Burr	Graham	McCain
Chambliss	Grassley	McConnell
Coburn	Gregg	Murkowski
Cochran	Hatch	Risch
Corker	Hutchison	Roberts
Cornyn	Inhofe	Sessions
Crapo	Isakson	Shelby
DeMint	Johanns	Thune
Ensign	Kyl	Vitter
Enzi	LeMieux	Voinovich
Feingold	Lugar	Wicker

The PRESIDING OFFICER. On this vote, the yeas are 60, the nays are 39. Three-fifths of the Senators duly chosen and sworn having voted in the affirmative, the motion is agreed to.

Mr. REID. Mr. President, I have been conferring off and on throughout the day with the Republican leader. There will be no more votes today following final passage. That will be the last vote today.

We are going to swear in the new Senator from West Virginia at 2:15 p.m. on Tuesday. Immediately after that, as soon as that is over, at 2:30, we will vote on extending unemployment benefits.

The Republican leader and I are working on a way to move forward on small business. I think we have a pretty good path figured out on that.

After that, it is my intention to move to the supplemental appropriations bill. It appears that we are going to have to have a cloture vote. I think we can work out the time on that and not spend too much time.

I have conferred with the Republican leader at the beginning of the work period, on Monday. We have a list of things we need to accomplish before we leave here. As everybody knows, we are going to be here either 4 or 5 weeks. The leaders—Democrat and Republican—are betting on 4 rather than 5 weeks. But we need cooperation to get that done.

The PRESIDING OFFICER. The question is on agreeing to the conference report.

The yeas and nays having been ordered, the clerk will call the roll.

The legislative clerk called the roll.

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

The result was announced—yeas 60, nays 39, as follows:

[Rollcall Vote No. 208 Leg.]

YEAS—60

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

NAYS—39

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

The conference report was agreed to.

Mr. DODD. Mr. President, I move to reconsider the vote by which the conference report was agreed to and to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized for 30 minutes.

NOMINATION OF ELENA KAGAN

Mr. SPECTER. Mr. President, I have sought recognition to state my position on the nomination of Solicitor General Elena Kagan to be Associate Justice of the Supreme Court of the United States and to comment about the appropriate role of the Senate, what is happening to the doctrine of separation of powers, and how institutionally the Senate might assert itself to stop the erosion of powers from this body to the Court and from the Congress to the executive branch.

I am supporting Ms. Kagan because of her intellect, her professional background, her academic background, and because I think she will be an effective balance in the ideological battle which is being waged in the conference room of the Supreme Court—the ideological balance which is so sorely needed at the present time.

The hesitancy I have had, as I have expressed it in the hearings, has been on the failure of Ms. Kagan to respond with substantive answers so that Senators would have a realistic idea as to where she stands philosophically on some of the very important questions of the day—not how she would decide cases but what standards she would apply if confirmed, and I will be very specific about that.

It has been especially troublesome because Ms. Kagan has been outspoken in the past about the importance of having substantive answers in nomination proceedings. She wrote a now-famous article for the University of Chicago Law Review criticizing Supreme Court proceedings on nominations by saying that they were vacuous and a farce and by name criticized Justice Ruth Bader Ginsburg and Justice Stephen Breyer for not answering questions and, in effect, criticized the Senate and Senators for not asking and pressing questions to find out where nominees stood. There was a similar article written by a young lawyer in Phoenix, AZ, named Bill Rehnquist, back in 1958, for the Harvard Law Record, where he criticized the confirmation proceeding of Supreme Court Justice Whittaker, saying that the Senate did not ask questions about the important substantive matters. During the confirmation of Chief Justice Rehnquist, I asked him a series of questions which he declined to answer; I cited his own words, and then he answered a few—not very many, just about enough to be confirmed. Which has been my conclusion, generally, having been a party now to 13 confirmation hearings. Nominees answer just about as many questions as they think they have to.

When Justice Scalia came up for confirmation in 1986, he answered virtually nothing. When the question came up about Marbury v. Madison, he said: Well, I can't answer that question. It might come before the Court.

May the RECORD show the look of amazement on the face of the distinguished Senator from Minnesota who is presiding. I was frankly amazed by it myself.

But, with the tenor of the times, following the very contentious nomination proceeding of Chief Justice Rehnquist, and other factors, Justice Scalia was confirmed handily, 98 to nothing.

I have seen him frequently at social events. I saw him at one a couple of weeks ago. I commented to a group standing with him that prisoners of war give their name, rank, and serial number, but in the Scalia nomination proceeding he would only give his name and rank. It just about amounted to that.

Following the hearing on Justice Scalia, Senator DeConcini and I were formulating a resolution which would establish standards that Senators would insist on, or could insist on—some guidance to try to get more forthcoming answers. Then we had the confirmation hearing of Judge Robert Bork, who answered questions. Judge Bork did so in a context of having very extensive legal writings, an article in the Indiana Law Journal in 1971 on original intent. In the context of that article, and books, many speeches, law review articles, I think it is realistic to say that Judge Bork had no alternative but to answer questions.

Since the Bork hearings, the pattern has evolved where nominees do not give substantive answers. It is a well-known fact of confirmation life that there are murder boards. That is what they call them, when the nominee goes down to the White House and they have practice sessions. Since that time it has been pure prepared pablum. That is what we get in these hearings.

So there had been reason to expect more from Ms. Kagan. We didn't get it. I had expressed at the hearings the concern as to how we could get answers on substantive issues and was there any way to find that out short of voting ''no,'' and rejecting a nominee? I decided it would not be sensible to vote no to issue a protest vote in the context of what has regrettably become

the standard. Ms. Kagan was following the accepted practice. Why not, in the face of that strong advice from the White House and the success of all of the nominees who have stonewalled and been confirmed?

I have since discussed with a number of my colleagues the prospect of reverting to what Senator DeConcini and I had thought about in early 1987, to try to establish some standards. Not that Senators would be bound to follow them. We have our stature under the Constitution to ask questions as we choose. We cannot compel answers. Perhaps they would not be followed. But it could obviate one line of excuse that nominees have given: They better not be too specific or they may breach the standard of ethics. If the Senate were to establish standards as to what we were looking for, for confirmation—it is our constitutional role—there might be some benefit.

In looking further, to try to make a determination on the Kagan nomination, there were two of her responses which I found impressive. One was her comments about Justice Thurgood Marshall, for whom she had clerked, who was a role model. There was extensive testimony about her admiration for the way he decided cases. I inferred from that, that looking as best I could to find her philosophy, ideology, where she would stand, that she would be protective of civil rights, protective of constitutional rights, of individual rights, and respectful of rights of the Congress.

The second line of answers which she gave which I thought—and I do think—is very important is her very positive attitude about televising the Supreme Court. I will come to that in a few minutes, because there is an urgent need to find some line to have some influence on the Court as to their following precedent on stare decisis, as to their respecting the constitutional role of the Congress in fact finding. They have judicial independence and are the bulwark of the Republic. The rule of law is what makes the United States famous for the stability of our government and that is very highly prized. In the long history of this country, it has been the courts which have protected civil rights. It was the Supreme Court, as we all know, in Brown v. Board of Education, where the Court did what the Congress did not have the political courage to do, nor did the President have the political courage to do, to integrate schools in America—the best example but only one example of where the courts have stood up as a bulwark to do what the elective branches have not had the political courage to do.

Now on to the specifics, as to the concerns on the substantive questions to which Ms. Kagan did not give substantive answers. I pressed her hard on the separation of powers. We all know of the three branches of government. Congress was article I, thought by the Framers to be the most important; the executive, President, No. II; and the Court, No. III. I think if the Constitution were to be rewritten today the numbers would be changed. The Court would be No. I, and the other branches would be a distant second and third, but again the executive would be ahead of the legislative branch because of the way the Court has interpreted the law.

Coming to the first line of legislative responsibility, it is fact finding on which we make a determination of what ought to be enacted by way of public policy. The Supreme Court of the United States has changed the rules of the game. For a long time it was a ''rational basis'' test, to decide whether the record was sufficient for the legislation which was enacted.

Then, in 1997, in a case captioned City of Boerne, the Supreme Court of the United States adopted a new standard: Was the evidence proportionate and congruent; the test of proportionate and congruent. That test, with its fluidity, has been the basis for the Supreme Court legislating, taking over from the Congress. Now it is the Supreme Court which decides the sufficiency of the record on a test which is not discernible with any specificity. Justice Scalia has called the test a ''flabby test,'' which is used for judicial legislation. That was the fact in the case of United States v. Morrison, which tested at the time constitutionality of legislation to protect women against violence and there was, in the hearings leading to that important legislation, a mountain of evidence as described by Justice Souter in dissent. Yet the Court overturned that important statute to protect women against violence, citing the Congress's ''method of reasoning.'' It is a little hard to understand what that means. We are not perfect around here. There are a lot of failures in this body, especially now—even some failures across the Rotunda in the House of Representatives. But who can challenge the method of reasoning and what miraculous occurrence is there, when somebody leaves the hearing room of the Judiciary Committee, walks across Constitution Avenue, across the green from this Chamber, and suddenly is in a position to have some superior reasoning? But that legislation went down, as has so much legislation.

Another illustration is in Citizens United, where a 100,000-page report was amassed, detailing the problems with what goes on with money in politics and what the corrupting influence is. As a result, the McCain-Feingold law was passed, and, in Citizens United, the critical section was declared unconstitutional. So there you have a tremendous shift in power from the Congress of the United States to the courts, to the Supreme Court. What we legislate on our traditional standards—we have the institutional expertise, and I am going to come to that in some greater detail in a few moments, analyzing the positions which have been taken by Chief Justice Roberts and Justice Alito.

But first an analysis of a decisive shift from the power of the Congress of the United States to the executive branch, to the President. Here again I will be specific. Arguably the most dramatic historic confrontation between Congress and the President is the Foreign Intelligence Surveillance Act, which establishes the exclusive way to invade privacy and get a wiretap contrasted with the Terrorist Surveillance Program, initiated by President Bush, for warrantless wiretapping.

It was a Friday in December of 2005. I chaired the Judiciary Committee. We were in the final day on the reauthorization of the PATRIOT Act, and that morning the New York Times broke the information about this secret program of warrantless wiretapping.

As it was expressed on the floor that day, Senators who had been prepared to vote to reauthorize the PATRIOT Act declined to do so. There was an extended proceeding—which is not relevant to the specific point I am making now. But back to the point, 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, which declined to hear the merits in a 2-to-1 decision on standing grounds.

The petition for cert. to the Supreme Court to take the case was denied, no reason given. The doctrine of standing is a very flexible doctrine, which I think, in a practical sense, although inelegantly stated, accurately stated, it is the way the Court ducks a case if they don't want to hear the case. It avoids a judicial decision. But any fair-minded reading of the dissenting opinion in the Sixth Circuit would say there was plenty of room for a judicial decision, adequate basis for standing in that case.

We currently have before the Judiciary Committee legislation on another issue which illustrates the shift of power from the Congress to the executive branch because of the failure of the Supreme Court to decide a case, and that involves the litigation brought by survivors of people killed on 9/11 against, among others, the Government of Saudi Arabia, Saudi princes, and Saudi charities, litigation where there is an enormous factual record showing the connection between financing of al-Qaida and the Saudi charities, which are really instrumentalities of the Saudi Government, and showing the financing from Saudi princes and from the government itself.

The Second Circuit denied the claim on what I think is a spurious ground, saying that Saudi Arabia is not on the list of countries declared by the State Department to be terrorist states. Well, there is an alternative under the immunity statute, and that is for tortious conduct, that is wrongful actions. Certainly that would encompass flying a plane into a building. And Senator SCHUMER, Senator LINDSEY GRAHAM, and I have introduced legislation to clarify this issue.

When an application was made for certiorari to the Supreme Court, the administration opposed having the Supreme Court hear the case on the ground that the acts by the Saudis in financing the terrorists occurred outside of the United States. That hardly is a rational basis when you plot in Saudi Arabia and pay money to bring terrorists to the United States, to board airplanes, to hijack the planes to fly into American buildings, to fly and crash in Pennsylvania, fly and crash into the Pentagon. That certainly happened in the United States. It is arguably the most barbaric conduct in the history of mankind, certainly among the terrorists.

Now I mention these cases because when I pressed Ms. Kagan—and others did—what standard would you apply? Going back to the factfinding, the two standards are proportionate and congruent, contrasted with rational basis.

Now, that is not asking a nominee to decide a case; that is asking a nominee to decide a standard—certainly well within the ambit of Ms. Kagan's famous law review article in 1995. But she simply stated she would not answer.

On the cases involving the terrorist surveillance program and on the 9/11 litigation, would she grant to hear the case—not how she would decide the case but would she take the case? Again, a refusal to answer the question.

So in this context, we are really searching for ways to find out more about the nominees, and Ms. Kagan has said just enough to get my vote because of voting my hopes, rather than my fears, that she will be in the mold, as a general sense, of Justice Thurgood Marshall and also because of her position on television, which I think has the potential for being a very ameliorating factor in what goes on in the Supreme Court, and that is the business of publicity.

The famous article ''What Publicity Can Do'' by lawyer Louis D. Brandeis back in 1913 provides insights as to where we might go in the modern world with television. In that article, Brandeis made the famous statement that, ''Sunlight is said to be the best of disinfectants.'' Well, that may be a little strong for these circumstances. We are not exactly looking at it as a disinfectant, but neither was Brandeis, and he was really talking about publicity as the way to deal with problems in our society. I believe that if we had publicity and people understood what was going on, there would be a realistic chance to have the Court respect the powers of Congress and have the Court respect the separation of power between the President and the Congress.

I now turn to the confirmation proceedings as to Chief Justice Roberts and Justice Alito, which bear very heavily on this subject. Both of the nominees were questioned at length during the course of the nomination proceeding, and this is what Chief Justice Roberts testified to on the question of factfinding:

> The reason that Congressional factfinding and determination is important is because the courts recognize they can't do that. The Supreme Court cannot sit and hear witness after witness in a particular area and develop that kind of a record. Courts can't make the policy judgments about what type of legislation is necessary in light of the findings that are made. The courts don't have it, Congress does. It is constitutional authority. It is not our job.

He goes on to say:

> When the courts engage in factfinding, they are really, in effect, legislating.

These are his exact words in the confirmation hearing:

> As a judge, you may be beginning to transgress into the area of making a law. That is when you are in a position of reevaluating legislative findings because that doesn't look like a judicial function.

This is what Justice Alito had to say in his confirmation hearing:

> The Judiciary is not equipped at all to make findings about what is going on in the real world, not this 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 the findings.

These two Justices were in the five-person majority which disregarded 100,000 pages of congressional findings to make a declaration that McCain-Feingold was unconstitutional.

Then you had the similar issue of stare decisis.

The best way to limit judicial activism is by respecting what the Congress has done on factfinding, and when the Court disregards congressional factfinding and substitutes its own judgment on policy, they are making the law. That is conceded by the citations I have read.

Then there was extensive questioning of both Chief Justice Roberts and Justice Alito on the issue of stare decisis.

This is what Chief Justice Roberts had to say, in part, about stare decisis:

> I do think that it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness. It is not enough that you may think the prior decision was wrongly decided.

Justice Alito said about the same thing, in part:

> It is important—

That is, stare decisis is important—

> because it limits the power of the judiciary. It is important because it protects reliance interests.

These are two of a five-person majority which decided in Citizens United that McCain-Feingold was unconstitutional.

This is what Seventh Circuit Judge Richard Posner, a distinguished jurist and a commentator on the Court, had to say about the role of Chief Justice Roberts in these decisions, coming from his book ''How Judges Think'':

> Less than two years after his confirmation, he demonstrated by his judicial votes and opinions that he aspires to remake significant areas of constitutional law. The tension between what he said at his confirmation hearing and what he is doing as a justice is a blow to Roberts's reputation for candor and further debasement of the already debased currency of the testimony of nominees at judicial confirmation hearings.

In going into these issues, as to the contrast between what Chief Justice Roberts and Justice Alito testified to and what they have done once on the Court, I do not challenge their good faith. I understand the difference between what happens in a judicial confirmation hearing and what happens in court when there is a case in controversy to be decided by the Justices of the Supreme Court. But these variations are so stark that had there been an understanding by Senators on these confirmation hearings as to the judicial philosophy and how factfinding would be handled in court and how precedents and stare decisis would be handled in court, to take the opinion by Chief Justice Roberts, his concurring opinion in Citizens United where they disregarded the Austin case as an ''aberration''—there is your license to eliminate stare decisis: the case is an aberration, down the drain. So what happened to precedent? Is Roe v. Wade safe based on that standard? I questioned Chief Justice Roberts at length about Roe v. Wade and the successor case, Casey, and how the case stood.

Austin was not reversed when the Supreme Court had an opportunity to do so. Chief Justice Roberts says in his opinion: Well, nobody asked the Supreme Court to reverse the Austin case. Well, the way the Court reached for the Hillary movie in Citizens United, the way they reconstructed the issue, you do not have to—it is a thin veneer to say that the Court is guided and that it is determinant who raises an issue and who asked the Court for a decision.

What can be done to have Justices adhere to standards agreed to at their hearings? I spoke earlier about the sanctity of judicial independence and how the Court is the bulwark of our Republic and the rule of law. The most promising idea that I have found is to demonstrate to the public what the Court does, how powerful the Court is, and how it makes decisions on the cutting edge of all of the judgments in society. It decides who lives and who dies, a woman's right to choose. It decides on late-term abortion. It decides on the death penalty. It decides whether juveniles may be executed for crimes committed below the age of 18. It decides affirmative action, who goes to school, who gets into the best colleges, who gets a job. It decides assisted suicide. It decides cases of international law. It is the ultimate arbiter on all the cutting-edge issues.

America is cited as being the most litigious country on the face of the Earth, but there is not an understanding among the public as to how far the power of the Supreme Court is,

how they have taken it from the Congress, how they have let the executive branch take it from the Congress.

In an article published yesterday in the Washington Post, Stuart Taylor, Jr., a noted commentator on the Supreme Court, had some interesting observations on this precise subject. This is what he wrote in part:

> The key is for the Justices to prevent judicial review from denigrating into judicial usurpation.

This goes right to the point of separation of powers, to defer far more often to the elected branches. Well, that is the Congress. That is the hue and cry. That is the question asked every time we have a confirmation hearing in the Judiciary Committee: Will you interpret the law rather than make the law? But these are matters where demonstrably they make the law.

Then Taylor goes on to write:

> . . . 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, the first time I have seen it articulated this way. It is the ''infuriating the public test.'' Whatever you may say in a democracy, in our society, the public has the ultimate power, and it is felt in many ways, perhaps even by osmosis. But wherever you go, when the public attitude changes on segregation, the Supreme Court changes the decision. When the public attitude changes on sexual orientation, the Supreme Court's position changes on sodomy cases. When we find so many States recognize same-sex marriage, it is a change recognized by the courts, as the Massachusetts court recently did in declaring the Defense of Marriage Act unconstitutional. It wouldn't have happened when it was passed 86 to 14 in the Senate of the United States in 1996. So how do we activate the doctrine of ''infuriating the public''?

The best way, to my knowledge, is to televise the Court. In that magnificent chamber across the green from where I stand, we have a room which seats about 300 people fighting to get in there for about 3 minutes. That is where the most important business of the country is being conducted. Years ago the Supreme Court decided that when it came to judicial proceedings newspapers had a right to be in the courtroom. That same logic would give television cameras and electronic radio similar rights to inform the public. That was a case in 1940. Today the information is gleaned largely from television and, to a lesser extent, by radio. So if the public knew what was going on in the Supreme Court, if they understood it, there would be a chance that they would be a little more respectful of the constitutional doctrine of separation of powers.

When the case of Bush v. Gore was scheduled for argument, then-Senator BIDEN and I wrote to Chief Justice Rehnquist asking that television cameras be permitted inside the courtroom. To get inside the courtroom that day, one practically had to be on the Judiciary Committee. It was packed. Americans should have been able to see it.

Surrounding the building on all sides were mobile television units. I am not sure exactly what they were doing. The most they could have would be standups outside the chamber because they couldn't get inside the chamber. That day the Supreme Court did release an audio of the proceedings, which was a novelty at that time. They have done that occasionally since, but relatively rarely.

Mr. President, in the face of these factors, I have been pressing for more than a decade for legislation to televise the Supreme Court. It has come out of the Judiciary Committee, once 12 to 6, and, most recently this year, 13 to 6, first, a legislative proposal which would call for the Supreme Court to be televised and, second, a sense-of-the-Senate resolution urging the Supreme Court on its own to be televised.

I believe as a legal matter that the Congress has the authority to require the Supreme Court to be televised. I say that because it is an administrative function. Congress has the authority to decide, for example, how many Justices there will be on the Court, illustrated by the famous Roosevelt Court packing plan where the effort was made to raise the number from 9 to 15 new faces to control the decision. The Congress by law establishes the number of Justices—six—for a quorum. The Congress decides that the Court will begin its session on the first Monday in October. The Congress has set the time limits on habeas corpus matters in the appellate system under the Speedy Trial Act. I think a strong case—in fact, the appropriate conclusion—is that Congress has the authority to act in this field.

There are now cameras in the United Kingdom's Supreme Court. They are now televised in Canada. They are now televised in many State supreme courts. They are now televised in two Federal appellate courts.

A recent poll was conducted and released on the day of the start of hearings on Solicitor General Kagan. That poll, conducted by C–SPAN, showed that 63 percent of the American people think the Court ought to be televised. Among the 37 percent who said no, when they were told that the proceedings are open to the public but people have to come to Washington to see them and can only stay for 3 minutes, most of those folks decided they ought to have television.

So the number went from 63 to 85 percent of the American people who think the Supreme Court ought to be televised. That is a pretty good indication that the Congress ought to act; that if the Supreme Court will not open its doors on a voluntary basis, the Congress ought to respond.

On recent nominations I have asked every nominee: What is your attitude on television? I was pleased. Both in the informal meeting with Ms. Kagan and in her testimony before the Judiciary Committee, she said she was in favor of television; that the more information the public has, the better off our society is. It is a pretty obvious conclusion, but she would press the issue if seated.

Another key factor in my affirmative vote for Ms. Kagan is her sense of humor, her quick wit, which she displayed. She was even almost a match for the distinguished junior Senator from Minnesota, who has had some expert experience in that line. I think that will stand her in good stead in the ideological battle in that small conference room where these big decisions are made.

Chief Justice Roberts said he would be open to the idea. Justice Alito testified he voted for it on the Third Circuit but would want to confer with his colleagues. I believe Justice Breyer said in a hearing on the budget in the House of Representatives a few months ago that television was inevitable. Justice Ginsburg was quoted at one point as saying that if it were gavel to gavel, it would be satisfactory. Justice Scalia has been negative about it most of the time because there would only be snippets, but if some way could be found to have gavel to gavel so that it was not just a snippet, there may be some flexibility on his part.

It is an item whose time has come because, institutionally, we ought to be doing something about it in the Senate. Institutionally, we have the responsibility to confirm. We aren't doing a very good job of finding out what a reasonable understanding is of where these nominees are heading. While we are fiddling, our institutional power is burning. If we lose much more of it, what we legislate to will not amount to a tinker's dam when the Supreme Court disagrees with our factual findings no matter how voluminous and solid they may be. What power is left is going to gravitate down Pennsylvania Avenue to the White House. So it is time to sit up and take notice.

Ms. Kagan quoted me in her 1995 Law Review article, saying that I said one day the Senate is going to have to stand up on its rear legs and reject a nominee. Well, now is not the right day, in my opinion, for the reasons I have said.

One other point I want to make. I would ask how much time I have remaining, but I think a more appropriate question would be how much time have I gone over?

The PRESIDING OFFICER (Mr. FRANKEN). The Senator has consumed his time.

Mr. SPECTER. What is the answer to my question?

The PRESIDING OFFICER. Seventeen minutes extra.

Mr. SPECTER. Extra?

The PRESIDING OFFICER. Yes.

Mr. SPECTER. Mr. President, I ask unanimous consent for 4 more minutes.

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

Mr. SPECTER. Only one colleague is present. He is the congenial junior Senator from Florida. I thank my colleague.

I want to make one more point. That is on the issue of the Supreme Court taking more cases. Here again, if there was transparency, America would be outraged at the workload on the Supreme Court, as the Court has moved from one clerk, to two clerks, to three clerks, to four clerks. And I do not begrudge them the time between the session ending in late June and the first Monday in October, where they travel and lecture and write books. But I am much concerned about the circuit splits.

For anyone who may be watching on C–SPAN2—and I know my aunt and sister are watching—these cases are very important because if the Third Circuit, having Pennsylvania, New Jersey, and Delaware, decides a case one way and the Ninth Circuit, governing the Western States, decides it another way, and the case arises in Wichita, KS, nobody knows which precedent to follow because the circuits are autonomous.

There are many important cases which the Supreme Court does not decide when there are circuit splits and they have time to decide them. They have time to decide the conflict between the Foreign Intelligence Surveillance Act and the Terrorist Surveillance Program. They have time to hear the case involving the 9/11 terrorist attacks and sovereign immunity.

But these are the statistics which are very informative: In 1886, the Supreme Court decided 451 cases. In 1987, the Supreme Court wrote 146 opinions. That was cut by less than half in 2006 to 68, in 2007 to 67, in 2008 to 75, 2009 to 73; this in the face of Chief Justice Roberts's testimony at his confirmation hearing that the Supreme Court ought to hear more cases. Ms. Kagan said about the same thing. My recollection is that Justice Sotomayor said about the same thing.

So here, again, it is a matter of the public understanding it. We are very conscious in this body about not missing votes. When I miss votes, it appears in the Philadelphia Inquirer or the Pittsburgh Post-Gazette. The public does not like to see ARLEN SPECTER missing votes. I am paid to vote.

Well, you cannot vote on a case if you do not take a case. But having the discretion not to take the case just leaves this level of workload with circuit splits undecided, and this is something which ought to be handled.

I have legislation pending to compel the Supreme Court to take, for example, the Terrorist Surveillance Program litigation. Most people do not know, but Congress cannot decide cases for the Court. The Congress can mandate what cases they take, as we did the flag burning case, as we did McCain-Feingold, and many other cases.

So it is my hope that when we confirm Ms. Kagan—and it looks like we will confirm her—we will pause on the nomination proceedings and focus on their utility, if not to get substantive answers to see what intellectual dexterity the nominee has, but providing an opportunity to review what the Court is doing. We have to bone up on what happened since the last nomination proceeding. I think the record is open to substantial question. I think those questions could be answered for the reasons I have given, if we move ahead with television.

Mr. President, in conclusion, I ask unanimous consent that a full copy of the text of my prepared statement be printed in the RECORD with these exact words so people will understand what I have said up until now is repeated to some extent in the formal written statement. Mr. President, I refer my colleagues to the two letters which I wrote to Chief Justice Roberts in anticipation of his nominating proceeding, three letters I wrote to Justice Alito, three letters I wrote to Justice Sotomayor, and three letters I wrote to Ms. Kagan. All have previously been printed in the RECORD.

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

Mr. President, I have sought recognition to speak on the nomination of Solicitor General Elena Kagan to be an Associate Justice of the Supreme Court of the United States. General Kagan comes before us with an impressive background. She received her bachelor's degree summa cum laude from Princeton University, her master's degree through a prestigious fellowship at Oxford University, and her law degree magna cum laude from Harvard Law School. She was a clerk for Judge Abner Mikva of the DC Circuit and for Supreme Court Justice Thurgood Marshall. She practiced law at a top private firm, Williams & Connolly, and served as special counsel on the Senate Judiciary Committee. General Kagan was an associate White House counsel to President Bill Clinton and Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council. General Kagan has taught constitutional and administrative law as a tenured professor at two of the country's best law schools, Harvard and the University of Chicago. A breaker of glass ceilings, General Kagan became the first female Dean of Harvard Law School and the first female Solicitor General of the United States, in which capacity she argued six cases before the Supreme Court. Given these extraordinary credentials, it is little surprise that the American Bar Association's Standing Committee on the Federal Judiciary gave General Kagan a unanimous ''well-qualified'' rating.

One characteristic of General Kagan which, I think, is a subtle but important trait is her sense of humor. She is a real intellectual beyond any question. And I think that since the Court is an ideological battleground, it is good to have somebody there to go against the ideologues, like Justice Scalia in particular. A sense of humor is, in my opinion, a high level intellectual characteristic. General Kagan is very good at humor. As I said in the hearing, that trait is very much to her credit because it demonstrates that she's fast on her feet and I suspect it will serve her well as she sits with her colleagues at that intimate conference table and casts her votes on cases of monumental import.

In addition to her impressive resume and quick wit, General Kagan brings with her a striking show of support from lawyers representing all points on the ideological spectrum. The outpouring of accolades from conservatives includes the testimony of Professor Jack Goldsmith of Harvard Law School, a respected scholar whose own views are much closer to those of Justice Scalia than to those of General Kagan. Professor Goldsmith, who served in the Bush Department of Justice and Department of Defense, had this to say about Elena Kagan:

Based on my experiences with Kagan, my reading of her scholarly work, and my assessment of her very successful legal career, I believe that she will be a truly outstanding Supreme Court Justice. I urge this Committee to approve her nomination and the entire Senate to confirm her.

Professor Goldsmith also testified to General Kagan's deep knowledge of the areas of law which arise often before the Court. ''As an academic,'' he explained, ''Kagan taught and was expert in constitutional law, administrative law, First Amendment law, civil procedure, and labor law. These subjects constitute a large chunk of the Supreme Court's docket . . . Elena Kagan is immensely qualified to serve on the Supreme Court. She should be easily confirmed.''

Professor Goldsmith is not alone in his effusive praise for General Kagan; many other conservatives have expressed strong support for her confirmation. Miguel Estrada, a conservative lawyer nominated to the D.C. Circuit by President Bush, wrote in his letter of support that ''Elena possesses a formidable intellect, an exemplary temperament and a rare ability to disagree with others without being disagreeable . . . Elena is an impeccably qualified nominee.''

Professor Michael McConnell, a constitutional law expert at Stanford and a former Bush-appointed federal appellate court judge, also speaks highly of General Kagan. He writes,

On a significant number of important and controversial matters, Elena Kagan has taken positions associated with the conservative side of the legal academy. This demonstrates an openness to a diversity of ideas, as well as a lack of partisanship, that bodes well for service on the Court . . . Publicly and privately, in her scholarly work and her arguments on behalf of the United States, Elena Kagan has demonstrated a fidelity to legal principle even when it means crossing her political and ideological allies.

This perspective is shared by conservative legal scholar and former Judiciary Committee aide to Senator John Cornyn, Professor Brian Fitzpatrick of Vanderbilt Law School. Professor Fitzpatrick, who was General Kagan's student in administrative law at Harvard, wrote: ''The best those of us on my side of the aisle can hope for at this time are Supreme Court nominees who are thoughtful and open minded, with views nearer the center than the poles. There is little doubt that Elena fits this bill. In my experience, her ideas have been more than reasonable, and she has always treated those who may disagree with her with respect and understanding.''

General Kagan has also received strong support from legal scholars and practitioners with moderate or progressive views. The depth of her bipartisan support is clear from a letter written by eight former Solicitors General—five Republicans, three Democrats. According to their letter, Elena Kagan ''would bring to the Supreme Court a

breadth of experience and a history of great accomplishment in the law.'' Additionally, the former Chief Judge of the D.C. Circuit and Carter appointee Patricia M. Wald wrote of General Kagan,

She is an extraordinarily smart lawyer with a practical bent of mind. Her significant exposure as a law clerk and Solicitor General to the way in which courts of appeal as well as the Supreme Court operate, to the thrust and parry of dueling theories in the academy and finally to the competing demands at the highest level of government policymaking provide a broad spectrum of experience on which she can draw in the important post of Justice.

The praises of Judge Wald, who served on the D.C. Circuit while General Kagan worked there as a law clerk for Judge Abner Mikva, are echoed by Kagan's colleagues from the world of academia. The former Dean of Notre Dame Law School, Professor Patricia A. O'Hara, wrote in her letter of support that General Kagan ''possesses a powerful intellect . . . She listens to the views of others, adds her own, exhibits respect for differences of opinion, and cogently makes her case.'' In addition, the deans of 56 law schools, including the top schools in the nation, expounded on General Kagan's personal attributes, intellectual prowess, and legal experience, arguing for swift confirmation. They wrote,

Elena Kagan excels along all relevant dimensions desired in a Supreme Court Justice. Her knowledge of law and skills in legal analysis are first rate. Her writings in constitutional and administrative law are highly respected and widely cited. She is an incisive and astute analyst of law, with a deep understanding of both doctrine and policy. In terms of intelligence as intellectual ability, she is superbly qualified to sit on the United States Supreme Court . . . She was a superb and successful dean, among other reasons, because of her willingness to listen to diverse viewpoints and give them all serious consideration.

Prominent legal organizations also spoke out in favor of General Kagan's nomination, including the American Bar Association, the National District Attorneys Association, and the National Association of Women Judges. The consensus among these groups is that General Kagan is well-qualified for the position of Supreme Court Justice. It should also be mentioned that noted attorney and past President of the American Bar Association Jerome Shestack wrote in favor of General Kagan, saying that ''Our Court and nation will be well served if Elena Kagan becomes a Justice of the Supreme Court.''

General Kagan's diversity of experience—in private practice, in academia, in the executive branch, and in Congress as an aide to the Judiciary Committee—has clearly cultivated in General Kagan a deep and penetrating understanding of the impact of law on people's lives. By practicing, teaching, and studying the law from a broad array of perspectives, Elena Kagan has prepared herself well for the work of an Associate Justice of the Supreme Court.

The Fourteenth Amendment (which prohibits states from denying any person within their borders the equal protection of the laws or depriving them of life, liberty, or property with due process of law) and the Fifteenth Amendment (which prohibits both the federal government and the states from denying any citizen the right to vote ''on account of race'') give Congress strong remedial power to enforce their commands. It is critical that the Court not stand in the way of its exercise. The enforcement of the amendments' substantive provisions depends on whether private citizens can enforce their rights against states in federal and state courts. Whether they can depends, in turn, on whether Congress can abrogate the states' Eleventh Amendment immunity from suits by private parties. The Supreme Court has held that Congress cannot abrogate Eleventh Amendment immunity under its Article I powers (including its Commerce Clause powers). Only through its remedial powers under the Fourteenth and Fifteenth Amendments can Congress do so.

Until 1997, the Court required no more of federal legislation passed under the Fourteenth and Fifteenth Amendments than that it satisfy a ''rational basis'' test. That is same test that governs legislation enacted under Congress's Article I powers, including its power to regulate interstate commerce, as I noted during the hearing when I cited Justice Harlan's 1968 Commerce-Clause decision in Maryland v. Wirtz. As the Supreme Court explained in South Carolina v. Katzenbach (1966), Congress could ''use any rational means to effectuate the constitutional prohibition[s]'' of the Fourteenth and Fifteenth Amendments. A strong presumption of constitutionality attended the rational basis standard. With one anomalous exception, every civil rights statute of the twentieth century tested in the Court under this rational basis standard was upheld as a permissible exercise of Congress's remedial authority.

That all changed in 1997 with the Court's decision in City of Boerne v. Flores. The Court there abandoned the rational-basis test and, citing no precedent, held that ''there must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'' This worked a sea change in the relationship between Congress and the Court. As Justice Scalia observed in Tennessee v. Lane (2004), the ''congruence and proportionality standard, like all flabby legal tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking. . . . [I]t casts . . . [the Supreme] Court in the role of Congress's taskmaster. Under it, the courts . . . must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional.''

Wielding the congruence-and proportionality test, the Court has, again in Justice Scalia's words, come into ''constant conflict'' with Congress. It has, among other things, struck down the provision of the Age Discrimination in Employment Act that prohibits age discrimination in employment by states (Kimel v. Florida Board of Regents (2000)), the provision of the Americans with Disabilities Act prohibiting states from discriminating against disabled persons in employment (Board of Trustees of the University of Alabama v. Garrett (2001)), and the provisions of the Violence Against Women Act that created a federal civil remedy for the victims of gender-based crimes against private parties (United States v. Morrison (2000)). In Morrison, the Court refused even to sustain the challenged provisions on the alternative ground that Congress could prohibit gender-based crimes under its Article I authority—long considered to admit of few, if any, justiciable limitations—to regulate interstate commerce. This was just the second time since the New-Deal era that the Court struck down a federal statute on the ground that Congress exceeded its Article I power to regulate commerce.

Of the few federal statutes that survived Constitutional muster under the congruence-and-proportionality test, most survived by only slim margins. Chief among them were the provisions of the Family and Medical Leave Act (FMLA) governing state employment practices challenged in Nevada Department of Human Resources v. Hibbs (2003). There was no principled basis to uphold the FMLA in Hibbs but not, say, the ADA in Garrett. The Court's post-Boerne cases illustrate, as Justice Scalia has noted, that the congruence-and-proportionality test often allows the Supreme Court to go any which way and the Justices to indulge their own personal policy preferences.

Most significantly, in applying the congruence and proportionality test (and, in Morrison, in evaluating the challenge statute's constitutionality under the Commerce Clause), the Court has cast aside legislative findings justifying remedial legislation as it has never before done. Each of the cases striking down federal civil rights legislation—including Kimel, Garrett, and Morrison—involved extensive Congressional factual findings justifying the legislation. The Court even went out of its way in Morrison to disparage the ''method of reasoning'' that underlay Congress's unassailable finding that gender-based crimes have a substantial effect on interstate commerce. This prompted Justice Souter, in a dissent joined by three other justices, to decry the Court's long-standing practice of assessing no more than the ''rationality of Congressional conclusions.'' Justice Souter's criticism reflects the once-dominant view that, in Laurence Tribe's words, only ''Congress has the institutional competence,'' including the fact-finding capabilities, to evaluate what practices threaten the Fourteenth Amendment's guarantees.

General Kagan, it seems to me, acknowledged the crazy quilt of decisions in cases where the Court was reviewing statutes enacted through Congress's remedial authority under Section 5 of the Fourteenth Amendment. Though she did not prejudge the congruence-and-proportionality test by affirmatively labeling it ''unworkable,'' she did go pretty far in repeating criticisms of the test and in acknowledging that its application is unfair to Congress.

While General Kagan was not as forthcoming as she ought to have been, or as forthcoming as her law review article stated nominees should be, she did do a better job of answering questions than most nominees have done.

When I criticized Chief Justice Rehnquist's denigration of Congress's ''method of reasoning'' in Morrison and asked ''do you think there is some unique endowment when nominees leave this room and walk across the street to have a method of reasoning which is superior to [the] congressional method of reasoning so that a court can disregard voluminous records because of our method of reasoning?'' General Kagan replied, ''Well, to the contrary . . . I think it's extremely important for judges to realize that there is a kind of reasoning and a kind of development of factual material more particularly that goes on in Congress.'' She continued, ''I think it is very important for the courts to defer to congressional fact finding, understanding that the courts have no ability to do fact finding, are not, would not legitimately, could not legitimately do fact finding.'' Furthermore, General Kagan said, ''I have enormous respect for the legislative process. Part of that respect comes from working in the White House and working with Congress on a great many pieces of legislation.''

After contrasting Justice Harlan's test in Wirtz with the congruence-and-proportionality test that Justice Scalia criticized in Lane, I asked General Kagan, ''would you take Harlan's test as opposed to the congruence and proportionality test'' and she replied, ''Justice Scalia is not the only person who has been critical of the test. A number of people have noted that the test which is of course a test relating to Congress' power to legislate under Section 5 of the Fourteenth

Amendment, that the test has led to some apparently inconsistent results in different cases.'' I followed up stating, ''What I want to know from you is whether you think that is an appropriate standard to replace the rational basis test of Wirtz?'' General Kagan responded, ''Now . . . there are times when the Court decides that a precedent is unworkable. It just, it produces a set of chaotic results.'' When I asked whether the congruence-and-proportionality test was unworkable General Kagan testified, ''I think that the question going forward, and it is a question, I'm not stating any conclusion on it, but I think that something that Justice Scalia and others are thinking about is whether the congruent and proportionality test is workable or whether it produces such chaotic results . . . .'' General Kagan further testified that she knew ''that Congress needs very clear guidance in this area. It is not fair to Congress to keep moving the goal posts. It is not fair to say oh well, you know, if you do this this time it will be okay but if you do that the next time it won't.''

While General Kagan refused to say whether, if confirmed, she would apply the congruence-and-proportionality standard to test the constitutionality of remedial legislation enacted under the Fourteenth Amendment, she did at least express serious reservations about that standard. She noted that the standard had been subject to ''significant criticism'' and, more importantly, that ''it's produced some extremely erratic results.'' She added: ''There seems to me real force in the notion that a test in this area dealing with Congress' section 5 powers [under the Fourteenth Amendment] really needs to provide clear guideposts to Congress so that Congress knows what it can do and know what it can't do. And so the goal posts don't keep changing and so . . . Congress can . . . pass legislation confident in the knowledge that legislation will be valid. And I think those concerns are of very significant weight.'' None of General Kagan's predecessors (Justice Sotomayor, Justice Alito, and Chief Justice Roberts)—all of whom I questioned about Congress's Fourteenth-Amendment powers—was as forthcoming. General Kagan also said that Congressional fact findings are entitled to ''great deference.''

When I later returned to the question of whether Justice Kagan would apply a rational basis test or a congruence-and-proportionality test when reviewing congressional facts General Kagan replied, ''as I understand it, the congruence and proportionality test is currently the law of the [C]ourt, and notwithstanding that, its been subjected to significant criticism and notwithstanding that its produced some extremely erratic results. And I can't . . . sit at this table without briefing, without argument, without discussion with my colleagues and say, well, I just don't approve of that test, I would reverse it.''

When I cited Justice Stevens' dissent in Citizens United and asked General Kagan ''what deference [she] would show to congressional fact finding'' she replied, ''the answer to that is great deference to congressional fact finding.'' When I asked General Kagan if there was ''any way you could look at Citizens United other than it being a tremendous jolt to the system'' she replied, ''this is one that as an advocate, I have taken a strong view on which is that it was a jolt to the system. There was a great deal of [reliance] interests involved and many states had passed pieces of legislation in reliance upon Austin that Congress had passed legislation after accumulating a voluminous record.''

I also asked General Kagan about cases regarding Sovereign Immunity and Federal Court Jurisdiction. One of the two cases involving the jurisdiction of the federal courts was Weiss v. Assicurazioni Generali, S.P.A., 529 F.3d 113 (2d Cir. 2010). It was brought by victims of the Holocaust and their heirs to recover on unpaid World War II-era insurance policies issued by an Italian insurance company. Just a few months ago, the United States Court of Appeals for the Second Circuit affirmed the dismissal of the plaintiffs' claims on the ground that they were preempted by an Executive-branch foreign policy favoring the resolution of such claims through an international commission. The Second Circuit did so in reliance on the Supreme Court's 2003 decision in American Insurance Association v. Garamendi. There the Court held that this policy, though not formalized in an executive agreement (let alone a Senate-ratified treaty), preempted a state law requiring insurers to disclose information about certain Holocaust-era insurance policies. Among the important questions presented by Generali is whether the executive branch can shut the courthouse doors on litigants in the absence of Congressional authorization. I asked General Kagan whether, if confirmed, she would vote to grant cert. in the Holocaust case and she replied, ''this is difficult for me because, as I understand this, this is a live case and I continue to represent one of the parties in this case. In other words, there may very well be a petition for certiorari in this case, but I continue to be Solicitor General and—and would head the office that would have to respond to a petition.''

The other case involving the jurisdiction of the federal court was In re Terrorist Attacks on September 11, 2001, 538 F.3d 113 (2d Cir. 2009). This litigation was brought by over 6,000 victims of the September 11 terrorist attacks against, among other defendants, the Kingdom of Saudi Arabia and five Saudi princes. The plaintiffs asserted various claims arising from their allegation that Saudi Arabia financed the attacks. The United States Court of Appeals for the Second Circuit ruled that Saudi Arabia was immune from suit under the Foreign Sovereign Immunities Act (FSIA). In a brief filed on behalf of the United States, Solicitor General Kagan urged the Court not to hear the case even though she conceded that the Second Circuit had effectively nullified the key statutory exception to sovereign immunity on which the plaintiffs had relied. I raised the case at Solicitor General Kagan's confirmation hearing because of the key objective underlying the FSIA: to take sovereign immunity determinations away from the executive branch (which until enactment of the FSIA had made discretionary immunity determinations on case-by-case basis) and vest them the courts (which would make immunity determinations according to the FSIA's objective, non-discretionary statutory criteria). I asked General Kagan, ''As a justice, would you vote to take that kind of case?'' General Kagan responded, ''the government did argue, based on very extensive consultations, that the Supreme Court ought not to take that case, and that continues to be the government's position. You know, I don't think it would be right for me to undermine the position that we took in that way by suggesting it was wrong.''

Another case I raised with Solicitor General Kagan concerned the constitutionality of the Bush Administration's secretive Terrorist Surveillance Program (TSP). The TSP brought into sharp conflict Congress's authority under Article I to establish the 'exclusive means' for wiretaps under the Foreign Intelligence Surveillance Act with the President's authority under Article II as Commander-in-Chief to order warrantless wiretaps. The TSP operated secretly from shortly after September 11, 2001, until December 2005, when The New York Times exposed the existence of the program. In August 2006, the United States District Court for the Eastern District of Michigan found the program to be unconstitutional. In July 2007, the Sixth Circuit reversed on the ground that the plaintiffs lacked standing to sue. One judge on the three-judge panel , Judge Gilman, dissented. Judge Gilman noted that ''the attorney-plaintiffs in the present case allege that the government is listening in on private person-to-person communications that are not open to the public. . . . [T]he attorney-plaintiffs have thus identified concrete harms to themselves flowing from their reasonable fear that the TSP will intercept privileged communications between themselves and their clients.'' The Supreme Court denied certiorari without explanation. I asked her about the Court's reticence to take up the Sixth Circuit's decision in the Terrorist Surveillance Program (TSP) case and General Kagan testified, in part, ''In a case where the executive branch is determined or is alleged, excuse me, is alleged to be violating some congressional command, it is I think one of the kinds of cases that the [C]ourt typically should take.'' She called this a third specie of case, aside from circuit splits and those that strike down statutes on constitutional grounds, where there ''is an issue of some vital national importance.''

I later asked her ''would you vote to take that kind of case?'' General Kagan responded, in pertinent part, ''Well . . . I do think that this is a case that, as I understand it, generally falls within the third category of case, a case which presents an extremely important Federal issue as to whether the executive has overstepped its appropriate authority and has essentially flouted legislation in the area.''

When I referenced the Court's declining docket and the need to resolve more circuit splits of authority, General Kagan responded, ''I do generally agree with that. I clerked on the [C]ourt in 1987 which was pretty much at the high point of what the [C]ourt was doing, about 140 cases a year.'' She went on to testify, ''I do agree with you that there do seem to be many circuit conflicts and other matters of vital national significance.''

Although General Kagan failed, in many instances, to adhere to her own standard of providing forthcoming and detailed answers during her confirmation hearing, there is much that we can glean from her record prior to her nomination. Since nominees have a vested interest in saying whatever will get them confirmed, and since past nominees have not always decided cases in line with their testimony at nomination hearings, in many ways a nominee's prehearing record is more reliable than her confirmation hearing testimony.

While General Kagan refused to say whether, if confirmed, she would apply the congruence-and-proportionality standard to test the constitutionality of remedial legislation enacted under the Fourteenth Amendment her pre-hearing record on the issue, though limited, strongly suggests that she shares my concerns about the denigration of Congressional power. I refer to her notes of two (un-transcribed) speeches she gave in 2003 (one to Princeton alumni) the other to an audience at the University of Minnesota Law School). The notes suggest that, contrary to the position taken by Justices Kennedy, Scalia, and Thomas, as well as former Chief Justice Rehnquist and Justice O'Connor, General Kagan believes that the Court should give Congress substantial deference, especially when legislating under its Fourteenth Amendment authority. In a May 21,

2010, article, The Wall Street Journal characterized General Kagan's views as expressed in one of the speeches as follows: ''The piece, in short, seems to suggest that in at least one key area, she would be an arbiter of judicial restraint, prone to giving considerable deference to Congress. . . . [S]he says [that] courts should defer to Congress when the framer of the Constitution clearly authorized legislators to exercise power. Such a clear authorization, she says, can be found in section 5 of the 14th Amendment. . . . So, Kagan concludes, courts should defer to Congress when it takes actions to effectuate 14th Amendment rights.'' As I said during my June 7, 2010, floor statement on the confirmation process, the Senate should put considerable weight on such pre-hearing statements reflecting a nominee's legal ideology.

It is also clear that General Kagan is a strong and principled supporter of civil rights. As Harvard Professor Ronald Sullivan pointed out in his testimony before the Committee, a telling story about General Kagan is that she turned down the Royall Professorship of Law, Harvard Law School's first endowed chair, because the fortune that endowed the chair was derived from the slave trade. Instead, then-Dean Kagan decided to become the first Charles Hamilton Houston Professor of Law, a chair named in honor of one of Harvard Law's most accomplished African-American graduates and, as an architect of the civil rights movement's legal strategy, an historic figure in his own right.

Elena Kagan's support for civil rights extends far beyond symbolism, however. In an email from her time at the Clinton White House, General Kagan wrote that she ''care[s] about [affirmative action] a lot,'' which she demonstrated through her work on the issue. For example, in a brief to then-Solicitor General Walter Dellinger strategizing how to ''avoid a broad and harmful ruling invalidating non-remedial affirmative action in employment,'' General Kagan argued in favor of pursuing a narrow judgment which would preserve affirmative action policies. She wrote, ''I think this is exactly the right position—as a legal matter, as a policy matter, and as a political matter.'' This echoes her comments to Justice Thurgood Marshall in a memo urging denial of certiorari on a case involving a school desegregation plan which had been upheld at the circuit court level. In her memo, Kagan described the plan as ''amazingly sensible,'' even though it was not implemented in response to historic state-sponsored school segregation in that particular district. It is clear to me from these memos and from her comments that when it comes to civil rights, General Kagan supports strong protections for racial minorities and believes in expanding opportunities for historically disadvantaged groups. If General Kagan were seated on the Court, cases like Parents Involved in Community Schools v. Seattle School District No. 1 may have been decided differently.

Additionally, General Kagan's record reveals strong support for ensuring fair and clean elections through campaign finance regulation. Long before she urged the Court in Citizens United v. FEC to uphold the federal ban on independent campaign expenditures by corporations, Elena Kagan assisted the development of the McCain-Feingold Act during her time in the White House. In one of her memos from that time, she argued vigorously for President Clinton to support campaign finance reform and criticized the Court for its ''mistaken'' conclusion ''that money is speech and that attempts to limit the influence of money on our political system therefore raise First Amendment problems.'' She argued not only that the Court should uphold campaign finance regulation on the basis of the compelling government interest in preventing corruption or the appearance of corruption, she also argued that the Court should reexamine the basis for its rejection of expenditure regulations beginning with Buckley v. Valeo in 1976. Although she may have made some of these arguments in her capacity as a policy advisor and advocate for the President's agenda, these memos provide insight into General Kagan's views of campaign finance reform—views which appear to be positive in terms of both personal preference and legal analysis.

General Kagan's time as a senior aide to President Clinton also shows that she has respect for Congress, respect born of personal experience and legal reasoning. Although some from my party have expressed concern that General Kagan has too broad a view of executive power, her writings indicate otherwise. She has clearly and unequivocally rejected the Unitary Executive theory, which posits the President possesses plenary authority over all federal agencies involved in administering federal law and that Congress had been granted too much power relative to the executive. In her famous 2001 Harvard Law Review article, Presidential Administration, she wrote, ''I do not espouse the Unitarian position . . . the constitutional values sometimes offered in defense of this claim are too diffuse, too diverse, and for these reasons, too easily manipulable'' to support exclusive presidential control over the administration of federal law through agencies. Additionally, then-Dean Kagan criticized the expansive views of executive authority in the so-called torture memos of the Bush administration, which she described in a 2007 commencement address as ''expedient and unsupported.'' General Kagan also criticized expanding executive power to the detriment of Congressional prerogative when she wrote in a 1996 White House memo on a pending decision on whether or not the Solicitor General would defend two particular statutes. She wrote:

What difference does it really make whether Congress explicitly directs the executive branch to take action against private persons (via separation) or implicitly directs the executive branch to take such action (via prosecution)? In either case, refusal to comply with the directive violates congressional will.

In light of these writings, it seems not only General Kagan's personal opinion but also her legal opinion that Congress has a powerful role to play vis-à-vis the executive and the courts. Finally, General Kagan's experience working with Congress and on the Senate Judiciary Committee also increases my confidence in her understanding and respect for this institution as the first branch of American government.

General Kagan has been clear and straightforward on the issue of making the Supreme Court more accessible and more accountable by televising its proceedings for the public. In her 2009 speech before the Ninth Circuit Judicial Conference, she expressed support for televising the Court. When I met with General Kagan in my office, she continued to be forthcoming about her support for broadcasting the Court's proceedings, which I appreciated. I asked General Kagan ''Wouldn't televising the [C]ourt and information as to what the [C]ourt does have an impact on the values which are reflected in the American people'' and she replied, ''I do think . . . it would be a good thing from many perspectives and I would hope to if I am fortunate enough to be confirmed to engage with the other Supreme Court Justices about that question. I think it is always a good thing when people understand more about government rather than less and certainly the Supreme Court is an important institution and one that the American citizenry has every right to know about and understand. I also think that it would be a good thing for the [C]ourt itself that that greater understanding of the [C]ourt I think would go down to its own advantage. So I think from all perspectives, televising would be a good idea.''

I have introduced both a resolution expressing the sense of the Senate that Supreme Court proceedings should be televised, as well as a bill to require the Court to allow the television broadcast of its open proceedings, except in some special circumstances. The Judiciary Committee passed both the resolution and the bill on April 29, 2010, by an overwhelming vote of 13 to 6. With the retirement, last year, of Justice Souter, the strongest opponent of televising the Court's proceedings, and the potential addition of General Kagan, there is a good chance that the Court will finally be accessible to all Americans, as it should be. If the Court does not allow cameras in of its own volition, I will continue to press for passage of my legislation before the end of the year.

Regardless of personal political persuasion, there is near consensus among Senators that a nominee should be able to unmoor herself from political and policy views when deciding a case in our nation's highest court. In her 25 years of experience in the law, General Kagan has consistently demonstrated fairness, humility, moderation, and adherence to duty—the exact attributes we all seek in a Justice of the Supreme Court of the United States.

In my first autobiography, Passion for Truth, I wrote:

Chief Justice William Rehnquist, at his 1986 confirmation hearing, would not answer basic constitutional questions. Rehnquist, an associate justice since 1971, didn't believe he should have to go before the Senate a second time for promotion to chief, according to Tom Korologos, a premier Washington lobbyist. . . . Rehnquist cited Korologos the case of former Senator Sherman Minton, whom President Truman nominated to the Supreme Court and who refused to go before the Senate for a hearing. Minton argued that the legislative branch had no right to question a nominee. The Senate confirmed Minton without a hearing. ''What do you think of that?'' Rehnquist asked Korologos. ''Why do I have to testify?'' he demanded. Rehnquist's record was there; his opinions were public. He would not expand on them or defend them. Rehnquist insisted Korologos try to get him through without a hearing. ''I said, 'Fine, Bill,' and dismissed it out of hand,'' Korologos recalled. . . . ''What am I going to do, tell the leadership we're not going to have a hearing on Rehnquist? Anyway, it died before it got off the ground.'' [Korologos continued]. Rehnquist relented and agreed to go before the Senate.

I further observed that ''Chief Justice Rehnquist answered barely enough questions to get my vote. In all, sixty-five senators supported him, but thirty-three others voted against his nomination.'' Turning to Judge Robert Bork's nomination in July 1987, I noted that Democrats controlled the Senate and Senator Kennedy was a strong opponent of the nomination. ''Considering the context and controversy, Bork concluded—correctly, I think—that he would have to answer questions on judicial philosophy to have a chance at confirmation.'' Perhaps General Kagan concluded—again correctly—that with a Democratic Senate and little controversial published work of her own, she would be confirmed without betraying many of her substantive views. I regret that she chose that course but it is a course many before her have chosen and it is a course that the Senate has permitted.

When I was questioning Rehnquist he refused to answer my question about stripping the federal courts' jurisdiction. He deflected my question, stating ''I feel I cannot go to any further than that, for fear that that sort of issue will come before the Court.'' When I pressed him, Rehnquist insisted, ''I honestly feel I must adhere to my view that it would be improper for a sitting justice to try to advance an answer to that question.''

I describe in my book that during an overnight recess, when the hearing continued, a staffer brought me an article from the Harvard Law Record that Rehnquist had written in 1959, when he was a practicing lawyer. The article criticized Charles Whittaker's nomination to the Supreme Court because Whittaker had essentially told the Senate only that he was the son of two states, that he had been born in Missouri and practiced law in Kansas. Much like General Kagan in her 1995 law review article, Rehnquist, in his Harvard article, expressed outrage that the Senate had endorsed Whittaker without asking him any substantive questions, writing that ''Until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.'' The next day I confronted Justice Rehnquist with his article and his own words twenty-seven years later. Rehnquist responded ''I don't think I appreciated, at the time I wrote that, the difficult position the nominee is in.''

Following that admission, I pressed Rehnquist on jurisdiction and he finally answered that Congress cannot take away jurisdiction from the Supreme Court on the First Amendment. He refused, however, to answer questions regarding the Fourth Amendment (search and seizure), the Fifth Amendment (privilege against self-incrimination), the Sixth Amendment, the Eighth Amendment (cruel and unusual punishment), or even his reasoning for answering a question regarding the first amendment but not the others.

While I do not condone General Kagan's change of view on how much a nominee should answer, she is not the first nominee to criticize the Senate for not insisting on substantive answers and then later change her mind when she is a Supreme Court nominee. We confirmed Chief Justice Rehnquist after he disclaimed his statements in the Harvard article, so there is no reason, at this point, not to do the same for General Kagan.

I have never asked that a nominee satisfy an ideological litmus test—whether liberal or conservative—much less that a nominee commit to reaching a particular certain outcome in any given case. What I have asked is that a nominee, first, affirm his or her commitment to the doctrine of stare decisis; and, second, to honor the legislative powers the Constitution assigns to the Congress, especially its remedial powers to enforce the Fourteenth and Fifteenth Amendments.

Nominees committed to stare decisis and respectful of Congress's lawmaking powers are much less likely to indulge their ideological preferences—whether left or right—in interpreting the open-ended provisions of the Constitution and federal statutes to which very different meanings could be ascribed. They are, in short, less likely to become activists. Noted Court commentator Jeffrey Rosen made just that point soon before the Roberts confirmation hearing. He said that the ''best way'' to find out whether Chief Justice Roberts was a conservative activist (in the mold of Justice Scalia and Thomas) or a moderate, cautious, and restrained conservative (in the mold of Justice O'Connor) would be ''to explore Judge Roberts's view of precedents, which the lawyers call stare decisis, or 'let the decision stand.' '' (''In Search of John Roberts,'' The New York Times, July 21, 2005.)

That is why when I questioned Roberts and Alito in 2005 and 2006, respectively, I focused heavily on the issue of stare decisis. Several other Senators did as well. Both Chief Justice Roberts and Justice Alito provided extensive testimony on the subject. Their testimony warrants extensive quotation.

Chief Justice Roberts testified:

''Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire. Judges have to have the humility to recognize that they operate within a system of precedent shaped by other judges equally striving to live up to the judicial oath . . . .''

''[T]he importance of settled expectations in the application of stare decisis is a very important consideration.''

''I do think that it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness. It is not enough—and the Court has emphasized this on several occasions. It is not enough that you may think the prior decision was wrongly decided.''

''Well, I think people's personal views on this issue derive from a number of sources, and there's nothing in my personal views based on faith or other sources that would prevent me from applying the precedents of the Court faithfully under principles of stare decisis.''

''I think one way to look at it is that the Casey decision [Casey v. Planned Parenthood of Southeastern Pennsylvania (1992)] itself, which applied the principles of stare decisis to Roe v. Wade [1973], is itself a precedent of the Court, entitled to respect under principles of stare decisis. And that would be the body of law that any judge confronting an issue in his care would begin with, not simply the decision in Roe v. Wade but its reaffirmation in the Casey decision. That is itself a precedent. It's a precedent on whether or not to revisit the Roe v. Wade precedent. And under principles of stare decisis, that would be where any judge considering the issue in this area would begin.''

Testifying a year later, Justice Alito was no less emphatic. He testified:

''I think the doctrine of stare decisis is a very important doctrine. It's a fundamental part of our legal system, and it's the principle that courts in general should follow their past precedents, and it's important for a variety of reasons. It's important because it limits the power of the judiciary. It's important because it protects reliance interests, and it's important because it reflects the view of the courts should respect the judgments and the wisdom that are embodied in prior judicial decisions. It's not an inexorable command, but it's a general presumption that courts are going to follow prior precedents.''

''I agree that in every case in which there is a prior precedent, the first issue is the issue of stare decisis, and the presumption is that the Court will follow its prior precedents. There needs to be a special justification for overruling a prior precedent.''

''I don't want to leave the impression that stare decisis is an inexorable command because the Supreme Court has said that it is not, but it is a judgment that has to be based, taking into account all of the factors that are relevant and that are set out in the Supreme Court's cases.''

Again, without challenging their good faith, I note the contrast between the testimony cited at length above, from both Chief Justice Roberts and Justice Alito, with their concurring opinion in Citizens United. That concurrence, authored by Roberts and joined by Alito, says, ''The Court's unwillingness to overturn Austin in [subsequent] cases cannot be understood as a *reaffirmation* of that decision.'' (emphasis in original). It seems to me that Chief Justice Roberts's concurrence flies in the face of what he said about Casey reaffirming the central holding in Roe. Contrary to his testimony that ''It is not enough that you may think the prior decision was wrongly decided[,]'' Roberts went on to write in Citizens United, ''[w]hen considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*.'' (emphasis in original). That is an about face.

In announcing my ''aye'' vote for General Kagan's nomination to the Supreme Court, I have attempted to sound a cautionary note. The point is to remind Senators, in the first instance, of the need to jealously guard against incursions from the other branches. It is also, I submit, to remind the nominee and the sitting Justices of the Supreme Court that Congress is a coequal branch of Government deserving of a modicum of respect. It takes at least fifty-one votes in the Senate (some would say sixty) and at least two-hundred and eighteen votes in the House to present legislation to the President for his signature. Getting from the introduction of any legislative measure to enacting a new law is a Herculean task. When that task is augmented by a lengthy congressional record supported by hearings and reasoned testimony it should not be cast aside. So it has been important for this Senator to underscore a healthy respect for Congress in the course of Supreme Court confirmation proceedings.

Of the 13 nominees to have come before the Judiciary Committee for a hearing during my tenure in the Senate, none was less forthcoming than Justice Scalia. He answered no substantive questions at all. He would not even say whether Marbury v. Madison, which established the principle of judicial review, was correctly decided.

In my first autobiography, Passion for Truth, I wrote that ''From my experience participating in Supreme Court nomination hearings, I have found that the better the nominee thinks his chances are, the less he will say at the hearing to minimize his risk.'' In short, Justice Scalia was confident he would be confirmed and, therefore, less forthcoming on substantive inquiries. Justice Scalia's testimony prompted Senator DeConcini to remark: ''It is apparent to me that nominees are advised by the administration to be as evasive and passive as they can be.''

Since General Kagan has only followed the precedent set by previous nominees and by the Senate, I believe that she should be confirmed based on her record. In evaluating Ms. Kagan's overall record and performance before the committee, I have concluded that her intellect, academic accomplishments, professional qualifications and earlier statements expressing great respect for Congress outweigh her failure to give substantive answers. But it is worth preserving for the record my views as to what she failed to testify to during the course of the hearing. Several Senators tried in vain to elicit meaningful answers from General Kagan. Senator Kohl asked straightforward questions. When Senator Kohl asked her about her passions, she demurred, discussing ''the rule of law'' instead. He asked again, ''What are your passions?'' but General Kagan did not answer. Senator Kohl asked how she would impact

the everyday lives of Americans. Again, General Kagan did not answer. She referred back to her previous three responses, where she discussed just taking ''one case at a time,'' and nothing more. Senator Kohl tried asking ''Which cases will motivate you?'' and again General Kagan refused to answer, and instead simply recited facts we already knew about the certiorari process. When asked by Senator Kohl about her views on the Bush v. Gore case, a case that the Court specifically said was unique and would not hold precedential value, General Kagan refused to answer, stating that she could not answer because the ''question of when the court should get involved in election contests . . . might well come before the court again.''

Similarly, when asked by Senator Coburn if a law requiring Americans to eat three vegetables and three fruits every day would be unconstitutional, certainly not a case likely to come before the Court, she refused to answer even that question in a substantive manner.

After pressing General Kagan on her views of the Second Amendment several times without making any progress, Senator Grassley resigned himself to the fact that, in his words, she ''[didn't] want to tell us what [her] own personal belief is.''

Senator Coburn criticized General Kagan for ''dancing'' around instead of answering questions and suggested that ''Maybe [she] should be on 'Dancing with the Stars'.''

When General Kagan refused to discuss internal Justice Department deliberations with White House staff regarding upcoming cases, Senator Kyl pointed out that ''simply noting whether or not there were such contacts would not be an inappropriate thing for you to provide the Committee.''

General Kagan consistently declined to answer questions on whether she would vote to take two critical cases as Justice.

Toward the conclusion of my second round of questions, I told General Kagan:

I think the commentaries in the media are accurate. We started off with the standard you articulated at the University of Chicago Law School about substantive discussions. And they say we haven't had them here, and I'm inclined to agree with them . . . It would be my hope that we could find some place between voting ''no'' and having some sort of substantive answers. . . . I think we are searching for a way how senators can succeed in getting substantive answers, as you advocated in the Chicago Law Review, short of voting ''no.''

In her 1995 article, General Kagan criticized Justice Ginsburg's handling of her nomination hearing, stating that ''Justice Ginsburg's favored technique took the form of a pincer movement. When asked a specific question on a constitutional issue, Ginsburg replied . . . that an answer might forecast a vote and thus contravene the norm of judicial impartiality. Said Ginsburg: 'I think when you ask me about specific cases, I have to say that I am not going to give an advisory opinion on any specific scenario, because . . . that scenario might come before me.' But when asked a more general question, Ginsburg replied that a judge could deal in specifics only; abstractions, even hypotheticals, took the good judge beyond her calling. Again said Ginsburg: 'I prefer not to . . . talk in grand terms about principles that have to be applied in concrete cases. I like to reason from the specific case.'''

However, General Kagan failed to take her own advice. She frequently refused to answer questions without having a concrete case or briefs to read. In my attempt to find her views on the ''congruence and proportionality'' standard, she repeatedly avoided answering, saying ''I've not delved into the question the way I would want to as a judge,'' citing the fact that she hadn't read any briefs as she would in a case in controversy.

The Ginsburg-Kagan pincer movement creates a Catch-22 for Senators, who must avoid asking about a concrete case that could come before the Court, but then cannot receive any answer from a nominee on a more abstract question because the nominee simply shrugs and says, ''I haven't read the briefs.''

In her article, General Kagan went so far as to say she understood why nominees refused to answer questions, calling it a ''game'' in which the ''safest and surest route to the prize'' involves avoiding substantive answers. She wrote ''Neither do I mean to deride Justices Ginsburg and Breyer for the approach each took to testifying. I am sure each believed . . . that disclosing his or her views on legal issues threatened the independence of the judiciary. (It is a view, I suspect, which for obvious reasons is highly correlated with membership in the third branch of government.) More, I am sure both judges knew that they were playing the game in full accordance with a set of rules that others had established before them. If most prior nominees have avoided disclosing their views on legal issues, it is hard to fault Justice Ginsburg or Justice Breyer for declining to proffer this information. And finally, I suspect that both appreciated that, for them (as for most), the safest and surest route to the prize lay in alternating platitudinous statement and judicious silence. Who would have done anything different, in the absence of pressure from members of Congress?''

General Kagan certainly did the same. . . . Even with pressure from members of Congress, such as Senators Kohl, Grassley, Coburn, and myself, she still refused to answer to questions.

In her article, General Kagan took issue with the Senators for not insisting that nominees answer questions. She stated that ''Senators today do not insist that any nominee reveal what kind of Justice she would make, by disclosing her views on important legal issues. Senators have not done so since the hearings on the nomination of Judge Bork. They instead engage in a peculiar ritual dance, in which they propound their own views on constitutional law, but neither hope nor expect the nominee to respond in like manner.''

Again, I asked General Kagan several specific questions that she refused to answer. When I asked a direct question as to whether she would apply to the congruence-and-proportionality test in evaluating the constitutionality of laws passed under Congress's Fourteenth Amendment remedial authority, she refused to answer. When Senator Kyl asked her if detainees had habeas rights, she refused to answer. Senator Grassley asked her if Heller was correctly decided and she refused to answer. So I would hope that General Kagan will not claim that all Senators participating in her confirmation hearing did not hope for, or expect, substantive answers. We tried our best to get her to answer questions, but it was General Kagan who insisted on avoiding substantive answers.

Mr. SPECTER. Finally, Mr. President, I ask unanimous consent that a copy of an op-ed which I wrote which appeared in USA Today be printed in the RECORD.

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

[From USA Today, July 15, 2010]

SPECTER: ''KAGAN DID JUST ENOUGH TO WIN MY VOTE''

(By Arlen Specter)

Supreme Court nominee Elena Kagan did little to undo the impression that nominating hearings are little more than a charade in which cautious non-answers take the place of substantive exchanges.

In this, she was following the practice of high court nominees since Judge Robert Bork. But her non-answers were all the more frustrating, given her past writings that the hearings were vacuous and lacked substance. She accused Justice Ruth Bader Ginsburg and Stephen Breyer of stonewalling, but then she did the same, leaving senators to search for clues on her judicial philosophy.

Her hearings showed an impressive legal mind, a ready humor and a collegial temperament suitable to the court. But they shed no light on how she feels about the court's contemptuous dismissal of Congress' ''fact-finding'' role, its overturning of precedent in allowing corporate political advertising, and the expansion of executive authority at the expense of congressional power.

She offered no meaningful observations on U.S. vs. Morrison, in which the court overturned the Violence Against Women Act, blaming Congress' ''method of reasoning,'' notwithstanding a ''mountain of data assembled by Congress'' demonstrating ''the effects of violence against women on interstate commerce'' noted in Justice David Souter's dissent.

She offered no substantive comment on Citizens United, in which the court reversed a century-old precedent by allowing corporations to engage in political advertising. Justice John Paul Stevens said in dissent that the court showed disrespect by ''pulling out the rug beneath Congress,'' which had structured the campaign-finance reform bill, McCain-Feingold, on a 100,000-page factual record based on standards cited in a recent Supreme Court decision.

Likewise, she avoided taking sides in the court's expansion of executive authority, declining comment on the historic clash posed by the Foreign Intelligence Surveillance Act and the president's warrantless wiretapping authorized under the Terrorist Surveillance Program.

Despite repeated questioning, Kagan refused to comment on the court's refusal to resolve a contentious dispute involving the Sovereign Immunity Act and the Obama administration's foreign policy. Survivors of 9/11 victims sued Saudi Arabia, Saudi princes and a Saudi-controlled charity with substantial evidence that they had financed the 9/11 terrorists. The Obama administration persuaded the court not to hear the case, arguing that the Saudi Arabian conduct occurred outside the U.S.

On one controversial issue—the question of whether to televise open Supreme Court proceedings—Kagan was candid, stating that she welcomed TV in the court and, if confirmed, would seek to convince her colleagues on the bench. ''It's always a good thing,'' she said, ''when people understand more about government, rather than less. And certainly, the Supreme Court is an important institution and one that the American citizenry has every right to know about and understand.''

Her testimony recognized that the court is a public institution that should be available to all Americans, not just the select few who can travel to Washington. A recent C–SPAN poll found that 63% of Americans support televising the Supreme Court's oral arguments.

Given the fact that the court decides all of the cutting-edge questions—a woman's right

to choose, death penalty cases for juveniles, affirmative action, freedom of speech and religion—public demand for greater transparency should come as no surprise. When 85% of those polled think the Citizens United case expanding corporate spending in politics was a bad decision, one can conclude they want to know why the court decided as it did.

On balance, Kagan did little to move the nomination hearings from the stylized ''farce'' (her own word) they have become into a discussion of substantive issues that reveal something of the nominee's judicial philosophy and predilections.

It may be understandable that she said little after White House coaching and the continuing success of stonewalling nominees. But it is regrettable. Some indication of her judicial philosophy may be gleaned by her self-classification as a ''progressive'' and her acknowledged admiration for Justice Thurgood Marshall. That suggests she would uphold congressional fact-finding resulting in remedial legislation and protect individual rights in the congressional-executive battles.

The best protection of those values may come from the public's understanding through television of the court's tremendous power in deciding the nation's critical questions. In addition to her intellect, academic and professional qualifications, Kagan did just enough to win my vote by her answers that television would be good for the country and the court, and by identifying Justice Marshall as her role model.

Mr. SPECTER. I thank the Presiding Officer, and I thank my distinguished colleague from Florida.

The PRESIDING OFFICER. The Senator from Florida.

Mr. LEMIEUX. Mr. President, it is always good to follow my distinguished colleague from Pennsylvania and to hear his comments.

FINANCIAL REGULATORY REFORM

Mr. LEMIEUX. Mr. President, I am here today to talk about the bill the Senate just voted on and passed, the financial regulation overhaul bill. It is, in my mind, a missed opportunity. We had the opportunity to truly address the causes of the financial meltdown and put into place measures that would stop the meltdown from happening the next time. But, unfortunately—as I have seen in about the year's time I have had the privilege to serve in the Senate—it seems it is the predilection of this Congress to take a crisis and then come forward not with a narrowly focused and tailored solution but, instead, a large-ranging, comprehensive bill that creates more government, that creates more bureaucracy, that puts more debt on our system of government, and still fails to address the very problem we should be trying to focus upon.

We were supposed to rein in the wild and risky speculative tools and empower our regulators to prevent another crisis. But we did not. I heard Senator DODD, who I have enormous respect for—and I think he put a tremendous amount of time into this bill, but I heard him on the floor the other day, in giving his sort of summation as to why this bill should be passed, saying this will not stop any future recessions. He is right. He is right because we did not do what we needed to do in order to truly fix the problems that happened back in the 2007–2008 era when we had this tremendous financial meltdown—this meltdown which has depleted trillions of dollars of the net worth of Americans; this meltdown that has led to one of the greatest, if not the greatest, recession since the Great Depression.

In my home State of Florida, people are suffering mightily. We have nearly 12 percent unemployment. We are either No. 1 or No. 2—depending upon the month—in mortgage foreclosures, and our people are behind on their mortgage payments more than any other State in the Union.

We are a State that has been based, perhaps too much, on growth. So when folks are not coming to build a new home, the contractor does not have a job. When folks are not coming to visit our beaches or our tourist attractions, the restaurateur, the hotelier—they lose their work. So things are very difficult in Florida.

This financial crisis stemmed in part from some of the problems we saw in lending, in real estate, and there was no place that was any worse than what happened in Florida. What this bill fails to address: the underwriting standards that should have been in place to stop these so-called ninja loans—''no income, no job.'' They called them ninja loans. Anybody could get one, and people were put into homes they could not afford.

Why was that able to happen? It was because there were no underwriting standards. There was no skin in the game for those getting the mortgage. There was no skin in the game for the mortgage broker, who was able to sell off this mortgage to Wall Street, where there was this vast and great demand to bundle these products into mortgage-backed securities, and, for the first time ever, tie our real estate market, our homes—our most important investments—with the financial markets.

As soon as that was done, the speculation and the speculators ran wild. This bill does not do enough to prevent that in the future, to provide the real skin in the game that should be needed to trade those mortgage-backed securities. We failed to address those two factors. Perhaps even worse, we failed to address Fannie and Freddie, the government-sponsored entities that stood as silent guarantors to all these mortgages, that let the market have faith and confidence that the government was the backstop to these mortgages that should have never been let. This bill fails to address that. Two of the leading causes of the financial debacle we failed to addressed.

Finally, a point we needed to address, and we did: My colleague and friend, who presides over the Senate this afternoon, was the person who was the leading proponent on trying to do something about the rating agencies, and we did do something. I was pleased to work with Senator CANTWELL, and I was appreciative of the efforts of Senator FRANKEN, to try to do something about these rating agencies. And we did.

That is one good thing about this bill. They are written out of law. These rating agencies compounded the problem because when these mortgages, packed together—mortgages that were not any good, that were not going to get paid, that then got turned into a trading vehicle—when they went up to Wall Street, these rating agencies that are paid for by the investment banks stamped them with AAA ratings, gave them the ''good housing seal of approval'' and let the world believe they were sound investments. They failed. And lo and behold, we find that the government has given a sanction in law to these rating agencies to be the determiners of creditworthiness—a monopoly, if you will.

Well, one good thing this bill does is to strip that out. No longer will they be given that state-sponsored monopoly. Now the marketplace will have to work. Now we will not be so relying upon people who are paid by the investment banks that did not do their homework and in part caused this crisis.

If we would have tackled the GSEs, Fannie and Freddie, and if we would have tackled underwriting standards, I would be here giving a speech today talking about why I voted for the bill. But we only did one of the four things and, unfortunately, now, we have a bill that Wall Street loves. Citigroup loves it. Goldman Sachs loves it. But Main Street is very concerned about it. We are going to make sure that orthodontists are regulated because they, every once in a while, extend credit to their patients. But the folks on Wall Street, who caused these problems, and the underlying cause of the debacle, the mortgage problem, the underwriting problem, and the Fannie and Freddie problem do not get addressed.

According to the study by the U.S. Chamber of Commerce, this bill will create a huge new governmental bureaucracy: 70 new Federal regulations through the Bureau of Consumer Financial Protection, 54 new Federal regulations through the U.S. Commodity Futures Trading Commission, 11 new Federal regulations through the Federal Deposit Insurance Corporation, 30 through the Federal Reserve, 205 through the SEC.

You may say: Well, that sounds good. We need more regulations, right? There was a problem. But if the regulation does not go after the problem that caused the debacle, what do the regulations do? We are in a situation right now where business in this country is frozen. It is frozen solid because of the actions of the Congress and this administration who are doing so much to this economy that big business and small business alike do not believe they can hire new workers.