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

This incident illustrated her liberal agenda superseding her professional judgment.

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

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

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

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

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

The PRESIDING OFFICER. The Senator from Ohio is recognized.

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

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

HONORING OUR ARMED FORCES

LIMA COMPANY BATTALION, 25TH MARINES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sgt David Coullard, 32, of Glastonbury, CT;

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

LCpl Brian Montgomery, 26, of Willoughby, OH;

Sgt Nathaniel Rock, 26, of Toronto, OH;

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

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

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

LCpl Aaron Reed, 21, of Chillicothe, OH;

Cpl David Stewart, 24, of Bogalusa, LA;

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

Sgt Justin Hoffman, 27, of Delaware, OH;

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

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

LCpl Michael Cifuentes, 25, of Fairfield, OH.

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

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

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

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

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

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Alabama.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. SESSIONS. She did use that word.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Maybe that might be healthy for America.

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

Mr. MCCAIN. Or perhaps Alabama.

Mr. SESSIONS. Perhaps so.

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

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

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

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

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

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

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

The PRESIDING OFFICER. The Republican time has expired.

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

I yield the floor.

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

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

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

Referring to the military—

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

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

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

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

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

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

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

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

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

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

Very Respectfully,

ZACHARY PRAGER.

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

Here is what the lieutenant writes:

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

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

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

JUNE 30, 2010.

Re: Nomination of Elena Kagan.

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully,

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

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

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

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

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

I said: How did you find it?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The PRESIDING OFFICER. The Senator from Rhode Island.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I yield the floor.

The PRESIDING OFFICER. The Senator from Hawaii is recognized.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant editor of the Daily Digest called the roll.

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

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

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

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

AUTHORIZING SETTLEMENT FUNDING

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

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

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

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

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

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

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

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

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

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

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

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

I yield the floor.

The PRESIDING OFFICER. The Senator from Delaware.

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

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

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