Mr. LEMIEUX. I again call for the fact that every skimmer in the world that is available should be welcomed by this government. They should be steaming toward the Gulf of Mexico, and we should be doing everything we can to make sure we are cleaning up this oil before it gets on our beaches, before it gets into our estuaries and our coastal waterways. It is beyond belief we are not doing more. It is beyond belief this administration has no sense of urgency about stopping the oil from coming ashore.

I ask, Mr. President—and I will continue to come every day to the floor to ask the question—where are the skimmers? Where is the help? Where are the domestic skimmers? Why aren't we doing the job we should for the American people to protect our beaches, our waterways, and our estuaries?

Thank you, Mr. President.

The PRESIDING OFFICER. The Senator from Texas.

Mr. CORNYN. Mr. President, I see our distinguished colleague from Pennsylvania on the Senate floor, and I know he expects to speak for a little more extended time. He has graciously allowed me to go first.

NOMINATION OF ELENA KAGAN

Mr. CORNYN. Mr. President, I rise to speak briefly on the nomination of Elena Kagan to the U.S. Supreme Court. Of course, this vacancy is being left by the retirement of Justice John Paul Stevens.

The President has the constitutional prerogative to nominate whosoever he chooses, but it is important to recognize the Constitution does not stop there. It also provides a second constitutional obligation or responsibility, in this case upon the Senate, when it comes to the duty of advice and consent.

We know there are only nine Justices on the U.S. Supreme Court and that each has that job for life. It goes without saying—or it should, I would add—that the process in the Senate must be fair and dignified. I wish I could tell you it has always been that way, but I believe the confirmation process of Judge Sotomayor to the U.S. Supreme Court was conducted in that way, and I certainly believe so will this confirmation process as well. But in addition to being fair and dignified, it must also be careful, thorough, and comprehensive.

Our job is particularly difficult because of the fact that Solicitor General Kagan has never been a judge. She is a blank slate in that regard. We do not have any prior opinions to study. While that is not unprecedented, it is somewhat unusual for someone to come to the U.S. Supreme Court without ever having served as a judge. In addition, we know General Kagan has practiced law only very briefly. She was an entry level lawyer in a Washington law firm for about 2 years and then, of course, last year she was chosen by the President to be Solicitor General at the Justice Department. But that brief experience tells us virtually nothing about how she would approach cases as a member of the U.S. Supreme Court.

What we do know about Elena Kagan begins, and largely ends, with her resume. We know the jobs she has held. We know the positions she has occupied and the employers she has chosen to work for. A review of her resume shows us two things. First, Ms. Kagan is very smart. Her academic records are impressive. Second, we know Ms. Kagan has been a political strategist for a quarter of a century, but she has never been a judge. We know she has served extensively and repeatedly as a political operative, adviser, and a policymaker—quite a different job than that she would assume should she be confirmed.

We know General Kagan's political causes date back to at least college, when she volunteered to help a Senate candidate in her native State of New York.

We know that after law school, she worked for two of the most activist Federal judges in the 20th century, Abner Mikva and Thurgood Marshall. Justice Marshall often described his judicial philosophy as ''do what you think is right.'' I wish he had mentioned something about applying the law, but he said to do whatever you think is right. Elena Kagan has called Justice Marshall her judicial hero.

We know that Solicitor General Kagan volunteered for a time in the Michael Dukakis campaign for President in 1988, where she did opposition research.

We know that a few years later, Ms. Kagan advised then-Senator JOE BIDEN during the nomination of Ruth Bader Ginsburg.

We know General Kagan gave up her teaching job to work at the Clinton White House where she was a leading policy adviser on many of the hot button issues of the day. She was a deputy assistant to the President on domestic policy. She was a deputy director of the Domestic Policy Council. During that time, she was a leading policy adviser on a number of controversial issues regarding abortion, gun rights, and affirmative action.

After she left the Clinton White House, Ms. Kagan's political skills helped her become dean of the Harvard Law School and, by all accounts, she was successful in that job as an administrator and as a fundraiser. The one clear legal position she took as dean was her position against military recruiters that the Supreme Court rejected 9 to 0.

Solicitor General Kagan returned to government a year ago when she became Solicitor General following the election of her friend Barack Obama.

Ms. Kagan's resume shows that she is very comfortable in the world of politics and political campaigns. She has worked hard as a policy and political strategist in some very intense political environments. As a policy and political adviser, her record indicates she has been successful.

The question raised by this nomination, though, is whether Elena Kagan can step outside of her past role as political adviser and policy strategist in order to become a Federal judge. I have had the honor of being a State court judge and I know firsthand that being a judge is much different from being a political strategist. The job of a political strategist is to help enact policies. The job of a judge is to apply the law wherever it takes them.

The goal of a political adviser is to try to win for your team. On the other hand, a good judge doesn't root for or fight for a team but, rather, is impartial or, as sometimes stated, is disinterested in results, in winners and in losers.

The important question is whether Solicitor General Kagan can and will set aside her considerable skills as a political adviser to take on a very different job as a neutral judge. Will she apply the law fairly, regardless of the politics involved? Will Solicitor General Kagan appreciate the traditionally narrow role of a judge who must apply the law rather than the activist role of a judge who thinks it is proper to make up the law? Can she make the transition from political strategist to judge?

The hearings on Ms. Kagan's nomination are 1 week from today. I hope the hearings will be a substantive and meaningful opportunity for Elena Kagan to explain how she plans to make that shift from political strategist to judge. Because she has never been a judge, the hearings will be a chance to learn about what she expects her judicial philosophy and approach will be.

Every candidate for the Supreme Court has the burden of proof to show they are qualified to serve on the Supreme Court. Most nominees have a much longer record, including a record of judicial service, which could help satisfy that burden of proof, but not so in Ms. Kagan's case. Given Ms. Kagan's sparse record, however, the hearings themselves must be particularly substantive.

In 1995, then-Professor Kagan gave advice in a Law Review article to the U.S. Senate on how to scrutinize a Supreme Court nominee. She wrote that the ''critical inquiry'' must be ''the perspective [the nominee] would add'' and ''the direction in which she would move the institution.''

I agree. Given Solicitor General Kagan's sparse record and her lack of judicial experience, it is important that the hearings be an opportunity to fill in the blank slate that is Elena Kagan.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

SEPARATION OF POWERS

Mr. SPECTER. Mr. President, I have sought recognition to again alert my colleagues to what I consider to be a very important matter, and that is that the Supreme Court of the United States is materially changing the traditional separation of powers and that, as a result, the Congress of the United States continues to lose very substantial power in the Federal scheme under the Constitution of the United States. This is a theme I have submitted over the course of the last 30 years, since 1981, with the confirmation proceedings of Justice Sandra Day O'Connor. And in now the 12th proceeding that I will personally have participated in, I raise this issue again to urge my colleagues to take a stand.

The only opportunity we have to influence the process is through the confirmation of Supreme Court Justices. But we have witnessed a series of cases where instead of the traditional doctrine of separation of power, there has been a very material concentration of power which has gone principally through the Court and secondarily to the executive branch.

The Framers put the Congress under Article I. It was thought at the time the Constitution was adopted that Congress would be the foremost branch representing the people. The executive branch is Article II, and the judiciary branch is Article III. Were the Constitution to be written today, I think we would find the course inverted. But what we have seen here is that recent decisions of the Supreme Court have abrogated the traditional deference given by the judicial branch to findings of fact and the determination of public policy arising from what Congress finds in its extensive legislative hearings, with the Court substituting its judgment with a variety of judicial doctrines. During the confirmation process where we examine the nominees, we continue to receive lip service about congressional authority but, once confirmed, we find that the nominees have a very different attitude and engage in very substantial jolts to the constitutional law in effect.

The generalized standard for what would be the basis for upholding an act of Congress was articulated by Justice Harlan in Maryland v. Wirtz in 1968 interpreting the commerce clause, saying:

> Where we find that the legislation as a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.

That is the general legislative standard which had been adopted by the Court in reviewing acts of Congress until the case of City of Boerne v. Flores in 1997. There, the Supreme Court adopted a new standard. They articulated it as congruence and proportionality, with the Supreme Court of the United States reviewing the act of Congress to decide whether it was congruent and proportional to what the Congress sought to achieve, and that entailed an analysis of the record, giving very little deference to what Congress had found.

On its face, the standard of congruence and proportionality suggests that the Court can come out anywhere it chooses. That was the view of a very strong dissent by Justice Scalia in a subsequent case, where he said:

> The congruence and proportionality standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking.

So that when you take a standard of that sort and undercut the traditional deference to congressional fact-finding, you end up with the Court making law instead of interpreting law. Under that decision, we have seen a whole torrent of Supreme Court decisions declaring acts of Congress unconstitutional. Illustrative are the Morrison case, involving the Violence Against Women Act, the Garrett case under the Americans With Disabilities Act, and repeatedly the issue was undercut.

As a result, in the confirmation hearings, many of us—this Senator included—sought to establish an understanding of a nominee's approach to giving the deference to congressional findings. Illustratively—and I have spoken on this subject before—Chief Justice Roberts and Justice Alito used all the right language, but when we find the application of the language, they have done a reverse course. Justice Roberts spoke eloquently about the need for modesty and for the Court not to jolt the system, but to follow stare decisis. With respect to fact-finding, this is what Chief Justice Roberts had to say in his confirmation hearing:

> I appreciate very much the differences in institutional competence between the judiciary and the Congress when it comes to basic questions of fact finding, development of a record, and also the authority to make the policy decisions about how to act on the basis of a particular record. It's not just disagreement over a record. It's a question of whose job it is to make a determination based on the record. . . . [A]s a judge, you may be beginning to transgress into the area of making a law . . . when you are in a position of re-evaluating legislative findings, because that doesn't look like a judicial function.

So there you have a very flat statement by the nominee saying that it is not the Court's role to transgress into the area of lawmaking, which is what does happen in reevaluating legislative findings.

Justice Alito said about the same thing. This is his testimony in his confirmation hearing:

> I think that the judiciary should have great respect for findings of fact that are made by Congress. The judiciary is not equipped at all to make findings about what is going on in the real world—not these sort of legislative findings. And Congress, of course, is in the best position to do that. Congress can have hearings and examine complex social issues, receive statistical data, hear testimony from experts, analyze that and synthesize that, and reduce that to findings. And when Congress makes findings on questions that have a bearing on the constitutionality of legislation, I think they are entitled to great respect.

The decision in Citizens United found the Court reversing recent decisions in the Austin and McConnell cases. Instead of giving the deference to the congressional findings, which was articulated by Chief Justice Roberts and Justice Alito, they did an about-face.

In raising this consideration, I do not challenge the good faith of Chief Justice Roberts or Justice Alito. I recognize and acknowledge the difference between testifying in a confirmation hearing and what happens during the course of a decision when deciding a specific case in controversy. But when we take a look at what happened in Citizens United—and again, this is a matter of the illustration—we have the enormous record that was created by the Congress in enacting McCain-Feingold and the findings of fact there to support what the Congress did, which was invalidated by the Supreme Court of the United States in Citizens United, which upset 100 years of precedent in allowing corporations to engage in political advertising.

The scope and detail of the congressional findings were outlined by Justice Stevens in his dissenting opinion in Citizens United. The statement of facts by Justice Stevens on commenting on the record is not a matter of disagreeing on opinions. People are entitled to their own opinions but not to their own facts, as has been reiterated so frequently. This is what Justice Stevens noted on the congressional fact-finding:

> Congress crafted in the McCain-Feingold legislation ''in response to a virtual mountain of research on the corruption that previous legislation failed to avert.'' The Court now negates Congress's efforts without a shred of evidence on how section 203 or its State law counterparts have been affecting any entity other than Citizens United.

Justice Stevens said this to emphasize not only that the Court's holding ran counter to outstanding congressional judgment but also ''the common sense of the American people,'' who have recognized a need to prevent corruption from undermining self governing since the founding and who have fought against the distinctive corrupting potential of corrupt electioneering since the days of Theodore Roosevelt.

Justice Stevens went on to point out that the record compiled in the context of the congressional legislation was more than 100,000 pages long. He noted that judicial deference is particularly