Lugar	Risch	Thune
McCain	Roberts	Voinovich
McConnell	Sessions	Wicker
Murkowski	Shelby	

NOT VOTING—1

Vitter

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

The majority leader.

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

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

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

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

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

The majority leader.

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

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

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

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

The PRESIDING OFFICER. The majority leader is recognized.

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

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

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

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

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

The PRESIDING OFFICER. The Senator will state his inquiry.

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

The PRESIDING OFFICER. The point of order would lie.

The question is on agreeing to the motion.

The clerk will call the roll.

The assistant legislative clerk called the roll.

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

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

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

[Rollcall Vote No. 225 Leg.]

YEAS—61

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

NAYS—38

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

NOT VOTING—1

Vitter

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

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

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

The motion to lay on the table was agreed to.

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

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

EXECUTIVE SESSION

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

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

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

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

The Senator from Illinois is recognized.

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

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

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

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

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

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

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

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

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

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

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Texas.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The assistant legislative clerk proceeded to call the roll.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ms. Kagan would not answer the question.

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

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

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

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

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

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

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

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

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

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

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

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

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

I cite first the situation involving the terrorist surveillance program—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Then, Mr. Taylor comments about nominee Kagan:

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

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

Mr. Taylor goes on to say this:

Why so modest?

That is, why is the Court so modest?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EXAMPLES OF TELEVISED PUBLIC APPEARANCES BY JUSTICES

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

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

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

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

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

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

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

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

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

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

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

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

(See exhibit 1.)

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

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

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

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

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

I thank the Chair and yield the floor.

EXHIBIT 1

INTERESTING CIRCUIT SPLITS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The PRESIDING OFFICER. The Senator from Nevada is recognized.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I yield the floor.

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator GRASSLEY went back again. He asked straight on:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The PRESIDING OFFICER. The Senator from Georgia.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The PRESIDING OFFICER. The Senator from South Dakota.

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

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

To quote then-Senator Obama:

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

He went on to say:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Unfortunately, medical experts disagree with her assertion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I yield the floor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For these reasons, I cannot support her nomination.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I yield the floor.

The PRESIDING OFFICER. The Senator from California.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The National Association of Women Judges wrote:

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

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

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

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

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

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

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

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

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

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

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

I yield the floor.

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

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

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

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

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

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

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

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

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

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

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

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

The PRESIDING OFFICER. The Senator from Arkansas.

HEALTHY, HUNGER-FREE KIDS ACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(See exhibit 1.)

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

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

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

(See exhibit 2.)

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

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

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

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

EXHIBIT 1

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

A FOOD BILL WE NEED

(By Michelle Obama)

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

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

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

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

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

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

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

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

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

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

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

EXHIBIT 2

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

THE SENATE'S IMPORTANT LUNCH DATE

(By Richard G. Lugar)

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

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

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

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

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

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

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

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

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

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

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

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

The PRESIDING OFFICER. The clerk will call the roll.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This incident illustrated her liberal agenda superseding her professional judgment.

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

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

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

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

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

The PRESIDING OFFICER. The Senator from Ohio is recognized.

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

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

HONORING OUR ARMED FORCES

LIMA COMPANY BATTALION, 25TH MARINES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sgt David Coullard, 32, of Glastonbury, CT;

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

LCpl Brian Montgomery, 26, of Willoughby, OH;

Sgt Nathaniel Rock, 26, of Toronto, OH;

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

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

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

LCpl Aaron Reed, 21, of Chillicothe, OH;

Cpl David Stewart, 24, of Bogalusa, LA;

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

Sgt Justin Hoffman, 27, of Delaware, OH;

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

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

LCpl Michael Cifuentes, 25, of Fairfield, OH.

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

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

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

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

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

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Alabama.

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

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

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

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

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