the legislative, and the judicial. Executive, as in the President; legislative, as in us; and the judicial, as the jury—the jury not of who is right and wrong but is the Constitution right, is the law right that we passed in relation to the Constitution that created us.

Two things in Ms. Kagan's past concern me greatly in terms of the direction she would go as a Justice on the U.S. Supreme Court. One is the Solomon rule application when she was dean of the Harvard Law School.

When I helped write, along with a lot of other Members in this body, No Child Left Behind, we made sure we covered this issue of military access on campuses of secondary schools and postsecondary schools.

The Solomon Amendment is a simple amendment that says: If you accept Federal funds as a public institution or as a private institution, in terms of Harvard through research or funds such as that, that U.S. military representatives will have access to the campus.

Ms. Kagan made the conscious decision as dean of the law school that that access would not be available at Harvard and, even after direction otherwise, continued in that position until she eventually withdrew. Well, if someone is going to the Supreme Court of the United States of America to be a judge of our Constitution and its application to our legislative and judicial branches, you must remember the first responsibility designated to this Congress and to this government is to protect and defend the domestic tranquility of the people of the United States of America and to constitute an army and a navy to do that.

You cannot draw on that army and navy if you cannot draw on the people in your country. At a time today, a contemporary time such as 2010, where everyone who serves—everyone, not a one is conscripted, every single one is a volunteer—the information about the opportunities, the availability and the promise of a career in the military or a period of service should not be denied anyone who goes to an institution that receives funds from the United States of America and from this Congress.

Secondly, you know there has been a lot of talk about the Citizens United case, and there have been a lot of political arguments about the Citizens United case. But it is a first amendment case. I do not think anybody argues about that.

In listening to the testimony in the Judiciary Committee and reading the record on the Citizens United case, it is obvious, in her expression and her arguments before the Supreme Court, Ms.

Kagan felt that even though you had a first amendment, through either printing or writing or video or audio, the government could restrict political speech.

Well, the first amendment is the guarantee of free speech. To argue a case that, notwithstanding the first amendment, political speech could be run by the government and judged by the government and its timing and its accessibility, to me, flies in the face of the very first amendment, of the first 10 amendments that finally allowed us to pass a Constitution and come together as a nation.

So there are a lot of other issues. The Senators who preceded me have raised a lot of those issues. I commend Ms. Kagan, too, on her complete congeniality and her complete candor before the committee. But in terms of this Senator, in terms of my vote, in terms of my judgment, it is the case and the opinions on the first amendment in Citizens United, and the actions contrary to the Solomon Amendment, and military access that, to me, deliver a temperament that I do not think is appropriate of a Justice of the Supreme Court at this time.

I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. Mr. President, we are we here to discuss Solicitor General Elena Kagan's qualifications for the Supreme Court. We have heard a number of conversations from our colleagues who are themselves lawyers, who have sat in on the Judiciary Committee, and who have gone through the record with great detail.

As I have said before, I am unburdened with a legal education. I have great respect for those who have been taught to think like that and talk like that and who go into that kind of detail. But I view this from a slightly different point of view, and I hope it is a commonsense point of view. I would like to share it with my colleagues this afternoon.

I go back, not to start with Ms. Kagan but to start with an incident that occurred when we were discussing the possibility of John Roberts going to the Supreme Court as the Chief Justice. In that period of discussion, there was a particular case that was raised in the press where John Roberts had issued a ruling that, according to the newspapers and the reporters, was an egregious ruling.

Here are the facts of the case: There was a young woman riding the Metro who ate a french fry, not a lot of french fries—just one french fry. She had the misfortune—she was 12 years old—she had the misfortune to do that in the presence of one of the security officers of the Metro who arrested her for violating the publicly advertized zero-tolerance, no-eating policy in a Washington Metro station.

She was not just detained, she was arrested, searched, handcuffed, driven to police headquarters, booked, and fingerprinted. Three hours later, her mother showed up at the police station and she was released to her mother. The mother sued, alleging that her daughter was treated improperly, that an adult would have only received a citation, and that this was a terrible thing that had been done to her.

The law says children who violate this policy have to be detained until their parents can arrive. Well Justice Roberts, the case finally came to him on the circuit court, ruled that the Metro police had acted properly. In an attempt to derail his confirmation to Chief Justice, there was a dust-up in the newspapers and the media: This is a man, we want to put him as Chief Justice of the United States, and he will tolerate this kind of treatment of a young woman who does nothing more than eat a single french fry in a Metro station? Is that the kind of man we want on the Court?

I remember those kinds of editorials and denunciations that were made of Mr. Roberts. Then, the facts came out as they got into what happened. What I have said are, indeed, the facts. But this is what Justice Roberts said when he handed down his opinion. He said: No one is very happy about the events that led to this litigation. He said it was a stupid law. He did not say it in those kind of terms. He said it in appropriate legal terms. But basically the burden of what he said was it was a stupid law.

But he said: The question before us is not whether these policies were a bad idea but whether they violated the fourth and fifth amendments of the Constitution. And, as Judge Roberts concluded, they did not.

Interestingly, the city council, in response to this case, had changed the law. So he made it clear: I do not agree with this law. I think it is a bad law, but that is not my responsibility. My responsibility is to determine whether it violates the Constitution.

This is reminiscent of Justice Potter Stewart's dissent in Griswold v. Connecticut. He said: We are not asked in this case to say whether we think this law is unwise or even asinine. We are asked to hold that it violates the U.S. Constitution, and that I cannot do.

What does that have to do with Elena Kagan? She was faced with a similar situation. She was not a judge. But she was in a position of authority, and she was faced with a law that she decided was a bad law. This was the Solomon Amendment, having to do with the question of military recruiters on college campuses. She was in a position as the dean of the law school at Harvard, to prevent military recruiters from coming on campus.

The Solomon Amendment basically said: You cannot do that, Dean Kagan. You may disagree with the military's policy with respect to don't ask, don't tell, and you can do that. But you cannot accept federal funds and prevent military recruiters from coming on campus. You can even express your disagreement in a legal fashion, and she did. She openly opposed it. She joined other faculty to sign an amicus brief in support of a constitutional challenge of the Solomon Amendment.

I do not object to that. She has every right, as an American citizen, to challenge something she thinks is inappropriate in the law. But she does not have the right to flout the law, and to say: No, we choose not do it. When she became the dean at Harvard, she did that.

She refused to allow the recruiters to come on at the Harvard Law School. She says she did not. She says: The military had full access at all times. By the way, she was wrong on the law, as far as the Solomon Amendment is concerned, because the Supreme Court decided unanimously that the Solomon amendment was constitutional and that the military had the right to equal access to students at institutions receiving Federal funding.

So she should have waited for the Supreme Court to rule, but she did not. She said: I will comply with the law. This is what the recruiters said. She says they had full access. All right. If they had full access, I would think they would confirm that they had full access. But this is what they had to say. The Army's report from Spring 2005 said: The Army was stonewalled at Harvard. Phone calls and e-mails went unanswered and the standard response was: We are waiting to hear from our higher authority.

There is a Defense Department memo stating: Denying access to the Career Service Office is tantamount to chaining and locking the front door of the law school, as it has the same impact on our recruiting efforts.

The chief of recruiting for the Air Force JAG Corps was repeatedly blocked from participating in Harvard's 2005 recruiting session. He reported: Harvard is playing games and will not give us an on-campus interviewing date.

Three different recruiters give a different view of what was done with respect to Harvard. Yet General Kagan says: No. No. They all had full access at all times. If they did, then they are lying. If they did not, then she is giving us false information. She denies the entire incident.

I think she should have stated her opposition in the Judiciary hearings. The proper approach should be to say: I hate the Solomon Amendment. I think it is the wrong thing to do. But just as Judge Roberts upheld the action with respect to a 12-year-old girl that was clearly not appropriate, because it was the law, I have a responsibility, as a lawyer, and lawyers are officers of the court, I have a responsibility as a lawyer at Harvard, even as I am voicing my objection, to say: The Solomon Amendment is in place, and I am going to respect it.

She did not respect it. She denies that she did not respect it, in the face of testimony to the contrary from at

least three different sources who were directly involved in the case. I do not find that the kind of behavior, regardless of my ideological difference with her, the kind I think a Justice of the Supreme Court should have.

She has had much the same attitude with respect to the second amendment. She has taken a position of being above the law. She refused to declare support for the second amendment and when she was questioned about it, she simply dismisses it as ''settled law.'' Going back to the Solomon Amendment, wasn't that settled law? When she had an opportunity to act against it, she took that opportunity, feeling correctly that she would not be disciplined for it at Harvard. But now I do not think she can appropriately say she should not be questioned about it as she is being proposed for the Supreme Court.

When clerking for Justice Thurgood Marshall in 1987, Kagan was faced with a challenge to the District of Columbia gun ban. With respect to a plaintiff's contention with respect to the District of Columbia's firearms status—as he said, the District of Columbia violated his constitutional right to keep and bear arms—She wrote: I am not sympathetic, and she recommended that the Court not even consider the case. The Court recently considered the case and has ruled otherwise in the Heller decision.

So she is going to go to the Court—I assume she will be confirmed—with at least two circumstances where she has taken firm positions in opposition to the Court she intends to join. In one case it was a unanimous decision that overturned her; it was not a 5-to-4 decision.

My concern about her is that she has never shown any inclination toward impartiality. I do not mind people of strong opinions. This Chamber is filled with them. I do not mind judges who have strong opinions as long as they do not let those strong opinions get in the way of what the law says. I am afraid in her case she is one who will let her strong opinions get in the way of what the law says. For that reason, I intend to vote against her nomination.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. DEMINT. Mr. President, I rise in opposition to the confirmation of Ms. Kagan to the Supreme Court, and I would like to put this opposition in context with what is going on all around the country.

All of us know, and we have seen on the news—and many of us have seen in person—that people are upset with what is happening in Washington. They are angry. They are fearful. They are frustrated at all the spending, the borrowing, the debt, the government takeovers. I keep hearing from people: What can we do? How can we stop it? Why is it happening?

That is a question we need to keep asking here: Why is it happening? Why has this country, this Congress, and many Congresses before spent this country to the edge of bankruptcy—and continue to spend week after week? Even though the President and the majority are talking every week about the unsustainable debt, almost every week we are adding to that debt, adding new programs. It makes no sense.

Our Founders believed it very important that every Member of Congress—the House and the Senate—the President, the Supreme Court, and the military officers all take an oath of office to protect and defend the Constitution. That may seem perfunctory, just something we do as a part of history. But that was not its intent because the Constitution is a document that limits what the Federal Government can do. If anyone reads it seriously, it is pretty clear its primary purpose is to limit what the Federal Government can do. It specifies a few things, such as protecting our Nation, making sure there is justice, making sure we have the rule of law and the enforcement of those laws across all of our States.

But it says a lot about what we cannot do. The whole Bill of Rights says much about what the government cannot do to take our freedoms. The 10th amendment itself says whatever is not specified in the Constitution is left to the States and the people.

Even though all of us take that oath of office, it seems to me, after being here a number of years, that just about everyone here sets aside that Bible when they put their hands down and completely forgets they have just taken an oath to protect and defend a constitution that limits what we can do.

Last year, when we passed this health care bill, Obamacare, a reporter asked Speaker NANCY PELOSI where in the Constitution did she find the authority to require people to buy a government-approved health insurance policy. All she could say is, ''Are you serious?'' In fact, if you talk about a limited constitutional government, as I often do in the Senate, you are considered a radical, even though all of us take that oath of office.

What we have turned into here—and the President has used this phrase a lot—is a ''yes, we can'' Congress. It does not matter what it is, what problem comes up all across the country, we can do it, we can fix it. Government has a solution to almost anything because we do not pay any attention to the Constitution.

The Constitution is a constitution of no, of what we cannot do. That is to protect us and to avoid where we are today, which is approaching a $14 trillion debt which is about to destroy our whole country.

Think about this: In the world's great bastion of freedom that we call America, our Federal Government owns the largest auto companies. It owns the largest insurance company. It owns the largest mortgage companies. It controls our education system. It just took over our health care system. It controls the whole energy sector and our transportation sector. The rules and regulations and taxes that we put on businesses pretty much means mostly it controls all the business activity in our country.

When Congressman PETE STARK was asked last week—in an interview we have seen all over the Internet—is there anything that the Federal Government cannot do, he said no because he had forgotten the constitutional oath of office.

What is the Court's rule, as we think about Ms. Kagan, the Supreme Court, the confirmation process? What is the role of the Court? The intent is pretty clear that it is to watch over Congress, the executive branch, to make sure we do not get outside the bounds of the Constitution. If we do, the Court is supposed to say: No, you can't; that is unconstitutional. But the Court, over the years, has pretty much thrown that responsibility out the window.

Back during FDR's days, in their interpretation of the commerce clause, it had essentially given Congress and the White House unlimited ability to do almost anything that comes up, any whim that we have. That is how we ended up with over $13 trillion in debt. I know this overactive government is really important. This idea of a limited government is very important.

When Ms. Kagan was in my office and I asked: Does the Constitution limit us from doing anything, she really could not come up with a good answer. It is pretty similar to her hearings, when Senator TOM COBURN asked her: If the Congress passed a law, and the President signed it, that every American had to eat their fruits and vegetables every day, would that be constitutional? And she said: It would be a dumb law. But she would not say that is unconstitutional.

Friends, if this government can tell us what we have to eat, it can tell us anything. We cannot claim to have any freedoms if this government can tell us what we have to eat. It is essentially the same thing as telling us we have to buy a government-approved health insurance policy. We cannot say no. But the Constitution is intended to make sure we do.

Ms. Kagan talked a lot about precedents, which are just previous court rulings, not much about the Constitution being our standard. The problem with that is a precedent is a lot like what we used to call the gossip game. Some people call it the telephone game, where you have a bunch of people sitting around a table, and the person at the head of the table whispers a phrase to the person next to them. They whisper it to the person next to them, and it goes all around the room. The whole funny part of the game is, by the time it gets back to the person who started it, you cannot even recognize the phrase. It has nothing to do with what was originally said.

That is exactly how precedent works. Once you throw the standard out, then

the whole idea of a constitutional standard is out the window, if we have judges today who are making decisions by picking and choosing the precedent that agrees with their opinion rather than basing their decisions on true constitutional standards.

I oppose Ms. Kagan's nomination because she, in my opinion, does not believe in constitutional limited government. She does not believe in the original intent of the Constitution but more of President Obama's belief of a more living Constitution. As President Obama said before he was elected, he sees the Constitution as a document of negative liberties because it tells the government what it cannot do. But it does not tell us what we have to do.

It was never supposed to tell us what we have to do. But the progressives in power in Washington and many of our judges believe they need, through court rulings, to change that Constitution. What has resulted in that is the government controlling more and more of our lives, spending and borrowing money we do not have, and bringing our country to the brink of economic disaster.

We cannot afford more ''yes, we can'' judges in our country. We can cannot afford more ''yes, we can'' Senators or Congressmen. And we certainly cannot afford another ''yes, we can'' President. The decisions that have been made about our economy over the last couple of years have brought our economy to its knees. This is no longer something we can blame on President Bush. In fact, the Democrats have been in control of policymaking, economic policy spending for 4 years now. This is not Bush's recession. This is the result of Democratic economic policies.

This nomination will continue our move in the wrong direction because it will put another person on the Court who does not see their role as limiting what we can do in Congress, and this Congress desperately needs a Supreme Court that tells Congress no when we step outside the bounds of the Constitution.

Mr. President, I believe America is looking at Congress closer than they ever have before. They expect us to make the hard decisions, to stop the spending, to stop the waste, to stop the borrowing, to stop the debt, to stop the government takeovers, and to stop our courts from taking our freedoms away. That is why I am opposing Ms. Kagan to be a Supreme Court Justice, and I encourage my colleagues to consider their vote and to vote no.

Mr. President, I yield back.

The PRESIDING OFFICER. The Senator from Mississippi.

Mr. WICKER. Mr. President, we are not in a quorum call at this time. I am told there is a brief pause. I ask unanimous consent that I be allowed to speak as in morning business for 5 minutes.

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

COORDINATION OF WIND AND FLOOD PERILS ACT

Mr. WICKER. Mr. President, during this brief pause in the debate on the Supreme Court nominee, I rise to call to the attention of Senate Members my introduction of S. 3672, the Coordination of Wind and Flood Perils Act of 2010.

This month is, of course, the fifth anniversary of Hurricane Katrina. We are still rebuilding on the coast, and we are still rebuilding in many areas of the gulf, in the South, as depicted on this map.

Two weeks ago, I attended the opening of a municipal complex and library in the historic town of Pass Christian. The fact that we are just getting the money and just getting this library and city all rebuilt after 5 years is testimony to the extent of the destruction and the difficulty of funding projects like that. This is true in the public sector, and it is also true in the private sector.

But one of the greatest impediments to rebuilding, and one of the main reasons Katrina is still not over for the people of Mississippi and other areas of the gulf is the lack of affordable insurance. This is true in Mississippi, and it is also true from Texas all the way through the gulf, south, down to the tip of Florida, and on up through the New England coastal States. Anywhere there is coastal exposure there is a problem with affordability and availability of insurance.

I have had quite a number of visits to the coast in recent weeks, particularly in the last 100 days because of the oilspill. The recovery there is going to be a challenge.

There will be speeches later on this month commemorating the anniversary and discussing the heroism and the resilience and the determination of the people of the coast. All of this will be appreciated and necessary, but the truth is one of the best things that could be done for the gulf coast area—not just my State of Mississippi but in the entire area—is to resolve the issue of wind insurance versus flood insurance, and that is what S. 3672 is all about: coordinating the coverage between wind and flood perils coverage.

Of course, for people in this area, for people in my State of Mississippi, you need hazard insurance, you need fire insurance, as does everyone, you need wind insurance, and you need flood insurance. Back in 1968, that was the year of Hurricane Camille. It also was the year it became apparent to this Congress that something needed to be done at the Federal level to cover water damage. Hence, the National Flood Insurance Program was established in 1968. Since that time, Americans have been able to get flood insurance through the NFIP. Actually, in 1973, this Congress in its wisdom made such coverage mandatory for people mortgaging property in flood zones.

Let's fast forward to 2005, the year of Hurricane Katrina. Many victims who needed it didn't have flood insurance. One of the reasons they didn't have flood insurance is that the flood zone maps were wrong. I hope to a large extent this has been corrected. It is supposed to have been corrected now, and people in flood zones who have mortgages are required to have it. Oftentimes they cancel those policies, and that is something we need to attend to also, but that insurance is available.

The problem is wind insurance. The private insurance coverage for wind damage has pretty much left the coastal areas of many of our States in the eastern part of the United States. So we have this situation now where a homeowner needs flood insurance through the National Flood Insurance Program. They need their own hazard insurance that they get through their local broker. Then, they probably have to resort to the State wind pool, a State program, because private wind insurance is not available to them.

Another problem we had in 2005 after Katrina is that many homeowners found themselves caught in the middle between the issue of whether it was water damage in connection with the hurricane that caused their property loss or whether it was flood damage in connection with the hurricane that caused the loss. After hurricanes such as Katrina, if a homeowner has wind and flood insurance, the homeowner often has to prove in court whether it was wind or water that caused the damage. This is unacceptable. Let me emphasize this: Individuals who had all the appropriate insurance—wind and water—were, in many instances, caught in the middle and forced to go to court to watch the insurance carriers fight among themselves. My legislation would remove the burden of determining flood or wind loss allocation from the property owner and put it where it belongs—a decision to be made between the insurers.

If my bill becomes law, insurance companies, including State-run wind pools and the National Flood Insurance Program, would have to pay a claim as soon as possible after the hurricane. If there is a dispute, each would pay 50 percent. The homeowner would be paid for the loss while the parties responsible for paying the claim would work out the details.

My legislation—and again, it is S. 3672, the Coordination of Wind and Flood Perils Act of 2010—would prevent homeowners from having to go to court to determine what portion of the damages were caused by wind and what portion by water. This should not be part of the duties of the homeowner. Under my legislation, if there is a dispute between the parties responsible for paying the claim, the insured would be compensated immediately and the dispute between the insurers would be resolved by arbitration.

This is only a small step. It doesn't answer the whole problem. I still support the concept of putting wind coverage under the National Flood Insurance Program on a voluntary basis, as

my amendment would have done in 2008. It is an amendment that has passed the House of Representatives and it is known as the multi-peril concept. That did not get majority support in the Senate and is, frankly, unlikely to get that support in short order. They are having trouble with that concept in the House of Representatives, but I wish to emphasize that I still support the multi-peril concept. This is a step. It puts us on the right track and it removes the wind and water debate.

I would suggest that my friends in the Senate look at this bill. I invite them to become cosponsors, and I hope we will be able to add this simple amendment to the law in short order.

I thank the Presiding Officer and I yield the floor.

The PRESIDING OFFICER. The Senator from New Jersey.

Mr. LAUTENBERG. Mr. President, I have been in the Senate a long time. This is my 25th year of service. This is one of the most exciting moments I have seen here. Today we have an opportunity to fulfill a great responsibility and an honor, to be able to stand in this Chamber to declare our support for the President's selection of an outstanding nominee: Solicitor General Elena Kagan to be a Justice of the Supreme Court of the United States.

Everyone is aware that she brings an intellect, experience, and knowledge of the law that places her among the few in this country so perfectly qualified to serve on this most important body of jurisprudence in the entire world.

Upon the entrance to the Federal courthouse in Newark, NJ, there is an inscription that reads: ''The true measure of a democracy is its dispensation of justice.'' I was the author of that statement and I labored over it, short as it is, to reflect my view that reflects a fundamental principle of our democracy and the values on which the U.S. Constitution was founded. These values pervade throughout our government and legal system, and especially in the decisions of our Nation's highest Court.

I met with Solicitor General Kagan to hear her views and her personal history, and I watched the testimony before the Senate Judiciary Committee. I have no doubt that, if approved, Solicitor General Kagan will be an outstanding defender of our Constitution in the dispensation of justice entrusted to a Supreme Court member. That is why I hope that with this historic opportunity, the Senate will stand up for what is right, to confirm Ms. Kagan's appointment to become a member of the highest Court in our country because of her outstanding qualifications.

When I met with her, I told her the people of New Jersey were excited about her nomination not only because of her outstanding educational achievements—by the way, graduating from Princeton, NJ, summa cum laude, and contributing so much in her life through her commitment to public service. The excitement is generated because Ms. Kagan is a trailblazer who has paved the way to the top of the legal profession that has helped open doors to women as well as men. She was the first woman chosen to be dean of Harvard Law School. She is the first woman ever to have served as Solicitor General of the United States, a post many call the ''tenth Justice'' of the Supreme Court. We must remember what that job is, what that task is, and that is to appear on behalf of the United States as an advocate, having tested abilities to bring the case to the Court, defending our country, and experience second to none in that courtroom.

Let us not forget that in the last year she has amassed an impressive record as Solicitor General. She has filed more than 3,500 pages of merit briefs before the Court, and she has argued cases on a broad range of issues from protecting children from pedophiles to protecting Americans from terrorists. If she is confirmed, of nine members of the Court, the proportion of women will be at its highest level in history, with women holding three seats.

She is the granddaughter of immigrants, and that experience shaped the world in which she grew up. Similarly, I came from parents brought to America by my grandparents, who had the common experience of so many of the struggle to learn a new language, adopt new skills to get by, mustering the determination to help their children rise above their circumstances in this new world. Though my parents worked very hard, they were never able to accumulate valuables. Instead, the heritage they left my sister and me was a set of values and a love for America with its freedom and opportunities and appreciation for what this country gives us all. They often reminded us that there were those far worse off than we and we had an obligation to contribute if we could to give something back to our community.

These same values are inherent in Ms. Kagan's views as she expressed them to me. Her father was a housing lawyer. Her mother was a public schoolteacher for 20 years, and she carries the heritage of their public service dedication. Solicitor General Kagan's career has confirmed her own commitment to public service, protecting rights and individual freedoms.

She served as a clerk to Justice Thurgood Marshall whom she, as many other Americans, greatly admired. Frankly, it is sad to see that some on this floor during her confirmation hearings attempted to discredit Solicitor General Kagan's reputation because of her association with Justice Thurgood Marshall. Justice Marshall was an icon who expanded respect and tolerance in America as few others have in our history. He argued Brown v. The Board of Education. He was the first African American to serve as Solicitor General of the United States, at which he excelled, amassing a remarkable record of Court victories. He was the first African-American Supreme Court Justice and distinguished himself as one of America's greatest jurists.

Some on the other side, in order to keep this appointment from being confirmed, have gone so far in their desperation to denigrate Ms. Kagan that they have labeled Justice Marshall as some radical on the bench and attempted to tear apart the years of brilliant contributions of this great man.

I want to be clear. The fight to end racial discrimination may have been radical to some, but it was the right fight and the right cause, and there will never be anything shameful about a person whose great mind and ferocious eloquence made him a giant in the civil rights movement. Shame on those who would denigrate those achievements.

Ms. Kagan's lifelong dedication has been to break down barriers and work for what is right, not simply popular. At Harvard Law School, one of her accomplishments as dean was to welcome different views among faculty members. She believed—and exercised that belief—that her students would not get the legal education they deserved if it was limited by one ideological perspective. She made it a point to add faculty members who came from different points along the political spectrum. No wonder Solicitor General Kagan's nomination has not only been endorsed by liberals but also by conservatives, including Ken Starr, Ted Olson, and Miguel Estrada.

Considering a Supreme Court nominee is one of the most important responsibilities we have. The Supreme Court makes decisions that determine the very underpinnings of our country's character. It has a direct say on the rights—or lack thereof—our children and grandchildren will have. The Court can decide whether big corporations and the rich and famous should have a stronger claim to justice than the average person. The Court sets the table for government power—whether it goes unchecked or is responsible to the people. The rulings of the Court affect everyday New Jerseyans and everyday Americans. There is no doubt in my mind that Ms. Kagan understands that.

After careful consideration, I am going to proudly vote yes to confirm a person who I believe will be one of the great Justices of the Supreme Court of the United States of America.

Mr. President, I hope there isn't this continuing attempt and process we have seen here where it is the objective of individuals in this room—typically on the other side of the aisle—to stop things from happening, to be obstructionists. There is no point in exercising that kind of foolishness. This is a time to step up and say we want the best we can get for our Supreme Court. President Obama has chosen carefully and wisely, and we want to see Ms. Kagan seated on the Supreme Court. I hope my colleagues will vote affirmatively to make sure that happens.

I yield the floor, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Ms. LANDRIEU. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

SMALL BUSINESS

Ms. LANDRIEU. Mr. President, I understand we are in controlled time. I will speak for the next 10 minutes, and if someone else comes to the floor, I will be happy to yield.

I know the discussion today has primarily been on our new potential Supreme Court nominee, but that is not why I have come to the floor. I have come to the floor to talk about an issue I have spent a good bit of time talking about in the last several weeks—particularly the last week—and that is the issue most Americans have on their minds right now, and that is, when is this recession going to end? That is a good question. My answer to that is that this recession is going to end as soon as we can get Main Street moving again.

The First Lady has been so wonderful in her advocacy to help Americans understand the importance of activity and moving, with her campaign ''Let's Move,'' to help us all get into better shape—particularly the young children of our country. I think we can really use almost that same slogan for Main Street—to get Main Street moving again, percolating again, and generating jobs, because that is the only way this recession is going to end. We can pass bill after bill up here regarding big bank bailouts, saving the big auto manufacturers. We can step up and send money to big, troubled banks. But until we figure out a way to get money to Main Street, this recession is going to be with us a long time.

I think that is really what is on people's minds, at least in Louisiana, my home State, the places with which I am very familiar. Our situation in Louisiana is even more complicated, and right now I am not going to take the opportunity—but I will before this session ends—to talk about the gulf coast disaster and the moratorium that has been placed on drilling in the gulf, which has exacerbated our problem. Suffice it to say that on Main Street all over America, people are wondering—we know that Supreme Court Justices are important, that health care is important, and we know that stabilizing the financial situation is important.

When is Congress going to focus on Main Street and small business? That is what our bill, the small business lending bill and particularly the small business lending fund, does.

I want to start the first few minutes of this discussion—there will be some Members coming down to the floor—by reading an e-mail I received in my office 2 days ago. This e-mail was so well written and so passionate and so encouraging to me that I was afraid it was not real. I actually had my staff call the man who wrote it to make sure before I came to the floor of the Senate, because I did not want to be fooled or embarrassed by someone sending some kind of form e-mail and not being sure it was correct.

I want my colleagues to know that we called Mr. Bryan Gipson, Sr. I am going to read his e-mail because I think this says better than I could what is at stake for those who have tried to obstruct this bill, unfortunately, for many of my friends on the other side:

> Dear Senator Landrieu, I wanted to start this e-mail by telling you I am a life long Republican and a former member of your district. I currently reside in Ocean Springs, Mississippi, and I am a Commercial Real Estate Broker. I watched with great interest today as the Senate debated H.R. 5297, the Small Business Jobs Credit Act. I was very, very disappointed by the unjustified stonewalling of the Republicans. To think that a Bill, whose only purpose is to provide funding for small business, create jobs and help the most battered segment of our economy recover from the worst recession of all time could be held up because one side had their feelings hurt because they don't have enough amendments is sickening.
>
> Senator Landrieu, I am a commercial real estate broker. My company sells hotels, throughout the southeastern United States. We have not completed a transaction in almost two years. There is no third party commercial financing for commercial real [estate] in the United States today our industry has been battered because of this. Hotels are closing through out this country and workers are being laid off. These workers make beds and clean rooms. They work as wait staff, accountants, reservationists, and front desk personnel. Thousands of these hard working Americans have been laid off. It's time for Congress to do something to put Americans back to work on the jobs.
>
> As I said, I am a life long Republican. I was sick to my stomach to see the leadership of the Republican Party do everything in their power to kill this bill. Please remind them they have lost my vote. I will do everything in my power to defeat my two Republican Senators when election time comes. It is plain to see the Senators of the Republican Party are holding the American economy and it's workers hostage for selfish, partisan politics, and the American voters are tired of it.

I will not read his last sentence because I do not think it is appropriate for the Senate.

Today I had the opportunity to speak with one of the region's most outstanding community bankers by phone. My phone call was prompted by a roundtable I held earlier this week—it was not yesterday but the day before—with some of the country's most outstanding entrepreneurs. I had several individuals from Louisiana—surprising to many people. You may be surprised to know that New Orleans, LA, has been on the front cover of Entrepreneurial magazine twice in the last year because after Katrina, some of the leaders, including myself, had the sense to say: We are not going to build back just what we had; we are going to build back better and stronger, and part of that is inspiring young people around the country to come and start new businesses in New Orleans and help us build a greater city and a better region.

We also had individuals from all parts of the United States. One of the two most interesting individuals who owns arguably the most famous small business in America today, Georgetown Cupcake, better known as DC Cupcakes, the reality show—Sophie and Katherine were in my committee 2 days ago. I want to tell you what they said, and nobody is going to believe it. There is a transcript of this record.

This is one of the most famous, most popular small businesses in America. They have their own reality show. They testified to my committee that they could not themselves get a business loan. They knocked on bank after bank until finally a community banker—the chairman of the bank is Ron Paul. I spoke with him today. It is EagleBank right in this region. They finally gave them a loan which they paid back in 3 months. For 2 years they used every credit card they had. They used their entire savings. Even with a line 2 blocks long—if anyone in Washington, DC, doesn't know about it, they should know about it. I have not been there, but my children have been there. They ask me to take them there all the time. The line is 2 blocks long, I hear, every night.

If a small business not 10 minutes from the Capitol, with a line 2 blocks long, cannot get a loan from a bank and has to go through all this trouble—but they finally, thank goodness, found a community bank to lend them the money—do I have to say anymore about what we are trying to do?

Another young woman showed up in our committee. She graduated magna cum laude from Duke University. She received a scholarship from the Fulbright Scholarship Program. She went to Sri Lanka to work for a year under the Fulbright Scholarship Program. Her idea as a scholar was that maybe she could create a business using environmentally sensitive methods and practices designing very fashionable clothes that she could then sell to college students because our college students today are much more sensitive to the environment and to these sorts of things than we were when we were in college.

She had a very brilliant idea. She had a great market. She went to bank after bank with $250,000 worth of purchase orders and could not get a loan and does not have one today.

If our young people who are graduating at the very top of their class, who have the most extraordinary ability to create jobs in America, cannot get money in their hands, we should close these doors and turn these lights off because it is never going to get fixed. That is what this bill tries to do.

It has been stopped by petty politics or slowed down considerably. We are

still hoping we can get this done by the other side, which wants to pretend this is not important or that the Small Business Lending Program that got 60 votes on the floor of the Senate is somehow damaging to this bill. It is the heart of this bill.

I want to use fact versus fiction to clear up another point. I could go on and on about what these young entrepreneurs running small but extraordinarily exciting businesses said at that roundtable. This bill will help them, and we are going to continue to do more.

One of the things I want to speak about today is fact versus fiction about the one article that has criticized us. It was an AP article that was written 2 days ago and was circulated in defense of the opposition, so I want to take this issue by issue.

The article was written by Daniel Wagner of Associated Press. When we called him, he admitted that he failed to call anyone from our office or the Small Business Committee to get any real information about the bill. He had not written in an updated way. He had gotten this information some months ago. He was frustrated. He couldn't get Treasury to respond, so he just wrote the article.

The problem is half of his article is completely factually wrong about this bill. I want to go point by point.

He comments in his article:

> Federal Reserve Chairman Bernanke and others have questioned whether the problem is lack of capital or if there simply are not enough creditworthy borrowers.

I have given two examples in the last 2 or 3 minutes about creditworthy borrowers. I think every Member of Congress knows a dozen businesses that are good, solid businesses with good cashflow and a good product with a good record that are beiing told they cannot get funding. If you do not believe me or what you are hearing back in your States, the fact is our Chairman stated last month:

> It seems clear that some creditworthy businesses, including some whose collateral has lost value but whose cash flow remains strong have had difficulty obtaining the credit they need to expand and, in some cases, even continuing to operate.

Part of the article, quoting the Chairman, is factually wrong. Chairman Bernanke did not say that. Chairman Bernanke said what I just quoted.

The second fiction he said was that Congress was at work on a new program to send $30 billion to struggling community banks. No, that is not what our bill does. We do not send $30 billion to struggling community banks. We allow healthy banks, not struggling banks, healthy community banks to apply, completely voluntary, for money from the Treasury so they can increase the capital they have to lend hopefully to wonderful young people such as the two young women who started Georgetown Cupcake, now better known nationally as DC Cupcake, and other small businesses that are hiring people and increasing their locations and starting to bring this recession to an end.

The facts are that you have to be a healthy bank to apply for this program.

The next thing Mr. Wagner said—and he has retracted this already. We appreciate him retracting this statement. He said:

> Under the new program, the 775 banks on the government problem list can qualify for the bailout.

A, that is not true, it is not a bailout. And B, they are expressly prohibited in our bill. The 775 banks on the problem list would be ineligible to receive capital. Only the strongest banks, and they are registered as CAMELS 1, 2, and 3, not 4 and 5. Finally he said:

> This time the money is more likely to disappear as a result of bank failure and fraud.

It is not the community banks we have to worry about failing. Their record has been extraordinary. In fact, there was not one bank in 2005, 2006, all the way up to 2007—there were less than a handful of community banks that failed. In 2009 and 2010, those numbers shot up because of the despicable and reckless policies perpetrated by many big banks and international lenders which put the whole economy at risk because of what they did, and then that had a ripple effect on our economy.

It is not going to be the small community banks that take this Nation down, I can promise my colleagues. It is going to be the small community banks and other nonbank lenders in places that have a hard time getting the capital they need to expand that are going to lead this country out of the recession.

So I wish to put this up—this ''Party of No''—because, unfortunately, we have on the other side an unprecedented number of objections. This is the graph that I think Senator STABENOW has used for 246 objections. It is one thing, of course, politically, if you want to say no to the President. I don't think it is great, but sometimes you have to, if you don't believe the President is right. I understand that. But to say no to the small businesses of America, most of which have done absolutely nothing wrong but try to build their businesses and try to expand their businesses? To say no to them is one no gone too far.

I wish to put up the chart about the businesses that will create jobs, because if we would spend some time focused on passing this bill—and I hope this chart I am using is an effective visual for the share of net new jobs by firm—these are our own statistics for 1993 to 2009. So for the last 16 years, 65 percent of new jobs have come from small firms. This goes to show that if we can get this bill—and maybe there are others but this bill for certain because it was built with bipartisan support. It has $12 billion of tax cuts targeted directly at small business. It is a $30 billion small business, healthy bank partnership fund that will help spur investments on Main Street, and it is an increase of lending limits and loan guarantees through the Small Business Administration for their very tested and proven and successful lending programs. This bill could have a tremendous impact on Main Street throughout America.

We have only a few more days here. The leaders are still talking about what can be worked out. I would suggest we get this bill on the floor, we agree to one amendment on both sides, and get this bill passed for the American public. I know the Chair has been supportive, and I see Senator CANTWELL and others on the floor who have been arguing successfully and passionately for this bill. When people say we need more amendments, this bill has been built with bipartisan amendments, section by section—I have said this over and over again—every section of this bill.

We call this chart our red-line, four-page outline of this bill. It is well known and has been well reviewed by not only Members here but staff and reporters as well who can see for themselves. This is a Snowe-Landrieu; Crapo-Landrieu-Risch; Snowe-Landrieu; Snowe-Merkley. I mean, every single section has been bipartisan, and we now have a strong bipartisan vote for the lending program. So all we need is for the leaders to agree on one amendment. It could be the 1099 amendment, which has generated a great deal of interest around here. Let's make a decision about how we move forward with that provision. I think it needs to be adjusted or completely repealed, but that is worth debating. Let's get that done and move this bill forward.

In addition, as I yield the floor for the Senator from Washington, we continue to receive more and more endorsements. Today, we got a letter from the United States Conference of Mayors:

> On behalf of the Nation's mayors, I am writing to thank you, Senator Landrieu, for supporting and sponsoring the Small Business Jobs Act. The U.S. Conference of Mayors firmly supports this legislation and urges all Senators to vote for its immediate passage.

Mr. President, I ask unanimous consent to have printed in the RECORD the entire letter.

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

THE UNITED STATES CONFERENCE OF MAYORS,
Washington, DC, August 4, 2010.

Hon. MARY L. LANDRIEU,
Chairwoman, Committee on Small Business and Entrepreneurship, U.S. Senate, Senate Russell Office Building, Washington, DC.

DEAR SENATOR LANDRIEU: On behalf of the nation's mayors, I am writing to thank you for sponsoring the Small Business Jobs Act of 2010, H.R. 5297. The U.S. Conference of Mayors firmly supports this legislation and urges all Senators to vote for its immediate passage. Mayors believe it will create jobs to help put Americans back to work. It will do

so by increasing small business access to credit. You and other supporters of the bill understand that even in these challenging economic times, many small businesses are ready to expand their operations but have not been able to borrow the money they need to move forward. This legislation would assist them by establishing a $30 billion lending pool for small community banks that make loans to small businesses. It also calls for increasing the limits on Small Business Administration (SBA) loans available to small businesses.

Across our nation many local communities are suffering from double digit unemployment. Every day mayors hear from residents who have lost their jobs. They tell them they don't want a hand out. They just want a decent paying job that will enable them to support their families. Nationally and locally, small businesses provide the vast majority of jobs for local residents. By increasing small business access to credit, this legislation will help create hundreds of thousands of jobs for unemployed residents in local communities across our nation.

Again, thank you for your support. Mayors stand ready to work with you to ensure the immediate passage of this important legislation. Please feel free to contact me or Larry Jones of my staff if you have any questions.

Sincerely,

TOM COCHRAN,
CEO and Executive Director.

Ms. LANDRIEU. This recession is a national recession, but you feel it in every town, in every community, in every city where mayors and Governors out there—Democrats and Republicans—are fighting every day to bring vitality back to their communities. This bill has the potential to help them, to be some wind under their wings and to get this job done.

So I am proud to have the thousands of mayors in our country who have stepped up to support this legislation. I am also proud to have almost 28, if not 30, Governors who have written personally, sometimes numerous letters, to say they support this legislation.

I have used the time in conclusion to rebut the only article we know of that was a negative one. We have had many positive articles and editorials, and we are grateful because the bill is self-explanatory. The one reporter who wrote, I thought, a very misleading story has retracted portions of it, which he admitted were not accurate, and I have given the detail to rebut the other sections of his article. But we continue to pick up endorsements.

The bill is bipartisan. We have to get Main Street moving again. When we do—and only when we do—will this recession end and our constituents can go back to work or they can fulfill their dreams to build a business of their own that can employ them and bring security, prosperity, and happiness to their families. But this Congress should act and we should act now—in the next 24 hours.

I yield the floor.

The PRESIDING OFFICER. The Senator from Washington.

Ms. CANTWELL. Mr. President, I thank the Chair, and I thank the chair of the Small Business Committee for her continued advocacy on this issue. It is so important for us to help small businesses; that is, if you believe they are the engine of economic growth for our economy, as I do, and as I think the chairwoman of the Small Business Committee does.

We know 75 percent of new job creation comes from small business. So we can continue to talk about the economy, we can continue to debate it or we can get down to the business of helping small business, as this bill does by outlining three principal programs: tax credits for small businesses on depreciation to make new investments; an enhancement of the 7(a) and 504 loan programs, which are successful programs for lending to small businesses where their capital has fallen off because the program ended in June, so we basically have a lot less money for small businesses; and a small business lending program that could help small businesses grow and help our economy at this critical point in time.

We are here tonight because we only have a few days left, but the chair of the Small Business Committee is not giving up on this issue and neither am I. I am saying it is important enough for us to stay and make sure we get this legislation passed because we want to grow small businesses. I know my newspaper, the Seattle Times, had this to say: ''Nothing should be more nonpartisan than putting people back to work.''

I think that says it all. If you are down to this, a program that could help grow small businesses, why would you be partisan at a time when our economy has huge unemployment and we have had such stagnant growth? Why would you continue being partisan instead of passing this legislation?

In fact, I haven't actually heard people on the other side say if we got through the cloture motion that they wouldn't support this legislation. No one has come to the floor and said: I will not support this legislation with this language in it. In fact, we have kind of had people indicate the opposite. So if that is the case, let's have the votes. Let's vote on this legislation and let's put people back to work.

One of the important things I wish to talk about is this small business bill is a lending program. As somebody said to me today: When you can't figure out how to stop something, then make up something that it isn't and claim that it is. That is exactly what has been going on, on the other side. They can't figure out a reason why they do not like this, but if they can pretend it is TARP-like, then maybe they have a chance of defeating it.

Well, this is not TARP-like. This is a small business lending fund, which is a voluntary program for small businesses, and it uses community banks as a conduit. So it is literally, if you will, similar to 7(a) and 504 programs in the sense that they are designed primarily to get capital to small business. Those two programs are direct lending programs that help with the partnership of banks, and this is a program we are creating—the Small Business Lending Fund—that helps, especially given that during this huge economic downturn, two-thirds of job losses in America since 2008, because of the implosion, have impacted small business the most. So when we look at all the job losses from 2008 to 2010, 81 percent of them are from small businesses.

So we can either design a program that is about helping to get capital to small businesses and move our economy forward or we can go home for the August recess and say we took partisan votes. I am for trying to solve this problem.

What this is not is a TARP bill. I love the comparison people make, because I didn't support the TARP legislation. But just by comparison, TARP was an open-ended bailout of Wall Street firms. It basically was the U.S. Government buying toxic assets. That is what it was. I call it, at times, a blank check, and being able to say no strings attached to firms that were failing and then actually get assistance from the government. In fact, if you look at it more specifically, TARP was an open-ended bailout. It basically said: Here are the resources—targeted at Wall Street. It bought toxic assets. The banks weren't viable. They basically got the revenue because people were concerned they were failing. Today's estimates are—we don't know what tomorrow's estimates will be—that it basically cost the taxpayers $100 billion.

So none of these things are what the Small Business Lending Fund is. The Small Business Lending Fund isn't a bailout, it isn't targeted at Wall Street, it doesn't buy toxic assets, it is not for banks that are not viable, and it doesn't cost the taxpayers any money.

So the other side is just trying to say this because they do not have anything else to say about this program. What they need to be able to do is to explain to their constituents why we have lost so many jobs with small businesses and we don't have a proposal on the table to help grow small businesses.

But I will tell you what this Small Business Lending Fund is: It is a program that is lending to small businesses, it is targeted at Main Street, it increases lending instead of buying toxic assets. TARP was just about buying toxic assets. This is about saying to banks: Show us a plan. If you have a plan on how you are going to increase lending to small businesses, then we will give you access to capital. So nothing could be further from the way TARP worked. TARP bought toxic assets and bailed out banks with no strings attached, and this is a lending program. The banks have to be healthy and viable. Nobody asked AIG or Citigroup or Goldman Sachs if they were viable. They just wrote a check. In fact, here you have to prove you are viable. This actually saves taxpayers money; that is, in essence, the Federal Government is going to be making

loans available to small businesses and they will have to pay for that access to capital. That payment back to us is expected to generate over $1 billion.

So nothing could be further from the truth in how these two programs work. The bottom line is back to that small business job loss and how we are going to actually increase job growth for the future. I actually think this number is quite significant for our economy and that if we want to help small business, we will get them capital.

One banker from my State sent a message to me and said this:

> We would absolutely use the funds for small business lending. Our bank has a backlog of $50 million to $70 million of loan requests, which is counter to statements of soft loan demand. We have reduced our lending to preserve capital as expected by the regulators.

They did that because that is what regulators expected. He went on to say:

> This legislation would give us the capital to significantly increase lending.

That is a banker from my State. So that is what they are up against. They know this program will help them with the backlog of requests they have and the requirements they also have from regulators to keep capital and to have reserves. So this is about getting small business lending flowing.

When we think about the fact that this will generate, as some people say, an estimated $300 billion of stimulus to our economy, it is critical we get this program going. We have experienced six straight quarters of decline in overall commercial and industrial lending, and the total cumulative decline in the fourth quarter from 2008 until 2010 of March of this year has been a 20-percent drop—over $315 billion taken out of our economy.

So we can do something in the next couple days, if my colleagues will show the dedication of breaking partisan gridlock and also the commitment to stay here to get this legislation done. We can start to give hope to small businesses.

My colleague mentioned all the small business organizations that support this legislation. I would like to point out, some people say this might be about banks or it might be about community organizations. It is not. We are working with them because this program is designed to use them as a conduit, but we are tonight talking about this because we are talking about small businesses. We are talking about the gentleman from Mississippi who sent a letter to the chairwoman. We are talking about people who do not have a hired lobbyist back here representing them to go up and down the halls. They are depending on us.

We have heard these stories throughout America, of businesses not getting access to capital, of people having performing loans cut right out from under them, of people who had a bank that was basically providing small business capital who cut that access to capital and they had to do all sorts of things to keep their businesses going.

We can continue to have job loss in America or we can start creating jobs and do so by investing in small businesses. I hope we will get this legislation moving in the next 2 days; that we will be able to basically overcome the partisan gridlock. As the Seattle Times said, ''There is nothing that should be more nonpartisan than putting people back to work.'' I could not agree more. So I hope we get this legislation passed in the next 2 days.

I yield the floor.

The PRESIDING OFFICER. The Senator from Louisiana.

Ms. LANDRIEU. I understand the time controlled by the Democrats is coming quickly to an end. I ask for 2 more minutes, if that is OK, to wrap up.

The PRESIDING OFFICER. The Senator has 5 minutes.

Ms. LANDRIEU. Five minutes. That is great.

I thank the Senator from Washington, who has been a partner on this bill with me from day one. She is a member of the Small Business Committee, quite an expert in the field of small business financing having built her own small business successfully and helped many others to build others. She brings that expertise to the Senate. I appreciate her focus and commitment.

Together with some of our other colleagues we have worked the extra hours and time, and we are still hopeful that we can get this bill done before we leave for the August break to go home and work in our States through that time.

I want to read just another short paragraph into the record. This is going to appear, I understand, in the Wall Street Journal tomorrow. I received a copy of it today. It is going to be in response to a wrongheaded editorial by the Wall Street Journal. They entitled their editorial a couple of days ago, ''Son Of TARP.''

As Senator CANTWELL from Washington said, this doesn't look like TARP, it doesn't walk like TARP, it is not TARP. But there are a few critics out there who, because they cannot say anything bad about it, want to put a bad name on it and scare people away.

This gentleman, Mr. Richard Neiman, let me say, first, is a superintendent of banks for the State of New York. He knows something about them, and is a member of the TARP Congressional Oversight Panel. So he most certainly understands TARP since he is an overseer of TARP. I think he would know if this was TARP, but this is what he writes—''Small Business Lending Fund Will Help Recovery, Jobs.''

> Your editorial, ''Son of TARP'' [on] July 30 is unfortunately titled, and underestimates the potential of the proposed Small Business Lending Fund.
>
> Small business growth is the only way out of this recession, yet our entrepreneurs are not being provided the credit they need, as the TARP Congressional Oversight Panel often hears from small business owners. Our recent report on the issue demonstrates that, during the crisis, lending to small business fell by 9 percent at our Nation's largest banks. . . .

In other words, the Nation's big banks took the TARP money and cut lending to small businesses. That is what happened. This bill is to reverse that and to give small banks a fighting chance, and small businesses, to get a voluntary lending fund to start flowing capital to small business. He says:

> Unlike TARP, the SBOF would incentivize banks to lend by lowering the dividend rate at which banks must repay the government if banks meet lending performance metrics. Further, the SBLF removes the TARP stigma that discouraged small banks from participating in government program. . . .
>
> The SBLF is not a sequel to TARP,

It is not the son of TARP, it is not the daughter of TARP——

> but it can be a segue toward a stronger future for our Nation's small businesses and their employees.

I could not have said that better myself. I ask unanimous consent to have the letter printed in the RECORD.

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

SMALL BUSINESS LENDING FUND WILL HELP RECOVERY, JOBS

Your editorial, ''Son of TARP'' (July 30) is unfortunately titled, and underestimates the potential of the proposed Small Business Lending Fund (SBLF).

Small business growth is the only way out of this recession. Yet our entrepreneurs are not being provided the credit they need, as the TARP Congressional Oversight Panel often hears from small business owners. Our recent report on the issue demonstrates that, during the crisis, lending to small businesses fell by 9% at our nation's largest banks, and the bankruptcy of nonbank business lenders such as the CIT Group has further limited credit options.

The financial crisis and recession have created the lack of demand for credit that your editorial points out, but it is as important to point out the lack of supply. Small banks are reluctant to take on more risk when small businesses' customer base is weak. Breaking this stalemate requires old-fashioned underwriting to identify the good deals which are still waiting to be made.

The SBLF is intended to provide public-sector support to bring credit- and lending-worthy parties back to the table. Unlike TARP, the SBLF would incentivize banks to lend by lowering the dividend rate at which banks must repay the government if the banks meet lending performance metrics. Further, the SBLF removes the TARP stigma that discouraged small banks from participating in government programs that support lending. It is these banks that are the primary source of credit for small businesses which lack the same access to capital markets as large companies.

The SBLF is not a sequel to TARP, but it can be a segue toward a stronger future for our nation's small businesses and their employees.

RICHARD H. NEIMAN,
New York.

THE PIGFORD SETTLEMENT

Ms. LANDRIEU. In my final minute I would like to change subjects and speak about another subject that is very important to people in Louisiana, particularly to some of my African-

American farmers and the small communities that they primarily reside in throughout my State.

These are farmers who were blatantly discriminated against in the last several decades. We have a bill right here before us. It is referred to as the Pigford settlement. This group of farmers took their grievances to the courts. Before they could get a final judgment from the courts, the Justice Department stepped in and smartly attempted to settle this situation because the Federal Government is probably going to be very liable for past discriminations that were blatant and proven.

We came up with a fair way to solve this issue, to get money to many African-American farmers. We have acknowledged there were some wrong things done by the Department of Agriculture and by the Federal Government. We want to try to make amends. We cannot make everything right and everything perfect, but the Pigford settlement is a fair and just resolution to this issue. One thousand African-American farmers in Louisiana would be benefited by this settlement.

Again, this is being held up. I don't understand why, but I wanted to lend my voice to say that this settlement is not just about correcting past wrongs but about ensuring future prosperity. It is time for Congress to end the 12-year delay and approve this settlement as quickly as possible.

The PRESIDING OFFICER. The time of the Senator has expired.

LEGISLATIVE SESSION

Ms. LANDRIEU. I ask unanimous consent the Senate resume legislation session.

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

MORNING BUSINESS

Ms. LANDRIEU. I ask unanimous consent the Senate proceed to a period of morning business with Senators permitted for up to 10 minutes each; that upon the conclusion of the so-called wrap-up period the Senate then resume executive session and continue the debate on the Kagan nomination provided for under the previous order in the specific hour blocks.

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

REMEMBERING ''CJ'' WILLIAM S. RICHARDSON

Mr. INOUYE. Mr. President, I rise today to honor the life of my friend, a consummate civil servant and respected legal mind, ''CJ'' William S. Richardson.

Bill Richardson was born into a working class family of mixed ethnic heritage representative of Hawaii's community. He was part Native Hawaiian, part Chinese, and part Caucasian. From these humble beginnings, one of Hawaii's greatest figures emerged. Like many men in my generation, Bill fought in World War II, serving as a platoon leader for the U.S. Army; he would later be inducted into the Infantry Officer Candidate School Hall of Fame. This was just one of many achievements in a life filled with distinction: Bill served as chairman of Hawaii's Democratic Party from 1956 to 1962, providing strong advocacy for statehood, which Hawaii achieved in 1959. From 1962 to 1966, he served as the State's Lieutenant Governor. In 1966, Bill became the first Native Hawaiian to serve as Chief Justice of the Hawaii State Supreme Court. As ''CJ,'' he deftly blended Hawaii's history and cultural practices with modern law, establishing a traditional Hawaiian understanding of water rights as the law of the land, and demanding public access to Hawaii's shoreline.

Yet his dedication to Hawaii did not stop at writing landmark legal opinions that redefined the State. It was Bill Richardson who recognized the need to build a law school in Hawaii. He was dedicated to creating more, and better, educational and professional opportunities for Hawaii. In keeping with his personal and legal opinions, he remained focused on the need for such opportunities within Hawaii's most disadvantaged communities. With this vision, and by his perseverance, Bill worked with Hawaii's legislature to open Hawaii's first, and only, law school in 1973. The school, appropriately named the William S. Richardson School of Law after its greatest champion, has committed itself to educating attorneys from places as close as Honolulu and as far away as Thailand, with a clear focus on educating the Pacific's traditionally disadvantaged groups. The school continues to follow Bill's vision: to promote justice, ethical responsibility and public service. The law school was, perhaps, Bill's best and most profound achievement.

Bill passed away on June 21, 2010, at the age of 90. Although I am saddened by my friend's passing, I am comforted by knowing that his legacy will live on through his family, his work, and the thousands of attorneys educated by the school bearing his name.

COSPONSORSHIP CORRECTION

Mr. SCHUMER. Mr. President, I would like to clarify, for the record, that Senator DIANNE FEINSTEIN was mistakenly added and then withdrawn as a cosponsor of S. 28 as a result of a clerical error. Let the record reflect that any notations regarding Senator FEINSTEIN's cosponsorship of this bill on June 24, 2010, or withdrawal on July 22, 2010, result solely from clerical error and should not be construed to convey any views of Senator FEINSTEIN regarding the merits of this bill.

REMEMBERING THE CREW OF SITKA 43

Ms. MURKOWSKI. Mr. President, late last month I had the honor and the privilege to be in Sitka, AK, to honor the crew of a U.S. Coast Guard helicopter that went down in the waters off of the State of Washington. That helicopter was based at the Coast Guard Air Station Sitka.

On Monday, it was my sad duty to attend yet another memorial service. A service to honor the crew of the Air Force C–17 Globemaster that crashed on Thursday evening shortly after takeoff from Elmendorf Air Force Base. Quite coincidentally, that C–17 aircraft bore the call sign ''Sitka 43.''

The C–17 crash took the lives of four of Alaska's finest airmen. MAJ Aaron Malone, age 36, who went by the nickname ''Zippy.'' MAJ Michael Freyholtz, age 34, CAPT Jeffrey Hill, age 31 and SMSgt Tom Cicardo, age 47.

Major Malone, Major Freyholtz and Senior Master Sergeant Cicardo were members of the 249th Airlift Squadron of the Alaska Air National Guard. Captain Hill was active duty Air Force. He served with the 517th Airlift Squadron at Elmendorf.

The C–17 mission at Elmendorf is operated as an active Air Force/Air National Guard association.

As our colleague Senator BEGICH noted on the floor, each was exemplary in his own right.

Zippy Malone was the unofficial morale officer. Michael Freyholtz began his career in the C–17 right out of pilot training. He was known as the best C–17 demonstration pilot around. But that is hardly his greatest accomplishment. Major Freyholtz flew 608 combat missions in Iraq and Afghanistan.

Jeffrey Hill began his career as an enlisted man at Elmendorf. He was known as a phenomenal airman and maintainer. He earned his commission in 2002 and was a top instructor pilot. Yet he never forgot from where he came. An inspiration to the enlisted airmen, he reinvigorated the booster club and motivated young airmen to get and stay fit.

Tom Cicardo gave more than 28 years in the service of his Nation. He was a soldier, a marine, and an airman. His peers described him as ''old school.'' He was one of the Air Force's premier loadmasters. During his first 11 years in the Alaska Air Guard he was involved in 58 search and rescue missions in the State of Alaska where he was credited with saving 66 lives. He also flew combat search and rescue missions in Afghanistan and personnel recovery missions in the Horn of Africa.

And each of these exemplary servicemembers lived their lives in Alaska to the fullest. Major Malone and Major Freyholtz coached Little League. Captain Hill was always traveling off-road, hunting and fishing, camping and hiking. They leave behind children, spouses, and loved ones.

Sitka 43 went down Thursday evening while on a training mission.