The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

IN PRAISE OF MICHAEL COPPS

Mr. KAUFMAN. Madam President, I rise once again to honor one of our Nation's great Federal employees.

The Federal employee I am recognizing this week—and this is my 89th since last May, and here they are on the chart—has made a name for himself as an advocate for sensible regulation of the communications industry.

At the Federal Communications Commission, Michael Copps has been a tireless fighter for the public interest and a steadfast campaigner for localism in broadcasting. In his position as one of the five Commissioners appointed by the President and confirmed by the Senate to oversee the regulation of our communications industry, Mike must work with the other Commissioners to come to agreement on key issues affecting broadcasting, the Internet, and other media. Whether they agree with him or not, I know they have to respect and admire his passion and energy in advocating for what he believes to be the best way to serve the American people.

I did not choose to honor Mike only because he is one of the FCC's Commissioners; he has had a distinguished public service career for three decades. His service as Commissioner is just his latest role in the Federal Government. Mike is currently in his second term, having been appointed twice by President George W. Bush.

Before his appointment to the FCC, Mike served at the Department of Commerce as the Assistant Secretary for Trade Development and Deputy Assistant Secretary for Basic Industries.

Prior to his service with the Commerce Department, Mike spent 12 years here in the Senate as chief of staff to former Senator Fritz Hollings of South Carolina. That is how I got to know Mike, when I was chief of staff for now-Vice President and then-Senator JOE BIDEN. I can say from personal experience that, as a chief of staff, Mike was truly first class. He earned the respect and admiration of his colleagues across the Senate on both sides of the aisle. Smart, exercising good judgment, and a very good listener, Mike embodied the skills and values that make someone a great chief of staff.

Before coming to Washington in 1970, he spent time working in the private sector for a Fortune 500 company, and he also taught as a history professor for some years at Loyola University of the South, in New Orleans. He holds a bachelor's degree from Wofford College in South Carolina and a Ph.D. from the University of North Carolina at Chapel Hill.

In his current role, Mike has been an untiring advocate for the public and has worked to push the FCC back toward its core mission: enforcing the regulations that maintain fair competition, protecting consumers, and ensuring that the communications industry serves the public interest. Particularly, he has been a crusader against control of the Internet by big corporations. His promotion of an open Internet is based on his belief that communications media should benefit all and foster the growth and development of communities.

Last week, I spoke from this desk about the dangers of regulatory capture. Over the past decade, many of our regulatory agencies have been caught up in a deregulatory mindset that viewed self-regulation as not only adequate but preferable. Michael Copps has long been a voice of reason against regulatory capture.

He is just one example of the many outstanding men and women at the Federal Communications Commission. They are all truly great Federal employees, and I hope my colleagues will join me in honoring their service to our Nation.

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

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. KAUFMAN. Madam President, I ask that the time of the quorum call be equally divided.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. KAUFMAN. I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

NOMINATION OF ELENA KAGAN

Mr. JOHANNS. Madam President, a Senator has an enormous duty when it comes to evaluating a Supreme Court nominee. The duty demands that Senators examine whether the person nominated to the highest Court in the land will uphold and defend the principles contained in the Constitution, refrain from judicial activism, and respect the rule of law.

Some have characterized this duty as one of the most important and far-reaching decisions that a Senator will make, and it is one of the most important decisions in their entire time in the Senate.

As the nomination process for Ms. Kagan began, I went into it with an open mind and a steadfast resolve to evaluate the nominee's qualifications without looking through a partisan lens. In fact, having gone through the confirmation process myself before being sworn in as Secretary of Agriculture, I know what an important process this is.

Senators have a strong duty to take it seriously. Considering Supreme Court judgeships are lifetime appointments, these nominations require even closer scrutiny. Thus, Senators must carefully review any Supreme Court nominee's record and their judicial philosophy.

After this careful review and closely monitoring the hearings before the Judiciary Committee, I came to the conclusion that I could not support this nomination.

The Court is not a place to create laws, and I was not convinced that Ms. Kagan understands this fundamental premise. Additionally, her long career as a political adviser and academic insufficiently prepares her for a lifetime appointment to the country's highest Court.

For example, prior to her position as Solicitor General, Ms. Kagan had never taken a case to trial. I find that remarkable. Since her time as Solicitor General, Ms. Kagan has only argued six cases before the Supreme Court.

Beyond that lack of experience, there are several other areas that concern me about this nomination. Ms. Kagan's view of the second amendment is disturbing to me. As a law clerk for U.S. Supreme Court Justice Thurgood Marshall, she wrote that she was ''not sympathetic''—''not sympathetic''—to the legal assertion that the DC gun ban violated citizens' constitutional right to bear arms.

Probably the most recent glimpse into Ms. Kagan's view of the second amendment is her failure to file a brief on behalf of the petitioner in the McDonald case regarding Chicago gun bans. The Supreme Court had already been clear on the DC gun ban, and Chicago's law clearly impacted a variety of Federal laws and programs.

Yet, as Solicitor General, she chose to sit quietly, tacitly casting aside a very important constitutional protection. Her not filing demonstrated the government's lack of interest or concern in protecting this important constitutional right.

Ms. Kagan's lack of action is viewed by many as a bias against the second amendment, as if she were picking and choosing which constitutional provisions she liked. Judges cannot selectively disregard the Constitution when it is convenient or in line with their point of view. So Ms. Kagan's record in this area is enormously troubling for someone who wants to sit on the Supreme Court.

Another very serious concern is her actions as an adviser to President Clinton were instrumental in keeping partial-birth abortion legal in the 1990s. During her time in the White House, the American College of Obstetricians

and Gynecologists privately briefed Ms. Kagan on the partial-birth abortion procedure. Their opinion was clear and lacing equivocation.

According to a memo Ms. Kagan wrote, the medical group said:

> In the vast majority of cases, selection of the partial birth procedure is not necessary to avert serious adverse consequences to a woman's health. There just aren't many circumstances where use of the partial-birth abortion is the least risky, let alone the necessary approach.

The group's public draft statement went on to say:

> A select panel convened by ACOG could identify no circumstances under which the partial birth procedure would be the only option to save the life or preserve the health of the woman.

Upon hearing this news, Kagan wrote in a memo that the statement would be ''a disaster.'' Then she edited the document and advised the medical group to include a much different sentence claiming partial-birth abortion ''may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman.''

The original sentence and Ms. Kagan's sentence are vastly different, almost complete opposites. Yet Ms. Kagan's language was copied verbatim into the medical organization's final statement.

While Ms. Kagan has no medical credentials whatsoever, she bullied her personal views into the opinion of these medical professionals.

Unfortunately, this assumed expert medical opinion was relied upon heavily in subsequent court cases, including the one that struck down Nebraska's partial-birth abortion ban—my State. U.S. District Court Judge Richard Kopf devoted more than 15 pages of his opinion to the policy statement that Kagan wrote.

Judge Kopf believed the statement was entitled to judicial deference because, ''Before and during the task force meeting, neither ACOG nor the task force members conversed with other individuals or organizations,'' he wrote in his opinion.

It is beyond belief and beyond unfortunate that no one was aware of Ms. Kagan's extensive involvement in drafting the supposedly independent policy statement; otherwise, this horrific procedure may have been banned 10 years earlier.

This type of extreme political policy engineering should give us all great pause and solid reason to question whether Ms. Kagan could serve as a truly neutral umpire on the bench.

My concerns do not stop there. My concerns extend further to her role as dean of the Harvard Law School. Ms. Kagan was confronted with the Solomon amendment, a Federal law that requires schools receiving Federal funds to give equal access to military recruiters. It was very straightforward. Yet she chose to ignore this law and denied military access to Harvard's on-campus recruiting program.

Even the Supreme Court unanimously ruled against Ms. Kagan in this matter. This is especially troubling that Ms. Kagan would openly defy Federal law, especially in a time of war.

Her judgment and her reading of the law was fundamentally flawed, and every one of her potential colleagues agreed she was wrong. That is not a good sign for things to come.

For these reasons and others, I do not have confidence that Ms. Kagan will be able to put aside her personal or political agenda before sitting on the bench.

As the National Right to Life Committee noted:

> We anticipate that Ms. Kagan often will treat the U.S. Constitution not as a body of basic law that truly constrains both legislators and judges, but rather as a cookbook in which may be found legal recipes that will allow the imposition of the policies that Ms. Kagan deems to be justified or advisable, or that are so regarded by whatever groups she sees as the enlightened elites on a given subject.

A lifetime appointment to the highest Court in the land is far too important a decision to have so many concerns. When the Senate votes on the nomination of Ms. Kagan, I will vote no. Doing otherwise would ignore the integrity of our Constitution and it would not be in the best interest of this great country.

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

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. JOHANNS. Madam President, I ask unanimous consent that the quorum calls during today's morning business be charged equally to both sides.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

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

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. ROBERTS. I ask unanimous consent that the quorum call be dispensed with.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. ROBERTS. I ask unanimous consent to speak up to 15 minutes.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. ROBERTS. Madam President, after careful consideration and assessment of the nominee's record and expressed views, I rise today to express my opposition to Solicitor General Elena Kagan's nomination to the U.S. Supreme Court.

In the nomination process, a telling and inciteful statement by another Senator is most applicable and pertinent. During the Senate's debate on the nomination of Chief Justice John Roberts, then Senator Barack Obama stated:

> . . . that while adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before the court, so that both a Scalia or Ginsburg will arrive at the same place most of the time on those 95 percent of the cases—what matters on the Supreme Court is those 5 percent of cases that are truly difficult.
>
> In those cases, adherence to precedent and rules will only get you through the 25th mile of the marathon.
>
> That last mile can only be determined on the basis of 1) one's deepest values, 2) one's core concerns, 3) one's broader perspectives on how the world works, and 4) the depth and breadth of one's empathy.

I respectfully disagree with this rationale and find it troubling. Our judges must decide all cases in adherence to legal precedent and rules of statutory or constitutional construction.

The role of a judge is not to rule based on his or her own personal judgments or comply with one's empathy, how they think the world really works, concerns and values—deep or shallow—all subject to personal views, ideology and the winds of time and political change. No, the role of a judge should adhere to the laws as they are written.

An appointment to serve on the Supreme Court of the United States is a lifetime term. It was crafted by our Founders to protect and insulate the highest Court of our land from personal concern, empathy, individual values or how one thinks the world really works at some point of time, not to mention the threat of any influence of politics.

Nominations to the highest bench should therefore not be considered lightly. It is one of the most important votes a Senator has the privilege to cast.

And I would submit compared to the standard of legal precedent, statutory rules, constitutional construction, again personal values, concerns, how the world allegedly works and one's personal criteria of empathy represents a lesser standard—sort of a standard lite.

The qualifications of the nominee must be carefully considered. As U.S. Senators, we have an obligation to ensure that our courts are filled with qualified, impartial judges.

In light of that I must ask—who is Elena Kagan?

In reviewing Ms. Kagan's qualifications, I find her lack of judicial experience striking.

While others note that serving as a judge is not a requirement for a Supreme Court nomination, it has also been noted that every nominee in nearly 40 years to the Supreme Court has had extensive judicial experience, whether from the bench or as a litigator in the courtroom.

Ms. Kagan's litigation experience is limited, with the majority of her arguments being made during her brief tenure as the U.S. Solicitor General.

Given her obvious lack of experience in the court room, one must ask if this is the best position to receive on-the-job-training? Will the ''craft'' of judging come innately to Ms. Kagan or is it a skill honed by years of practice and judicial experience?

Some have argued in defense of such a thin judicial resume that nominees can bring a ''real world''—- whatever that is—- perspective to the bench. Nonetheless, much of the nominee's experience lies in the hallowed, Ivy League, halls of academia, indeed a world of its own.

While I do not question the merits of a strong university background, I question how that makes one more in tune with the ''real world.''

Additionally, the nominee's resume includes her positions as special counsel and policy advisor in the Clinton administration—a role in which she truly relished her job. During her tenure she advocated for policies involving the second amendment.

In response to a Supreme Court decision which struck down the Brady Act's requirement of background checks before gun sales, documents from the nominee's tenure suggested that the administration explore how to maneuver around the Court's decision by executive action.

The advice here goes beyond legal counsel and indicates a clear interest in achieving a policy goal by going around the Supreme Court's decision, while forgoing the jurisdiction of Congress.

When determining how Ms. Kagan may approach a seat on the Court, her position as a policy adviser is one of the few records available to review.

Does this type of maneuvering indicate how Ms. Kagan would use her position as a Supreme Court Justice to justify an agenda where a policy goal is the intended outcome?

I must also say that as dean of Harvard Law School, Ms. Kagan's effort to ban military recruiters from the main placement office on campus is deeply troubling.

The justification for violating the Solomon Amendment—named after Congressman Gerald Solomon—was to protest the military's don't ask, don't tell policy. This action was also consistent with her own expressed views.

It must be noted, blocking access to military recruiters is counter to Federal law.

Only when threatened with the loss of Federal funding, did Harvard comply. Ms. Kagan then used a stayed decision by an appellate court, which determined the Solomon Amendment was unconstitutional, to reinstitute the ban. Shortly thereafter, the Supreme Court overturned the appellate court's decision by an 8–0 ruling.

According to Chief Justice John Roberts, ''A military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message.''

I must say, I don't know of any recruiter who would stand up and debate students in the circumstance of a policy judgment—more to the point, in regard to a policy that is as controversial as don't ask, don't tell. They are there to recruit individual students or to answer questions they may have.

U.S. servicemembers deserve our unfettered support, as they face unimaginable danger on the front line in defense of our Nation. Their willingness to sacrifice their time away from home and loved ones while serving in harsh and dangerous places under difficult circumstances should be honored.

It seems to me we dishonor their sacrifices and service by hollow justifications of policy agendas. These efforts are a clear indication to me, as well as my fellow Kansans, that Ms. Kagan's agenda is at odds with her role as a dean and a future Supreme Court Justice, and is clearly out of step with the average American no matter how deep her concern, empathy, values or the real world she believed she could change.

It is clear from her time as a policy adviser during the Clinton administration—a job she truly relished—that she supports methods of enacting policy changes through administrative means and around the jurisdiction of the legislative branch.

This type of disregard for the jurisdiction of the elected branch of government is concerning.

Ms. Kagan's zeal and enthusiasm as a political advisor and an academic does not qualify her for a lifetime appointment to our Nation's highest Court.

Not only does she lack experience on the bench, but her record clearly demonstrates a propensity towards pursuing an activist agenda.

In her own words, Ms. Kagan confessed difficulty in ''taking off the advocate's hat [to] put on the judge's hat.'' This admission is at best worrisome; at worst, a clear indication of her intent to legislate from the bench.

We have a constitutional obligation to ensure that our judges are impartial and faithful to the law. During Chief Justice John Roberts' confirmation hearing, he noted that ''Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.'' They may go to criticize the umpire, but they do not go to see him.

I am not convinced that Ms. Kagan will limit herself to merely applying the rules.

Given the limited judicial background and a lack of forthrightness in queries as to her judicial philosophy during the nomination hearings, I am fearful that this nomination will serve as another tool in what we have witnessed in further encroachment of government into the everyday lives of the American people.

Kansans have made clear to me that they do not want activist judges on the Court and they do not want additional government intrusion into their daily lives and pocketbooks, especially coming from the bench.

Unfortunately, I think appointing Ms. Kagan to the Court will result in more of both. Therefore, I must oppose her nomination.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from North Carolina.

Mr. BURR. The American people are worried about the direction of our country, and I absolutely share their concern. The public has witnessed Washington's growing disregard for the Constitution and its limits on government power. Too many of those powers see no limits to their authority, and that, to me, is frightening.

The size of government has exploded, spending is out of control, the national debt is soaring, and Congress has passed thousands of pages of legislation with little concern for the effects on the rights of everyday Americans and with no thought at all to the debt we saddle our children and our grandchildren with.

The Founding Fathers knew the dangers of expanding government power. The Founders knew what Barry Goldwater knew when he said: ''A government strong enough to give you what you want is strong enough to take it away.''

They established the judiciary branch in order to protect against an overly aggressive government. They envisioned it as a neutral arbiter of disputes based on the written law and as a check on government power grabs beyond the intended authority.

This is why the judiciary is so important and why the lifetime appointment of a Justice to the Supreme Court is one of the most serious actions any of us will consider. We must have judges who are committed to the job of holding us to the words of the Constitution and laws that are written.

We, in Congress, have proven again and again that we will not limit ourselves, and the executive branch continues to do the same. The American people knew this, and that is why they are concerned about President Obama's nomination of Elena Kagan to the U.S. Supreme Court. I am concerned that Ms. Kagan does not seem to recognize the limits the Constitution places on the Federal Government and does not understand or seem to understand the role of a Supreme Court Justice.

Ms. Kagan, of course, does not have a judicial record for us to base our decisions on. I do not think that alone should disqualify her, but it does make it difficult to discern how she will perform as a judge. Ms. Kagan has spent most of her career in political roles and

in the academic world. I do not think it is appropriate to cast my vote based only on her politics, but I do think her record shows she has been unable to separate her politics from her legal advice, even in her purely legal role in clerking for the Supreme Court. This is incredibly problematic.

I am concerned Ms. Kagan will only further the rapid expansion of the Federal Government, that her actions, particularly on issues such as military recruiting, second amendment rights, and abortion, show that her first allegiance is to her own political views. Her record and her testimony demonstrate that she is likely to limit the powers of the Federal Government only based on her personal political views and not based on the enumerated powers of the Constitution.

Our Founding Fathers established a Federal Government of limited power. They enumerated those powers and intended the list to be exclusive. In the 10th amendment, they specifically state: Powers not expressly granted to the Federal Government in the Constitution are reserved for the States. Everything not specifically named in the list of congressional powers was intended to be beyond Federal Government reach.

Unfortunately, legal progressives have sought to stretch that list far beyond its breaking point. Often they have chosen as their tool the commerce clause, which gives Congress the authority to regulate commerce amongst the States. Over the years, Congress has relied on the commerce clause to pass laws well beyond the scope of what our Founding Fathers intended, laws regulating matters totally unrelated to interstate commerce, such as how much wheat a farmer can grow on his own land for his own use or where a person might possess a firearm.

The Framers intended the limited nature of Congress's power as a method to protect the freedom of individual Americans to go about their lives without undue interference from government, but the limits the Constitution established matter only if our judges are willing to enforce them.

I am sad to say I do not believe Ms. Kagan will enforce those limitations. During her hearings, Senator COBURN asked Ms. Kagan a very basic question, but it is an important question that deserves a direct and straightforward answer. Senator COBURN asked this: ''If I wanted to sponsor a bill and it said, Americans, you have to eat three vegetables and three fruits every day, and I got it through Congress, and it is now the law of the land, does that violate the commerce clause?''

While Ms. Kagan acknowledged this would be a dumb law, she repeatedly stated the Court should give great deference to the will of Congress. She said: ''We can come up with sort of, you know, just ridiculous sounding laws and the principal protector against bad laws is the political branches themselves.''

I can certainly see why the American people are afraid, if the task of protecting against bad laws is left solely up to the political branch. Ms. Kagan had extreme difficulty in recognizing any limit at all on Federal powers. She simply refused to acknowledge that the Federal Government cannot pass a law telling American citizens what to eat.

Of course, I can see why the Obama administration supports her. The recently passed health care legislation is an exercise of unprecedented government power. The new health care law mandates—mandates—that Americans purchase health insurance.

By forcing Americans to purchase government-regulated insurance and by threatening them with IRS tax sanctions, the Obama administration is forcing its way into American lives in a way this country has never witnessed. Never before has the Federal Government forced Americans, under threat, to purchase a particular good or service.

I strongly disagree and most Americans disagree with this expansive view of the Federal Government's powers. We need Justices on the Supreme Court who are ready and willing to stand and defend the Constitution. We need Justices who recognize that there are, in fact, limits to the Federal Government's powers.

Not only must Supreme Court Justices recognize and enforce the limitations of the Federal Government, but they cannot owe any allegiance to advancing the political agendas of the President who appointed them. I do not believe Ms. Kagan fully appreciates this critical point. To the contrary, I believe that, if confirmed, she will be tied more to her own political agenda than to the Constitution of this great country.

Ms. Kagan's record is truly disconcerting to me. Throughout her career, her record reveals that she put politics above the law. Such a philosophy has no place in the Supreme Court. I oppose Ms. Kagan not because of her political views, I oppose her because she has not demonstrated an ability to leave those political views at the courthouse door. As such, she fails to meet the minimum requirement for any judicial appointment: impartial fidelity to the written law.

On military recruiting, Ms. Kagan has fought zealously to keep recruiters off our campuses during a time of war. As dean of Harvard Law School, she sent e-mails to the entire Harvard Law School community saying she abhors it, the military's don't ask, don't tell policy, and calling it a ''profound wrong,'' a ''moral injustice of the first order.''

The Obama administration has defended her actions against military recruiters saying these claims were overblown because she ultimately continued the practice of her predecessor in allowing the military to recruit through the school's veterans organization, which was primarily a social organization with fewer than 20 members.

Yet even this paltry action was only a way to continue to receive Federal funding for the school. A Federal law, known as the Solomon Amendment, denies Federal funding to any institution of higher education that has a policy or practice that either prohibits or, in effect, prevents the military from gaining access to the campus or access to students on campus for the purpose of military recruiting in a manner that is at least equal in quality and scope to the access to campus and to students that is provided by any other employer.

Even then she explains that doing so caused great distress. Ms. Kagan did everything she could to fight the Solomon Amendment, even signing on to an amicus brief in the Supreme Court in the case of Rumsfeld v. FAIR, with about 40 other law professors opposing the amendment. The Supreme Court unanimously rejected their argument. Not one Justice found it convincing—not Souter, not Breyer, not Ginsburg, not Stevens.

Ms. Kagan has demonstrated similarly poor judgment on the second amendment. When she was clerking for Supreme Court Justice Thurgood Marshall, she had the opportunity to consider Sandidge v. United States, a DC firearms case remarkably similar to the 2008 DC v. Heller case, in which the Court ultimately struck down the DC gun ban. In evaluating the case for Justice Marshall, she recommended that the Court not even consider the case.

Ms. Kagan wrote that the petitioner's ''sole contention is that the District of Columbia's firearms statutes violate his constitutional right to 'keep and bear arms,' '' and then said, ''I'm not sympathetic.'' That was her remark to Justice Thurgood Marshall.

Ms. Kagan also worked on several anti-second amendment initiatives in the Clinton administration. She worked on the Clinton administration's response to the Supreme Court's 1997 decision striking down parts of the Brady handbill law. The Court there said that Congress could not command State and local chief law enforcement officers to conduct Federal background checks on handgun purchasers. She considered such proposals as outlawing the sale of handguns where a chief law enforcement officer was unavailable or unwilling to conduct a background check, and also suggested that President Clinton issue an Executive Order to do the same.

She coauthored two policy memos advocating for events and gun control proposals, including legislation requiring background checks for all secondary market gun purchases, a ''gun tracing initiative,'' a new law holding adults liable for giving children easy access to guns, and a call for a new gun design ''that can be shot only by authorized adults.''

She drafted an Executive Order restricting the importation of dozens of

semiautomatic rifles that had been considered ''sporting'' and importable under the 1994 assault weapons ban. One of her colleagues in the White House described the plan by saying, ''We are taking the law and bending it as far as we can to capture a whole new class of guns.''

She also worked on an effort to allow background check information from lawful sales to be retained by law enforcement, and a member of her staff wrote, ''the longer we are able to keep records—even days, weeks—the more useful [it] will be as an overall law enforcement tool.

This, of course, is exactly what the gunners don't want.'' ''Gunners,'' a new word.

As Solicitor General, Ms. Kagan notably declined to submit a brief in support of the petitioner in the McDonald case—proably the biggest second amendment case in decades.

In working on the Volunteer Protection Act, Ms. Kagan expressed concern to the Department of Justice that ''Bad guy orgs'' like the NRA and the KKK might be included in a ''cumulative list'' of nonprofits whose volunteers would qualify for liability protection from lawsuits. To lump the NRA in with such a despicable organization is an insult to gun owners across America.

On partial-birth abortion and on taxpayer-funded abortions, Ms. Kagan also has a history of far-left advocacy on abortion issues, skewing even her legal judgments based upon personal politics.

When she was working for Justice Marshall, she urged him to vote to deny review of a lower court decision holding that prison inmates had a constitutional right to taxpayer-funded elective abortions, and even though she admitted that parts of the decision were ''ludicrous'' and that the facts showed no constitutional violations, she called it ''well-intentioned.'' She insisted the Court should deny review, and let this decision stand, because she was concerned that the Court might ''create some very bad law on abortion.''

Memos and handwritten notes during her time in the Clinton White House demonstrate that she pushed even the Clinton administration further to the left on the issue. President Clinton at the time had expressed a desire to ban all elective partial-birth abortions, to which, as she wrote in a handwritten note to the White House Counsel at the time, ''This is a problem. . . .'' She was the lead person working on a strategy to ensure that elective partial-birth abortions remained available without real restrictions. In one memo, she lays out her plan to support a ''ban'' that includes a ''general health exception'' that would make the ban largely meaningless.

Even when she heard that the American College of Obstetricians and Gynecologists was prepared to issue a statement stating that they ''could identify no circumstances under which [the partial-birth] procedure . . . would be the only option to save the life or preserve the health of the woman,'' she continued her fight.

In an internal White House memo, she notes that the medical statement ''would be a disaster'' for the White House's case against the partial-birth abortion ban. Documents show that she then drafted new language, hedging the original medical judgment, which the organization then published as their own, verbatim.

She then authored a memo to President Clinton arguing that his preferred approach, without the health exception, was unconstitutional, and that ''the groups will go crazy.'' Of course, in 2003, Congress passed, and President Bush signed, a law prohibiting partial-birth abortion, without such a health exception. The Supreme Court upheld that law.

Conclusion: I am afraid Ms. Kagan's record demonstrates that she substitutes her own political viewpoints for legal judgment. If confirmed, I believe Ms. Kagan will add to Washington's growing disregard for the Constitution of this country and its limits on government power, instead of protecting against intrusion and government actions, as the courts were designed to do.

I thank the Chair.

The ACTING PRESIDENT pro tempore. The Senator from New York.

Mr. SCHUMER. I am going to speak in support of Solicitor Elena Kagan for the Supreme Court in a minute, but just for a brief minute, I wish to speak about another very important issue, the legislation we are about to vote on, the legislation that will help teachers and police officers and firefighters and other workers retain their jobs.

I wish to thank my colleagues from Maine, Senator OLYMPIA SNOWE and Senator SUSAN COLLINS, for their courageous support of this measure. I would like to take a moment to talk about the critically important component of the legislation we will be voting on shortly.

That component is called the local share language that will send critical aid directly to county governments in any State. The counties in my State are always worried. When we send the money to Albany, they never see it or they see it much later and Albany takes a cut. But legislation that I have been able to put into the bill says: If the local area pays for part of Medicaid, then they should be reimbursed directly.

Anyone who is familiar with New York knows we have some of the highest property taxes in the Nation, way too high.

In fact, residents in West Chester County have the unfortunate distinction of having paid the most in property taxes in the entire country. Nassau County residents follow quickly. On the list of the top 20 counties with the highest property taxes, 5 are in New York. This provision, which will send a total of $530 million directly to local county governments, will have a tangible and important benefit for New Yorkers everywhere. Its No. 1 job is going to prevent counties from having to raise their already too high property taxes. County executives from one end of the State to the other—in Erie County, Nassau County, and others—have told me if they can get this money, this Medicaid relief—the Medicaid burden is so high—it will enable them to not raise property taxes. That is why I fought so hard to ensure this local share language was included in the first stimulus package and now in this bill. We know money sent to Albany far too often stays in Albany. The bill will not only provide property tax relief, it is an investment in our future. It will keep teachers in the classroom and cops on the beat and firefighters in the firehouses. A recession is no excuse to prevent the children from getting the best education they can get, no excuse for letting criminals get away from the dastardly crimes they commit.

Speaking of our children and their futures, I wish to mention one more important thing. We are making these investments without adding a dime to the Federal deficit. In fact, this bill, in addition to the benefits it contains, will reduce the deficit by over $1 billion. Congress should be focused like a laser on fighting unemployment and getting the economy humming on all cylinders again. This bill is part of that ongoing effort. For the good of the country, I implore my colleagues to support this sensible, important bill.

KAGAN NOMINATION

Madam President, later today, we will confirm an exceptionally well-qualified candidate to be an Associate Justice of the Supreme Court, and average Americans will be a step closer to once again having their voices heard in the highest Court in the land. This is because Solicitor General Elena Kagan brings both moderation and practical experience to a Court sorely in need of both.

Why, then, are so many fighting over General Kagan, a nominee who is mainstream through and through? Why are so many fighting? Our judicial system is at the tipping point. Of the six most conservative Justices in living memory, four are on the Court right now. Two of those four were confirmed within the last 5 years. It didn't happen by accident. Many conservatives decry what they call liberal judicial activism, but what they want is judicial activism of the right. Make no mistake about that. There can be activists on the left and on the right. Both seek to impose their views rather than follow the law.

The supposedly staunch opposition to judicial activism on the right has shown its true colors in this debate over a truly moderate and mainstream candidate. They themselves want rightwing judicial activism to pull this country into the past.

I have always said the far right is using the only unelected branch of government to do what it cannot do through the two elected branches—turn back history to a time when corporations and large special interests had more say in our courts than ordinary people. The right has created a kind of judicial activism that is as pernicious as the activism on the left. But they do not see it that way. Activism is their very ideology.

When George Bush was President and conservative majorities in the House and Senate still couldn't pull America back 100 years, they said: We need to do it by the Supreme Court. Hence, extremely conservative nominees were nominated and approved. As a result, our Court is on a collision course with precedent, with the other branches of government and, frankly, with the American people. General Kagan is exactly the antidote we need to put the Court back on the level, to put the bubble back on the plumb. General Kagan is a 6 or 7 on a scale of conservative to liberal, with 1 being the most conservative and the most liberal being 10. The President's nominees were ones, with an occasional two. They were way over to the far right. That is what independent, objective, not Democratic, not Republican analyses show. Again, four of the five most conservative Justices are on the Court right now.

The American people are reaping the bitter harvest from new laws that have been made and old precedents that have been overturned. Put simply, in decision after decision, this conservative, activist Court has bent the law to suit an ideology. At the top of the list, of course, is the Citizens United case where an activist majority of the Court overturned a century of well-understood law that regulated the amount of money special interests could spend to elect their own candidates to public office.

In the Ledbetter case, the Court upended decades of settled law and an agency interpretation to hold that a woman who received less pay than a male colleague is only discriminated against by the first paycheck, not by the last. There are many other examples, over and over—on the Clean Water Act, punitive damages against the Exxon Valdez, antitrust law where, again, favoring the special interests and turning back the law, this conservative majority has become the most activist Court certainly in decades. These truly activist decisions show little respect for Congress, for the executive branch, and for the well-settled understandings the American people commonly hold about our democracy. Yet somehow they label General Kagan as an activist, because she wants to follow precedent. That is not fair, and it is not true.

The record shows that General Kagan's record is replete with cases, articles, opinions, and discussion that shows and proves she is well within the judicial mainstream. First, in the course of her nomination hearing, she answered more than 700 questions. She answered them with a degree of candor and specificity we simply did not see when either Justices Alito or Roberts were before us, nominees who, I submit, actually had conservative agendas to hide from the American people, unlike General Kagan who has nothing to hide. When she was asked her views on interpreting the Constitution, she gave reasoned, detailed answers, the most reasoned, detailed answers I can remember from a nominee. She gave candid and detailed answers about her views of specific precedent governing the right to privacy, the commerce clause, freedom of the press, the second amendment, civil rights, cameras in the courtroom, even about her role as Solicitor General.

When Justice Alito was asked about his views of the takings clause, he gave an opaque answer about the value of owning private property, not even close to the specificity that General Kagan gave. But here we have Members on this side of the aisle saying they won't vote for Kagan because she is not specific enough, when they were in full support of Alito and Roberts who gave far less specific answers. Why? We know why. Again, the view on the right that they want their own brand of activism, judicial activism of the right to pull the Court and the country away from the mainstream.

My colleagues' continuing insistence that General Kagan is hiding and outside the mainstream agenda says more about their agenda than hers. It appears to me the only way to explain some of my colleagues' opposition to General Kagan is, they will vote for only ones and maybe a few twos on the Supreme Court, people way over to the right side. And if one believes in judicial activism of the far right, that is exactly what one would do.

A second sort of evidence of General Kagan's moderation is her stunningly broad bipartisan support. Each of the Solicitors General to serve under Democratic and Republican Presidents for the last 25 years has endorsed her. While at Harvard she got a standing ovation from, of all people, the Federalist Society, the training grounds for many of President Bush's conservative judicial nominees. She bridged the wide ideological divide between conservative and liberal faculty members. She brought together a faculty that had been fighting with one another. They came together under her thoughtful, pragmatic, and moderate decisions. As a result, to a Harvard faculty generally regarded as liberal, she bought in many conservative apppointments.

Why then does General Kagan not have more bipartisan support within this body? Why will she get fewer votes today than all but two Justices in the history of the Court, Justices Alito and Thomas? Again, one need look no further than the sheer amount of law that has been undone by the current Court in the last few years, law that protects ordinary Americans against special interests and corporate interests.

These are the wages of a war that the far right has mounted in order to remake the law. But General Kagan will not be a soldier in their fight and, hence, despite her moderation, does not get their vote.

Having studied the Court's decision in Citizens United, I am increasingly convinced that their war will not be won until we return to 1905, to what legal historians call the Lochner era of Supreme Court jurisprudence. In 1905, squarely in the age of the robber barons, big railroads and even bigger oil, a very conservative majority of Justices held that the people of New York, my State, could not pass laws that limited the legal workweek to 60 hours. This is because the Justices found, somewhere in the due process clause of the 14th amendment, that business had an inherent right to conduct itself without any government regulation, even if public safety was at stake. One hundred years later in Citizens United—same country, different setting, different rules—it does the same type of thing. Citizens United will go down as the 21st century example of 20th century Lochner. Allowing corporate and special interests, now because they have so much money, to pour that money into our political system without even disclosure, without even knowing who they are or what they are saying or why they are saying it, they are taking politics away, government away from the average person because of the influence of such large amounts of dollars.

Fortunately for Americans, General Kagan will be confirmed today, and gears of the time machine that is set to 1905 will be substantially slowed down. She will be confirmed with some bipartisan support, and I praise my colleagues on the other side who had the courage to break from the hard right. It takes courage to break from the extremes of either side. It is not easy. We all know that, no matter which party we are in. They have had the courage to do it. I salute them. She will be confirmed because she is mainstream, because enough of my colleagues recognize that her practical, real world experience will be a valuable asset to our judicial system and to our country.

And about practical experience, she has it in very real and tangible ways. She is an accomplished lawyer, first female dean of the Harvard Law School, a public servant who worked in all three branches of government. Yet some on the other side call her inexperienced. It is hard to believe. In fact, General Kagan's experience does measure up to her colleagues and predecessors. Like Justice Thomas and the late Justice Rehnquist, General Kagan held high-level political jobs in the executive branch. Like William O. Douglas and Felix Frankfurter, she spent much of her career in academia. And like 38 other Supreme Court Justices

before her, she does not have direct judicial experience, although like many of them, she clerked for a Supreme Court Justice.

Some of my colleagues have belittled General Kagan's experience as better suited to the backwaters of academia than a seat on the highest Court. I think this is wishful thinking on their part, perhaps because they know her real world experience will bring the Court back to the center.

And, in fact, it is clear that her experience at Harvard Law School demonstrates, rather than undermines, her qualifications.

Unlike every other current Justice on the Supreme Court, General Kagan ran a business. She understands much about how the real world functions that many of our current Justices simply do not.

She managed 500 employees and a budget of $160 million annually. Plus, this real world management experience was forged in an environment that was ideologically charged when she arrived.

But it was much less so when she left. Jack Goldsmith, whom Elena Kagan hired and who had been head of President Bush's Office of Legal Counsel, wrote of her:

It might seem over the top to say that Kagan combines principle, pragmatism, and good judgment better than anyone I have ever met. But it is true.

General Kagan's skills as a consensus builder are sorely needed on a fractious Court that often struggles to find the moderate ground between its two wings. A recent study showed that last term, the Court issued ''conservative'' opinions 65 percent of the time—more than any term in living memory.

The fact that the pull to the right is so demonstrable suggests also that these decisions are often quite broad—as in the Citizens United case, where the issues that were decided had not initially been briefed. Someone as persuasive and perceptive as General Kagan could help to narrow these decisions, to put together 5 to 4 majorities that issue mainstream, modest opinions.

An important component of General Kagan's pragmatic experience is her gender. As difficult as managing an ideologically diverse law school faculty is for anyone, General Kagan did it as the first woman. I have heard it said that Ginger Rogers did everything Fred Astaire did, but backwards and in high heels.

The exact details obviously don't apply to General Kagan, but the sentiment does.

Serving as the first female dean of Harvard, and the first female Solicitor General, has surely broadened her views and deepened her understanding of how Americans work and relate to one another. Her role as a woman in each of these institutions enriches the practical experience that she will bring to the Court.

This is the candidate whom many of my colleagues have branded as an out-of-the-mainstream liberal activist.

At the end of the day, it is fine to disagree with General Kagan's views and ideology. But labeling such a mainstream candidate as a liberal ideologue sets a troubling precedent. It moves the center further and further to the right.

I am confident that General Kagan is the right candidate for the Supreme Court at the right time. I will proudly cast my vote for her.

I yield the floor.

CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Morning business is closed.

FAA AIR TRANSPORTATION MODERNIZATION AND SAFETY IMPROVEMENT ACT

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will resume consideration of the House message to accompany H.R. 1586, which the clerk will report.

The legislative clerk read as follows:

House message on H.R. 1586, motion to concur in the House amendment to the Senate amendment to H.R. 1586, an act to modernize the air traffic control system, improve the safety, reliability, and availability of transportation by air in the United States, provide for modernization of the air traffic control system, reauthorize the Federal Aviation Administration, and for other purposes, with an amendment.

Pending:

Reid motion to concur in the amendment of the House to the amendment of the Senate to the bill, with Reid amendment No. 4575 (to the House amendment to the Senate amendment to the bill), in the nature of a substitute.

Reid amendment No. 4576 (to amendment No. 4575), to change the enactment date.

The ACTING PRESIDENT pro tempore. Under the previous order, all postcloture time is considered expired, except there will be 20 minutes of debate equally divided and controlled between the Senator from Montana, Mr. BAUCUS, and the Senator from South Carolina, Mr. DEMINT, or their designees.

The Senator from South Carolina.

Mr. DEMINT. Madam President, how long do I have to speak?

The ACTING PRESIDENT pro tempore. Five minutes.

Mr. DEMINT. Thank you, Madam President. I think I can do it in that time.

It seems we have time to do almost anything, but what we need to do is address the economy and jobs in this country. Just about every economist, from all across the political spectrum, says one of the most important things we can do right now is not to raise taxes. Yet taxes are scheduled to go up in 5 months on almost every American, including the businesses that create the jobs.

Of the two amendments I will offer here today, one amendment will stop the increase in income tax rates, and the second will stop the tax increases on small businesses that file as individuals.

Clearly, it makes no sense in the middle of a recession to raise taxes on individuals. An individual in South Carolina making $40,000 a year will pay $400 more next year in taxes if we do not act. A married couple with a combined income of $80,000 will see their taxes go up nearly $2,200. A married couple earning $160,000 combined could pay $5,500 in additional taxes.

The same thing will happen to small businesses that create the jobs. We will be taking money out of their accounts and putting it in our accounts. At a time when they need to keep the money to grow our economy and to hire workers, we do not need the money to continue to waste it on what we have been doing.

Consider the stimulus bill. A couple of my colleagues this week came out with a report showing where a lot of this stimulus money went: $62 million for a Pennsylvania tunnel that Governor Rendell said was a tragic mistake; $193,000 for voter perception of the stimulus bill. I could go on and on. This is not money we need to spend right now.

What we need to do is assure businesses and individuals that the tax rate this year will be the same next year so they can make good decisions that will move our economy forward.

MOTIONS TO SUSPEND

Madam President, in accordance with rule V of the Standing Rules of the Senate, I move to suspend rule XXII for the purpose of proposing and considering the following motion to commit, with instructions, H.R. 1586: I move to commit H.R. 1586 to the Committee on Finance with instructions to report the same back to the Senate with changes to include a permanent extension of the 2010 individual income tax rates, and to include provisions which decrease spending as appropriate to offset such permanent extension.

And, Madam President, in accordance with rule V of the Standing Rules of the Senate, I move to suspend rule XXII for the purpose of proposing and considering the following motion to commit, with instructions, H.R. 1586: I move to commit H.R. 1586 to the Committee on Finance with instructions to report the same back to the Senate with changes to include a permanent extension of current individual income tax rates on small businesses and provisions which decreases spending as appropriate to offset such permanent extension.

With that, Madam President, I reserve the remainder of my time and yield the floor.

The ACTING PRESIDENT pro tempore. The motions are pending.

The Senator from Montana.

Mr. BAUCUS. Madam President, this is a stunt. It is a gimmick. It is not serious, and it is very sad. We are in very difficult times. The economy is in recession, going out of recession. We are