to agree that Americans should have choices.

On all of those things we ought to be able to agree, if we were starting from scratch. If we do all those things, why do we need to create a so-called government-run insurance plan? That is the big difference of opinion we have in the committee and I believe on the Senate floor. A government-run insurance plan inevitably leads to a Washington takeover, of which we are having far too many these days: Washington takeovers of banks, Washington takeovers of insurance companies, Washington takeovers of student loans, Washington takeover of car companies. Why do we need a Washington takeover of our health system? And why would a government-run insurance plan lead to a Washington takeover?

Think of it this way. It is like putting an elephant in a room with some mice and saying: All right, fellows, compete. I think you know what would happen. After a little while only the elephant would be left. The elephant would be your only choice.

We have a very good example of what that elephant would look like. We call it Medicare, a program that every State has, that the Federal Government pays 62 percent of and the State pays 38 percent, on the average, and it provides health care to low-income Americans, those who are not on Medicaid.

I would like to find a way to require every Senator who votes for expanding Medicaid coverage to be required to go home and serve as Governor of his or her home State for 8 years and try to manage and pay for a Medicaid Program that is expanded to meet the needs of what we are trying to do. The only way you could like the Medicaid Program is if you have been in Washington a long time and you don't have to manage it, you don't have to pay for it, and you don't have to get your health care from it.

Let me be very specific. The Medicaid Program—and I dealt with this for years as Governor myself—is filled with lawsuits. It is riddled with Federal court consent decrees from 25 years ago that restrict the ability of government and legislators to make improvements. It is filled with inefficiencies and delays that take a Governor a year to get permission from Washington to do something 38 other States are doing and, I mentioned, it has intolerable waste of taxpayer dollars. The General Accounting Office says $32 billion, every year, is wasted in the Medicaid Programs. That is 10 percent of all the money that is appropriated to it.

The second thing wrong with Medicaid, what a Senator who goes home to serve as Governor would find out, it would require higher State taxes at a time when States are making massive cuts in services and are very nearly bankrupt. The State of Tennessee, by my own calculations—I believe it would require a 10-percent new State income tax by the year 2015, if the Senate were to take the Kennedy bill and the Baucus draft and enact them today.

Why would it do that? The State director of Medicaid in our State says if we increase Medicaid coverage to 150 percent of the Federal poverty level, that costs the State of Tennessee $572 million. If the Federal Government pays for that, the bill for the Federal Government for that increase is $1.6 billion, just for the Tennesseans covered.

It would also increase the pay for Medicaid providers to 110 percent of what Medicare pays physicians. That would add another $600 million in Tennessee, because Tennessee's Medicaid pays physicians 70 percent of what Medicare pays physicians. And Medicare pays physicians 80 percent of what private companies pay physicians.

So the increased costs, just for Tennessee of the Medicaid expansion in the Kennedy bill, is $1.2 billion, according to our State Medicaid directors. If the Federal Government has to pay the whole thing, it is $3.5 billion.

But then they are talking in the Finance Committee about shifting those costs back after 5 years to the States. So here comes a $1.2 billion bill to whoever is Governor of Tennessee in 2015.

Last thing, to put this into perspective, they tried to pass an income tax in Tennessee. Today, a 4-percent income tax would produce $400 million a year. We are talking about finding $1.2 billion a year.

The National Governors Association said increasing the Federal poverty level to 150 percent would increase the cost to $360 billion over 10 years in all the States, and increases in Medicare reimbursement would bring that total to half a trillion in all of the States. That is on top of the trillion dollars that the Congressional Budget Office has said Senator KENNEDY's bill already costs.

One of the effects of this is it would absolutely destroy our public colleges and universities across the country. It is already damaging them, because Governors and legislators are finding they barely have enough money to keep up with increasing Medicaid costs. They have nothing left for colleges and universities. So the quality of the universities goes down and the tuition at the universities goes up.

Finally, Senators serving as a Governor of their home State trying to manage an expanded Medicaid Program would find that most of the people, maybe a majority, would find a hard time getting service. Today, 40 percent of doctors nationally do not provide full service to Medicaid patients because of the low reimbursement rates.

So any version of the bill we are now considering in the Senate HELP Committee will explode into complexity and astronomical spending and will never succeed.

There is a better way. There are several better ways. Instead of stuffing low-income Americans into one failing government health care program, Medicaid, that now provides substandard care and creating a new government-run program, why do we not give low-income Americans government grants or subsidies so they can purchase private insurance as is provided by the Wyden-Bennett bill, for example, which has a cost of zero to the taxpayers, according to the Congressional Budget Office; or the Coburn-Burr bill, or Senator GREGG's bill, or the bill that Senator HATCH is working on with Senator CORNYN and others.

Those are the ways to meet our objectives. So here are our objectives once more: We want to provide health coverage to 300 million Americans, not just to the 47 million uninsured. We want for you a health care plan that you can afford. We want for you a plan in which you and your doctor make the decisions, not Washington, DC. We want a plan that emphasizes prevention and wellness. We want a plan that gives low-income Americans more of the same opportunities and choices for health care that most Americans already have. And we want a plan that does not make it harder for American businesses to compete in the world marketplace by adding to their cost.

We want, in the end, a program, a health care program your grandchildren and your children can afford and does not heap trillions of dollars of new debt up on them, that devalues the dollar they will eventually earn, and the quality of their lives.

As the President has repeatedly said, the best way to do that is in a bipartisan way. But in order to do that, we need to put aside the bill we are working on today in the HELP Committee and start over again in a truly bipartisan way to meet those objectives.

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

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

The legislative clerk proceeded to call the roll.

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

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

JUDICIAL CONFIRMATIONS

Mr. SPECTER. Mr. President, I sought recognition to comment on the forthcoming proceedings on the confirmation of Judge Sotomayor for the Supreme Court of the United States.

Judge Sotomayor comes to this position with an extraordinary record. Her academic standing at Princeton was summa cum laude, a graduate of the Yale Law School where she was a member of the Yale Law Journal Board of Editors.

Then in her practice, she was an assistant district attorney in Manhattan, a position which gives very extensive experience in many facets of the law,

something I know in my own experience years ago as an assistant district attorney.

She was in private practice with a very prestigious New York law firm, then served on the U.S. District Court, and more recently on the Court of Appeals for the Second Circuit.

The hearings will give Judge Sotomayor an opportunity to respond to a number of issues which have been raised about her background. I think Chairman LEAHY was correct in moving the hearing dates so that the confirmation process could be concluded in time for Judge Sotomayor, if confirmed, to sit with the Court during September when the Court will decide what cases it will hear.

A great deal of the important work of the Supreme Court of the United States is decided on what cases they decide not to hear. And perhaps that in some ways is as important as the cases they do hear, the cases they do decide. It is during that period of time when the decision is made of a grant of certiorari with four Justices deciding which cases to hear where the presence of a new Justice could be very important.

Confirmation hearings at an early stage will give Judge Sotomayor an opportunity to respond to many questions which are highly publicized. It is a very noteworthy matter when a nominee is being considered for the Supreme Court. There is a lot of publicity, and some of it is controversial.

As a matter of fairness, the earlier a nominee can have an opportunity to respond to those issues—a question has been raised about her decision on the New Haven firefighters case. Well, the nuances of disparate impact do not lend themselves too well to brief newspaper articles nor sound bites on the talk shows. They are made for Supreme Court hearings.

Her decision on property rights following the Kelo decision has been subjected to certain comment. There again, the nuances require a hearing. Or her statement about ''a wise Latina woman'' has been widely commented upon. And there again, she ought to have an opportunity to speak to those issues.

There have been some questions raised about her decisions under the Second Amendment, membership in the Belizean Grove, and a lot of speculation. So let's bring on the hearings where there will be an opportunity for Judge Sotomayor to present her views.

Based on what I have studied in her opinions, an extensive meeting which I had with her, she is a powerful intellect and prospectively she is likely to be able to have good comments. But that is what the confirmation process is all about. So let's move forward on it to the July hearing dates so we can consider her nomination and she can have an opportunity to respond to those issues.

There have been contrary views about the value of confirmation hearings. There are some who say they have outlived their usefulness, pointing historically to the fact that prior to 1955 or thereabouts there were very few confirmation hearings, only when there was some extraordinary question.

In recent decades the confirmation hearings have been extensive. Having participated in some 11 of those confirmation hearings, it is my judgment that they are very worthwhile, from many points of view.

It presents an opportunity to have a public focus on the appropriate role of the Supreme Court, a lot of very major questions about the respective roles on the separation of powers between the courts and Congress, on fact finding, and on the record.

There are important questions on the relative authority of the executive versus the Court on the issues of detention, of habeas; important issues on the relative power of the Congress versus the executive, as exemplified by the conflict between the Foreign Intelligence Surveillance Act, and the powers of the President under article II of the Constitution as Commander in Chief.

There are also hearings where it is a public focus on a civics lesson as to what the Court does, and public attention is focused on the Court. My preference would be, as I have noted on legislation I have introduced, which has been passed out of the Judiciary Committee in prior congresses, to have the proceedings of the Supreme Court televised under certain circumstances. That has not yet been approved. But I think the day will come when the Supreme Court hearings will be televised. I think they could be televised without having showboating, and real insight by the public as to what happens at the Supreme Court of the United States, just as hearings of the House of Representatives and the Senate are televised.

There are a lot of quorum calls, but there are debates that go on here for the public to see, where very major matters of public policy are decided.

At least the confirmation hearings do bring the role of the Court into focused hearings, I think, to a very beneficial effect.

We had the hearings on Judge Bork widely commented upon, very extensive hearings on his writings, his view of original intent. There was an opportunity for the American people and the scholars to see what was involved.

There has grown a myth that in that proceeding, the nominee was ''Borked,'' turning his name into a verb. My own view is that is not so; that the decision made in rejecting the confirmation of Judge Bork turned on the record, turned on what happened in the Judiciary Committee proceedings. When we took a look at original intent, it was way outside the mainstream of constitutional law, way outside the constitutional continuum. If we look to what Congress intended in 1868, when the equal protection clause was passed in the 14th amendment in this Chamber, the galleries were segregated. African Americans were on one side and Caucasians were on another. So the intent of Senators certainly could not have been that equal protection meant integration. But after Brown v. Board of Education in 1954, there was no doubt equal protection did mean integration.

The confirmation proceedings of Chief Justice Rehnquist were very informative. Chief Justice Rehnquist had more than 30 votes cast against his nomination in 1986. The issue arose as to the adequacy of his answering questions as to the role of the Supreme Court contrasted with the role of Congress. Chief Justice Rehnquist had written an interesting article for the Harvard Law Record, back in 1959, when he was a young practicing attorney, criticizing the Senate for the confirmation hearings of Justice Whittaker, not asking probing questions about due process of law but only extolling Justice Whittaker's virtues because he represented both the State of Kansas and the State of Missouri, living in one State and practicing law in the other. When Chief Justice Rehnquist was asked questions about the authority of Congress to take away the jurisdiction of the Supreme Court, he answered, finally, that the Congress did not have the authority on first amendment issues but declined to answer about the fourth amendment, fifth, sixth or eighth or to answer a question as to why he would respond on the first amendment but not on others.

There are some issues which are so firmly established that they are outside the respected rule that we don't ask nominees to say how they will decide upon cases that might come before them. But where we deal with issues such as Marbury v. Madison or Brown v. Board of Education or the authority of the Congress to take away jurisdiction of the Supreme Court in derogation of Marbury v. Madison, there are questions which ought to be answered.

The confirmation hearings provide an opportunity to go into detail about the functioning of the Court. A few years ago, when the issue of judicial pay was before the Congress, a number of Senators were invited to confer with the Justices. It provided an opportunity for me to see the conference room. I had been a member of the bar of the Supreme Court, argued a few cases there but had never seen their conference room. Frankly, it was quite an eye-opener—a small room, plain table, modest chairs, very intimate, very austere, quite some insight as to how close the Justices are together. When we talk about diversity, how long it took to get an African American on the Court, Thurgood Marshall did not go to the Court until 1967. Justice Lewis Powell made a comment reportedly that just having Thurgood Marshall in the room made a difference in perspective. Surprising, perhaps scandalous, that it took until 1981 to have a woman

on the Supreme Court. Now there have only been two. When I was asked for recommendations for the current vacancy, I recommended four women. To say that a woman's point of view is different and valuable is trite. When I was elected to the Senate in 1980, Senator Kastenbaum was the only woman in the Chamber. Senator Hawkins was elected that year. Now we have 16 and growing. It has been a very great addition and improvement to the deliberations here to have more women. Another woman on the Supreme Court would be a plus there, if Judge Sotomayor is confirmed.

Also, the diversity on being a Hispanic is important. We live in a very diverse society. When one sees that small Supreme Court Chamber, they can see the intimacy and can almost visualize the intellectual discussions and the powerhouses in that room and how the big cases are decided, with the Court having the last word on life and death, a woman's right to choose, medicinal issues of attempted suicide, the death penalty in capital cases, all the cutting edge issues of our society.

The confirmation proceeding of Judge Sotomayor will give us an opportunity to inquire into some very important issues on executive versus judicial authority, on the authority of the Court versus the Congress. Toward that end, I wrote a letter to Judge Sotomayor, dated June 15. I ask unanimous consent that this letter be printed in the RECORD at the conclusion of my remarks.

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

(See exhibit 1.)

Mr. SPECTER. As I note in the opening paragraph, our so-called courtesy call lasted more than an hour. At that time, I commented to her that I would be writing on other subjects on which I intended to comment at her hearing. She responded she would be glad to have that advance notice. The issue I focus on in this letter involves the respective authority of the Congress contrasted with the Court on the establishment of a record to warrant legislation which Congress enacts. I noted I had written to Chief Justice Roberts in a similar vein back on August 8, 2005, in advance of his confirmation hearings. I take up in my letter to Judge Sotomayor the same issue I took up with Chief Justice Roberts; that is, decisions of the Supreme Court in invalidating congressional enactments, declaring them unconstitutional, because of what the Court says is an insufficient record.

I note the case of United States v. Morrison, which involved legislation to protect women against violence, where the Court was denigrating, disrespectful to Congress, where the Court said the congressional findings were rejected because of our ''method of reasoning,'' as if there is some unique quality which comes to the nominee at the time of confirmation in walking across the green between the hearing room and the Supreme Court chambers.

A dissent by Justice Souter noted that the Court's judgment was ''dependent upon a uniquely judicial conference,'' as if the competence of the Congress was to a lesser extent. Justice Souter commented, in disagreeing with Chief Justice Rehnquist, who said there was an insufficient record, that ''the mountain of data assembled by Congress included a record on gender bias from a task force of 21 States, eight separate reports by the Congress.''

There was a similar finding by the Supreme Court of the United States in the case of Alabama v. Garrett, where the Supreme Court decided there was an insufficient record to support the enactment of title I of the Americans with Disabilities Act, even though there had been task force hearings in every State attended by more than 30,000 people, including thousands who had experienced discrimination, with more than 300 examples of discrimination by State Governments. Notwithstanding that, the Supreme Court in Garrett said there was an insufficient record.

In dissent, Justice Scalia called the test of congruence and proportionality a flabby test, a test that was ''an invitation to judicial arbitrariness and policy-driven decisionmaking.''

When we look to a standard of congruence and proportionality, it is very vague. Sharp divergence from the standard that Justice Harlan articulated in Maryland v. Wirtz in 1968, whether there was a rational basis for the congressional decision. So that as Justice Scalia noted in his dissent in Tennessee v. lane, the standard of congruence and proportionality was flabby. Justice Scalia went on to say:

> Worse still, it casts this Court in the role of Congress's task master. Under it the courts—and ultimately, this Court—must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy constitutional and proportional.

In the confirmation hearings of Chief Justice Roberts, he responded in a way very supportive of the role of Congress, where the Court should be deferential to the Congress. In response to a question by Senator DeWine, he said the Supreme Court ought to defer to congressional findings, and the answer will be in the RECORD with this letter.

In response to my questioning, Chief Justice Roberts said:

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

There, the Chief Justice comes to grips with the dominant role of the Congress that ought to be deferred to and says, when the court takes over, it is judicial lawmaking, which is something which is generally recognized to be in an area which ought not to be transgressed. ''Transgression'' is Chief Justice Roberts' word, that it is up to Congress to make the laws and up to the Court to interpret them.

In a hearing on the Voting Rights Act on April 29, 2009, Northwest Austin Municipal Utility District v. Holder, on the issue of the sufficiency of the record, here we have 16,000 pages of testimony, 21 different hearings, 10 months of action. Congress, in 2006, reauthorized the Voting Rights Act. In listening to the Supreme Court argument and reading the record—you cannot draw any conclusions totally—but it looks very much as if the Court may be on the verge of finding the record insufficient.

Chief Justice Roberts had this to say in the course of the argument on the Voting Rights Act:

> . . . one-twentieth of one percent of the submissions are not precleared. That, to me, suggests that they are sweeping far more broadly than they need to address the intentional discrimination under the Fifteenth Amendment.
>
> That's like the old elephant whistle. You know, I have this whistle to keep away the elephants. You know, well, that's silly. Well, there are no elephants, so it must work. I mean, if you have 99.98 percent of those being precleared, why isn't that reaching too broadly?

We will all be watching very closely to see what the Supreme Court of the United States does in the voting rights case and especially the opinion of Chief Justice Roberts, who has testified so emphatically at his confirmation hearing as to the role of the Congress being dominant, and it was, as he put it: ''. . . as a judge that you may be beginning to transgress into the area of making a law . . . ''

So those are issues which I am going to be addressing to Judge Sotomayor in the course of the confirmation hearings. I am not going to ask her how she is going to decide a case. That is outside the bounds. But I think it is fair to inquire as to what is the standard. Is it the Justice Harlan standard of rational basis or is it a standard of congruent and proportional—a standard which is of recent vintage in the City of Boerne v. Flores case, and having been applied in cases where it is very difficult to understand the conclusions of the Court, if you take Tennessee v. Lane, where one article of the Americans with Disabilities Act was upheld and contrast it with the Alabama v. Garrett case, where it was stricken.

Justice Scalia, in the argument of the voting rights case, took issue with the Congress on a 98-to-0 decision, suggesting if it is 98 to 0, it must not have been too carefully thought through.

It reminds me of the 98-to-0 vote Justice Scalia got on his confirmation and the many unanimous decisions of the

Supreme Court. I will ask to have printed in the RECORD a group of recent cases—10 or more—where Justice Scalia decided cases 9 to 0.

So if this legislative body—the Senate—votes 98 to 0 in favor of renewing the Voting Rights Act, relying upon the extensive record, which I have cited, that is not a sign of weakness. That is not a sign that the Senate does not know what it is doing with a 98-to-0 vote.

So the questions which I have posed for Judge Sotomayor are these:

First: Would you apply the Justice Harlan rational base standard or the congruent and proportionality standard?

Second: What are your views on Justice Scalia's characterization that the ''congruence and proportionality standard'' is a flabby test and an ''invitation to judicial arbitrariness and policy-driven decisionmaking,'' where Justice Scalia says that is the way for the courts to make law on a standard which is so vague?

Third: Do you agree with Chief Justice Rehnquist's conclusion that the Violence Against Women legislation was unconstitutional because of Congress's ''method of reasoning''?

And fourth: Do you agree with the division of constitutional authority between Congress and the Supreme Court as articulated by Chief Justice Roberts in his responses, cited in this letter, to questions posed at his hearing by Senator DeWine and myself?

I do believe there will be an opportunity for very important issues to be presented to the nominee. Based on what I have seen of her, in reviewing her record, and the meeting I had with her—I have noted her excellent resume—I am looking forward to giving her an opportunity to answer the many questions that have been raised in the press, where she will have more of an opportunity than to have a sound bite but to give commentary on her record in support of her nomination.

I ask unanimous consent to have printed in the RECORD the material to which I referred.

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

RECENT UNANIMOUS DECISIONS WITH OPINIONS AUTHORED BY JUSTICE SCALIA

Republic of Iraq v. Beaty,—S.Ct.—, 2009 WL 1576569 (2009).

Virginia v. Moore, 128 S.Ct. 1598 (2008).

Beck v. Pace Intern. Union, 551 U.S. 96 (2007).

U.S. ex rel Goodman v. Georgia, 546 U.S. 151 (2006).

U.S. v. Grubbs, 547 U.S. 90 (2006).

Domino's Pizza, Inc. v. McDonald, 546 U.S. 470 (2006).

Merck KGAA v. Integra Lifesciences I, Ltd., 545 U.S. 193 (2005).

Devenpeck v. Alford, 543 U.S. 146 (2004).

Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004).

Barnhart v. Thomas, 540 U.S. 20 (2003).

Pacificare Health Systems, Inc. v. Book, 538 U.S. 401 (2003).

Mr. SPECTER. I thank the Chair and yield the floor.

EXHIBIT 1

U.S. SENATE,
Washington, DC, June 15, 2009.

Hon. SONIA SOTOMAYOR,
The Department of Justice,
Washington, DC.

DEAR JUDGE SOTOMAYOR: When we concluded our meeting which lasted more than an Hour, I commented that I would be writing to you on other subjects which I intended to cover at your hearing, and I appreciated your response that you would welcome such advance notice.

In the confirmation hearing for Chief Justice Roberts, there was considerable discussion about the adequacy of congressional fact finding to support legislation. This issue is again before the Supreme Court on the reauthorization of the Voting Rights Act where the legislation is challenged on the ground that there is an insufficient factual record. At our hearing, I would uphold like your views on what legal standards you would apply in evaluating the adequacy of a Congressional record. In the 1968 case Maryland v. Wirtz, Justice Harlan's rationale would uphold an act of Congress where the legislature had a rational basis for reaching a regulatory scheme. In later cases, the Court has moved to a ''congruence and proportionality standard.''.

In advance of the hearing for Chief Justice Roberts by letter dated August 8, 2005. I wrote him in part:

''members of Congress are irate about the Court's denigrating and, really, disrespectful statements about Congress's competence. In U.S. v. Morrison, Chief Justice Rehnquist, speaking for five members of the Court, rejected Congressional findings because of ''our method of reasoning''. As the dissent noted, the Court's judgment is ''dependent upon a uniquely judicial competence'' which implicitly criticizes a lesser quality of Congressional competence.

In Morrison, there was an extensive record on evidence establishing the factual basis for enactment of the Violence Against Women legislation. In dissent. Justice Souter noted . . . the mountain of data assembled by Congress here showing the effects of violence against women on interstate commerce,'' and added:

''The record includes reports on gender bias from task forces in 21 states and we have the benefit of specific factual finding in eight separate reports issued by Congress and its committees over the long course leading to its enactment.''

In a subsequent letter to Chief Justice Roberts dated August 23, 2005, I wrote concerning Alabama v. Garrett where Title I of the Americans with Disabilities Act was based on task force field hearings in every state attended by more than 30,000 people including thousands who had experienced discrimination with roughly 300 examples of discrimination by state governments.

Notwithstanding those findings, the Garrett Court concluded in a five to four decision:

''The legislative record of the Americans with Disabilities Act, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.''

In another five to four decision, the Court in Lane v. Tennessee concluded Title II of the Americans with Disabilities Act met the ''congruence and proportionality standard''. There, Justice Scalia dissented attacking the ''congruence and proportionality standard'' calling it a ''flabby test'' and ''invitation to judicial arbitrariness and policy driven decision making'':

''Worse still, it casts this Court in the role of Congress's taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy constitutional and proportional. As a general matter, we are ill-advised to adopt or adhere to constitutional rules that bring us into conflict with a coequal branch of Government.''

During the confirmation hearing of Chief Justice Roberts, he testified extensively in favor of the Court's deferring to Congress on fact finding. In response to questions from Senator DeWine, he testified:

''. . . The reason that congressional fact finding and determination is important in these cases is because the courts recognize that they can't do that, Courts can't have, as you said, whatever it was, the 13 separate hearings before passing particular legislation. Courts—the Supreme Court can't sit and hear witness after witness after witness in a particular area and develop that kind of a record. Courts can't make the policy judgments about what type of legislation is necessary in light of the findings that are made''. . . 'We simply don't have the institutional expertise or the resources or the authority to engage in that type of a process. So that is sort of the basis for the deference to the fact finding that is made. It's institutional competence. The courts don't have it. Congress does. It's constitutional authority. It's not our job. It is your job. So the defense to congressional findings in this area has a solid basis.''

In response to my questioning, Chief Justice Roberts said:

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

The Supreme Court heard oral argument in Northwest Austin Municipal Utility District v. Holder on April 29, 2009 involving the sufficiency of the Congressional record on reauthorizing the Voting Rights Act. While too much cannot he read into comments by justices at oral argument, Chief Justice Roberts' statements suggested a very different attitude on deference to Congressional fact finding than he expressed at his confirmation hearing. Referring to the argument that ''. . . action under Section 5 has to be congruent and proportional to what it's trying to remedy,'' Justice Roberts said that:

''. . . one-twentieth of 1 percent of the submissions are not precleared. That, to me, suggests that they are sweeping far more broadly than they need to, to address the intentional discrimination under the Fifteenth Amendment.''

Chief Justice Roberts went to say:

''Well, that's like the old—you know, it's the elephant whistle. You know, I have this whistle to keep away the elephants. You know, well, that's silly. well, there are no elephants, so it must work. I mean if you have 99.98 percent of these being precleared, why isn't that reaching far too broadly.''

As a factual basis for the 2007 Voting rights Act, Congress heard from dozens of witnesses over ten months in 21 different hearings. Applying the approach from Chief Justice Roberts' confirmation hearing, that would appear to satisfy the ''congruence and proportionality standard''.

My questions are:

1. Would you apply the Justice Harlan ''rational basis'' standard or the ''congruence and proportionality standard''?

2. What are your views on Justice Scalia's characterization that the ''congruence and proportionality standard'' is a ''flabby test'' and ''an invitation to judicial arbitrariness and policy driven decision making''?

3. Do you agree with Chief Justice Rehnquist's conclusion that the Violence Against Women legislation was unconstitutional because of Congress's ''method of reasoning''?

4. Do you agree with the division of constitutional authority between Congress and the Supreme Court articulated by Chief Justice Roberts in his responses cited in this letter to questions posed at his hearing by Senator DeWine and me?

Sincerely,

ARLEN SPECTER.

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. CORKER. Mr. President, I ask unanimous consent to speak in morning business.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

(The remarks of Mr. CORKER pertaining to the introduction of S. 1280 are printed in today's RECORD under ''Statements on Introduced Bills and Joint Resolutions.'')

APPROPRIATIONS

Mr. CORKER. Mr. President, I would like to mention one other issue in closing. A large number of Senators signed a letter to the leader asking that we do our business in a very thoughtful way as it relates to appropriations. Each year we find ourselves in a position where we end up with an omnibus bill that most of us feel very uncomfortable signing into law.

We ask that the appropriations bills be passed in such a manner that we have eight of them passed individually by the August recess.

I know, today, we are stuck on a bill, and I realize there is some stalling that is taking place. I have to question why we are focused on a tourism bill today when we still have not begun our appropriations process.

So I will say to the leader, I hope he will move on with doing the appropriations in an appropriate order so, as I have mentioned, we will have at least eight of those passed by the recess so we can do our citizens' work in the most appropriate manner.

Mr. President, I yield the floor and thank you for the time.

The PRESIDING OFFICER. The Senator from New Mexico.

Mr. UDALL of New Mexico. Mr. President, I ask unanimous consent to speak in morning business.

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

HONORING OUR ARMED FORCES

ARMY SPECIALIST CHRISTOPHER KURTH

Mr. UDALL of New Mexico. Mr. President, I rise to honor a proud son of Alamogordo, NM. Army SPC Chris Kurth died on Thursday, June 4, after his vehicle was struck by an antitank grenade. He was 23 years old.

In Iraq, Chris was responsible for escorting convoys. But this job description conveys none of the risk or the courage involved in the job. The military can secure a town or a base, but somebody must still travel the roads that cannot be secured. Christopher Kurth was responsible for undertaking this act of courage.

Chris knew how dangerous his job could be when he began his last mission. He was on his second tour of duty, and he had just recovered from a neck wound that won him a Purple Heart. But for Chris, success was defined by keeping his fellow soldiers safe. And that is what he died fighting to do.

The values reflected in this duty are as important in peace as they are in war. His job was to protect his fellow soldiers—to be a good friend in the most difficult of times. By serving them, he served his country.

The characteristics that made Chris Kurth a good soldier also made him a good friend when he was back in Alamogordo. They made him a good teacher when he volunteered to tell students at his former high school about his life as a soldier. They made him a loving—and loved—son, brother, and husband.

Chris Kurth lost his life keeping American soldiers safe. He was a proud soldier and a good man.

My thoughts are with Chris's parents, with his wife, and with all those who knew and loved him. I ask you to join me today in remembering his service.

NAVAJO CODE TALKERS

Mr. UDALL of New Mexico. Mr. President, I rise to mark a solemn moment for the Navajo Nation and for our country.

In the past month, three of America's veterans passed away: Willie Begay, Thomas Claw, and John Brown, Jr. These men were members of the small group of marines known as the Navajo Code Talkers. Their story is one of the most compelling in American military history.

In May of 1942, 29 Navajo Indians arrived at Camp Pendleton in California. They were there to develop a code that could be deployed easily and would not be cracked by Japanese cryptographers.

Over the course of the war, the original 29 became a team of roughly 400 Navajos responsible for building and using their code. Their success in that mission helped the Marines capture Iwo Jima. It contributed to the American victory, and it saved untold numbers of allied soldiers.

As most World War II veterans were returning home with stories of courage and victory, the Navajo Code Talkers were ordered to keep their story secret. Their mission was classified. Only in 1968 was it revealed to the world. And only in 2001 did these men finally receive the recognition they deserved when they were presented with Congressional Medals.

It is often said that America's diversity makes her strong. During World War II, this country's cultural diversity contributed to America's military strength in a very real and concrete way. Because the Navajo language had survived and it had been passed down, Americans had a code that the Japanese were never able to crack—a weapon they could not counter.

America is unique among the countries of the world. Almost every other country on Earth finds its sense of solidarity in a common race and a common culture. Even countries as diverse as our own trace their heritage to some imagined community older than their political institutions. Our Nation has always defined itself by its ideals, not by race or culture. Although we have not always lived up to this vision of a truly multicultural democracy, it has guided our development and spurred our progress.

When the Navajo Code Talkers first arrived at Camp Pendleton, there were those who considered them less than fully equal. U.S. law had only acknowledged Native Americans as citizens for 17 years when our country entered World War II. Many of the code talkers were born as noncitizens in a land that had belonged to their people before the Europeans knew it existed. Yet 45,000 of 350,000 Native Americans in this country served in the Armed Forces during that conflict, including 400 Navajo Code Talkers.

The Native Americans who signed up to serve this country in the Armed Forces were sending a message that they, just as much as anyone else, were citizens of the United States of America, their people were just as much a part of this country's cultural tapestry as any other.

In the Navajo code, the word for America was ''our mother.'' As one code talker has explained:

> ''Our Mother'' stood for freedom—our religion—our ways of life. And that's why we went in.

The Navajo marines identified their culture with their country. When they fought, they fought for both. In fact, values integral to the Navajo experience spurred them to fight in America's war against tyranny. As Americans who faced bigotry and injustice, they eagerly signed on to free others from oppression. As individuals who had lived with the legacy of aggression against their people, they felt keenly the need to prevent other acts of aggression, even if these acts were being perpetrated on the other side of the world.

The passing of the three code talkers—thousands of miles and dozens of years from the events that made them heroes—should make us all remember the great patriotism and honor all the code talkers displayed. It should make