

this time. Rather, I think the appropriate place for coal-to-liquids technology will be in the Energy bill and there will be an Energy bill, of that I am positive. There is a question of what will be contained in that energy bill, but there will be one, I am sure, brought up on the floor of this body to help make this country more secure in its national energy position so we are less reliant on foreign countries to produce energy.

#### MONTANA DISASTERS

Mr. BAUCUS. I also rise to call attention to a pair of disasters that recently struck Montana and pledge my support for the recovery effort. Last week the Big Sandy Creek spilled over its banks and flooded into the Lower Box Elder Road and the surrounding area. The flooding displaced 30 families at the Rocky Point Boy's Indian Reservation in north central Montana.

As is the tradition in our States, folks with the Chippewa Creek Tribe are pulling together to help one another. The Vo-Tech Center in Box Elder has been converted to a makeshift home for those left homeless by the flooding. The American Red Cross of Montana is providing beds and other services at that center. The area is still under a stage two flood advisory. I just talked to the chairman of the Rocky Boy's about half an hour ago, who told me there have been about 7 inches of rain there and he had an extremely difficult time with the water problems and sewage problems. Homes have been displaced. He has never seen anything like it.

Initial estimates exceed \$1 million at this point. I will work with the Bureau of Indian Affairs and Indian Health Service to see that Rocky Boy's receives the assistance they need. I might add I will work with any agency that is relevant to make sure the people at Rocky Boy's Indian Reservation receive the assistance they need.

Just as folks at Rocky Boy's began assessing damage yesterday afternoon, another disaster beset Montana. A tornado with wind speeds between 111 and 135 miles an hour crashed into our State's largest city—Billings. Folks in Yellowstone County have not seen such a destructive twister since 1958.

The tornado hurled hail the size of golf balls, ripped the roof off our sports arena, the Metrapark—that is the largest facility, I might add, in Billings, MT. After striking it, it tore through a number of nearby small businesses. The tornado left a path of destruction in its wake—power outages, flooding in some places up to 2 feet of water. The winds damaged at least 10 businesses in Billings: the Main Street Casino, a laundromat, a dance studio, Reiter's Marina. The tornado also ripped the roof from Fast-Break Auto Glass. The roof was later found in a nearby creek. Witnesses saw big pieces of metal hanging from power lines near the arena. Insulation and metal debris was

thrown far across town. One look at these photos gives one a sense of the size of the destruction.

I might add, if you look at the photo to my right, that is what is left of the Metra arena, Billings' largest facility. You can see the Metra almost entirely destroyed, roof completely gone, walls collapsing. I talked to two county commissioners and the mayor today and they explained the deep problems they have with reconstructing this facility, to say nothing about all the bookings that have been made about 2 years in advance that have to be dealt with because of this destruction.

The Metra sports arena is part of the fabric of life in Billings. Montanans gathered at the Metra to cheer on the Billings Outlaws, for example, an indoor football team. Fans say their home field advantage is recognized around the league. The arena also houses the Chase Hawks Memorial Rough Stock Rodeo. Lots of events take place in this arena. I was there a couple of months ago for a high school graduation. Event after event occurs, it seems, around the clock at this arena. It is totally destroyed by the tornado.

The Metra was also visited by American Presidents—President Kennedy, President Reagan, President Clinton, and President Bush. It is part of our State's history. In Montana we work together to solve problems and we will work together through this disaster as well. Yesterday, utility crews worked to shut off a gas leak at a commercial strip mall near Main Street. Crews were also working to repair downed power lines.

Yellowstone County requested a state of emergency, requested that declaration from our Governor last night. They were given an oral declaration and clearly will receive a written declaration today.

The Montana National Guard has deployed to the area to help keep security around the crumbling arena. I am committed to working with local officials, the Governor, as well as Senator TESTER and Congressman REHBERG to coordinate any and all possible Federal assistance, coordinating with all Federal agencies to make sure all resources are available when requested. I have sent my staff to work with local and State officials on the ground to assess the extent of the damage and I will be there every step of the way during the recovery and rebuilding process.

My thoughts and prayers are with the people of Billings, particularly those injured during the storm and those whose property and homes were damaged by the winds.

Today, business owners are returning to the rubble that once was their place of business, their livelihood. Many homeowners are drying out as floodwaters recede. They will work hard in the coming days and months to make sure every Federal resource is made available to help folks in Billings as well as the Rocky Boy's Reservation as

they recover from these twin disasters. Our officials have done this before and nobody can handle this better than the great team we have in Montana.

I yield the floor.

The PRESIDING OFFICER. The Senator from Mississippi.

Mr. WICKER. I ask unanimous consent Senator CARDIN and I be allowed to engage in a colloquy for 20 minutes.

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

#### INTERNATIONAL DUE PROCESS RIGHTS

Mr. WICKER. Mr. President, I am appreciative that I am able to join today with my friend and colleague, Senator CARDIN. I appreciate his joining me today to discuss an issue of great concern to both of us and to human rights advocates around the world. That is the ongoing trial in Russia of Mikhail Khodorkovsky and his business partner Platon Lebedev. In June of last year, Senator CARDIN joined me in introducing a resolution urging the Senate to recognize that Khodorkovsky and Lebedev have been denied basic due process rights under international law for political reasons. It is particularly appropriate, I think, that Senator CARDIN and I be talking about this this afternoon because in a matter of days, Russian President Medvedev will be coming to the United States and meeting with President Obama. I think this would be a very appropriate topic for the President of the United States to bring up to the President of the Russian Federation.

I can think of no greater statement that the Russian President could make on behalf of the rule of law and a movement back toward human rights in Russia than to end the show trial of these two individuals and dismiss the false charges against them.

Since his conviction, Khodorkovsky has spent his time either in a Siberian prison camp or a Moscow jail cell. Currently, he spends his days sitting in a glass cage enduring a daily farce of a trial that could send him back to Siberia for more than 20 years. Amazingly, Mikhail Khodorkovsky remains unbroken.

I think it appropriate that President Obama and Secretary of State Clinton have committed to resetting relations with the country. I support them in this worthwhile goal. Clearly, our foreign relations can always stand to be improved. I support strengthening our relations, particularly with Russia. However, this strengthening must not be at the expense of progress on the issue of the rule of law and an independent judiciary. The United States cannot publicly extol the virtues of rule of law and an independent judiciary and at the same time turn a blind eye to what has happened to Khodorkovsky and Lebedev.

I urge President Obama and Secretary Clinton to put the release of these two men high on the agenda as

we continue to engage with Russia, and high on the agenda for President Medvedev's upcoming meeting here in Washington, DC.

Mr. CARDIN. Mr. President, I thank Senator WICKER for taking this time for this colloquy. He has been a real champion on human rights issues and on bringing out the importance for Russia to move forward on a path of democracy and respect for human rights. He has done that as a Senator from Mississippi. He has done that as a very active member of the Helsinki Commission. I have the honor of chairing the Helsinki Commission, which I think is best known because of its fight on behalf of human rights for the people, particularly in those countries that were behind the Iron Curtain—particularly before the fall of the Soviet Union, where we were regularly being the voices for those who could not have their voices heard otherwise because of the oppressive policies of the former Soviet Union.

So in the 1990s, there was great euphoria that at the end of the Cold War, the reforms that were talked about in Russia—indeed, the privatization of many of its industries—would at last bring the types of rights to the people of Russia that they so needed. But, unfortunately, there was a mixed message, and in the 1990s, I think contrary to Western popular opinion at the time, Russia did not move forward as aggressively as we wanted with freedom and democracy.

It is interesting that Mikhail Khodorkovsky, who was part of the Communist elite, led the country into privatization in the right way. He took a company, Yukos Oil Company, and truly made it transparent and truly developed a model of corporate governance that was unheard of at the time in the former Soviet Union and unheard of in the Russian Federation, and he used that as a poster child to try to help the people of Russia. He started making contributions to the general welfare of the country, which is what we would like to see from the business and corporate community. He did that to help his own people. But he ran into trouble in the midst of the shadowy and violent Russian market, and his problems were encouraged many times by the same people who we thought were leading the reform within the Russian Federation.

By 1998, with the collapse of the ruble, the people of Russia were disillusioned; they found their prosperity was only temporary. The cost of imports was going up. The spirit of nationalism, this nationalistic obsession, became much more prominent within the Russian Federation, and the move toward privatization lost a lot of its luster.

The rise of Mr. Putin to power also established what was known as vertical power, and independent companies were inconsistent with that model he was developing to try to keep control of his own country. Therefore, what he

did under this new rubric was to encourage nationalization spirit, to the detriment of independent companies and to the detriment of the development of opposition opportunity, democracy, and personal freedom. We started to see the decline of the open and free and independent media.

All of this came about, and a highly successful and independent company such as Yukos under the leadership of Mikhail Khodorkovsky was inconsistent with what Mr. Putin was trying to do in Russia. As a result, there was a demise of the company, and the trials ensued. My friend Senator WICKER talked about what happened in the trial. It was a miscarriage of justice. It was wrong. We have expressed our views on it. And it is still continuing to this day. I thank Senator WICKER for continuing to bring this to the Members' attention and I hope to the people of Russia so they will understand there is still time to correct this miscarriage of justice.

Mr. WICKER. I thank my colleague.

I will go on to point out that things started coming to a head when Mr. Khodorkovsky started speaking out against the Russian Government, led by President Putin, and his company that he headed, Yukos, came into the sights of the Russian Federation.

Mr. Khodorkovsky visited the United States less than a week before his arrest. He was in Washington speaking to Congressman Tom Lantos, the late Tom Lantos, a venerated human rights advocate from the House of Representatives, who had seen violations of human rights in his own rights. Mr. Khodorkovsky told Congressman Lantos that he had committed no crimes but he would not be driven into exile. He said: "I would prefer to be a political prisoner rather than a political immigrant." And, of course, a political prisoner is what he is now.

Shortly after his arrest, government officials accused Yukos Oil of failing to pay more than \$300 billion in taxes. At the time, Yukos was Russia's largest taxpayer. Yet they were singled out for tax evasion. And PricewaterhouseCoopers had recently audited the books of Yukos, and the government tax office had approved the 2002 to 2003 tax returns just months before this trumped-up case was filed.

The Russian Government took over Yukos, auctioned it off, and essentially renationalized the company, costing American stockholders \$7 billion and stockholders all around the country who had believed Russia was liberalizing and becoming part of the market society. A Swiss court has ruled the auction illegal. A Dutch court has ruled the auction illegal. But even more so, they tried these two gentlemen and placed them in prison. Mr. Khodorkovsky apparently had the mistaken impression that he was entitled to freedom of speech, and we discovered that in Russia, at the time of the trial and even today, he was not entitled, in the opinion of the government, to his freedom of speech.

A recent foreign policy magazine called Khodorkovsky the "most prominent prisoner" in Vladimir Putin's Russia and a symbol of the peril of challenging the Kremlin, which is what Mr. Khodorkovsky did.

I would quote a few paragraphs from a recent AP story by Gary Peach about the testimony of a former Prime Minister who actually served during the Putin years:

A former Russian prime minister turned fierce Kremlin critic came to the defense of an imprisoned tycoon on Monday—

This is a May 24 article—

telling a Moscow court that prosecutors' new charges of massive crude oil embezzlement are absurd.

What we now find is that when Mr. Khodorkovsky is about to be released from his first sentence, new charges have arisen all of a sudden. After years and years of imprisonment in Siberia, new charges have arisen.

Mikhail Kasyanov, who headed the government in 2000-2004, told the court that the accusations against Khodorkovsky, a former billionaire now serving an eight-year sentence in prison, had no basis in reality.

This is a former Prime Minister of the Russian Federation.

Prosecutors claim that Khodorkovsky, along with his business partner [who is also in prison] embezzled some 350 million tons—or \$25 billion worth—of crude oil while they headed the Yukos Oil Company.

That's all the oil Yukos produced over six years, from 1998 to 2003. I consider the accusation absurd.

He said that while Prime Minister, he received regular reports about Russia's oil companies and that Yukos consistently paid its taxes. Kasyanov, who served as Prime Minister during most of President Putin's first term, said that both the current trial and the previous one, which ended with a conviction, were politically motivated. So I would say this is indeed a damning accusation of the current trial going on, even as we speak, in Moscow.

Mr. CARDIN. Senator WICKER has pointed out in I think real detail how the dismantling of the Yukos Oil Company was done illegally under any international law; it was returning to the Soviet days rather than moving forward with democratic reform. As Senator WICKER has pointed out, the personal attack on its founders—imprisoning them on charges that were inconsistent with the direction of the country after the fall of the Soviet Union—was another miscarriage of justice, and it is certainly totally inconsistent with the statements made after the fall of the Soviet Union.

The early Putin years were clearly a return to nationalism in Russia and against what was perceived at that time by the popular Western view that Russia was on a path toward democracy. It just did not happen. And it is clearly a theft of a company's assets by the government and persecution, not prosecution, of the individuals who led the company toward privatization, which was a clear message given by the

leaders after the fall of the Soviet Union.

This cannot be just left alone. I understand the individuals involved may have been part of the elite at one time within the former Soviet Union. I understand, in fact, there may have been mixed messages when you have a country that is going through a transition. But clearly what was done here was a violation of their commitments under the Helsinki Commission, under the Helsinki Final Act. It was a violation of Russia's statements about allowing democracy and democratic institutions. It was a violation of Russia's commitments to allow a free market to develop within their own country. All of that was violated by the manner in which they handled Mr. Khodorkovsky as well as his codefendant and the company itself. And it is something we need to continue to point out should never have happened.

The real tragedy here is that this is an ongoing matter. As Senator WICKER pointed out, there is now, we believe, an effort to try him on additional charges even though he has suffered so much. And it is a matter that—particularly with the Russian leadership visiting the United States, with direct meetings between our leaders, between Russia and the United States—I hope can get some attention and a chance for the Russian Federation to correct a miscarriage of justice.

Mr. WICKER. Indeed, the second show trial of Mr. Khodorkovsky has entered its second year. We have celebrated the anniversary of the second trial.

I ask unanimous consent to have printed in the RECORD an editorial by the Washington Post dated June 9, 2010, at this point.

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

[From the Washington Post, June 9, 2010]  
SHOW TRIAL: SHOULD TIES TO RUSSIA BE LINKED TO ITS RECORD ON RIGHTS?

Russia's government has calculated that it needs better relations with the West to attract more foreign investment and modern technology, according to a paper by its foreign ministry that leaked to the press last month. Prime Minister Vladimir Putin has recently made conciliatory gestures to Poland, while President Dmitry Medvedev sealed a nuclear arms treaty with President Obama. At the United Nations, Russia has agreed to join Western powers in supporting new sanctions against Iran.

Moscow's new friendliness, however, hasn't led to any change in its repressive domestic policies. The foreign ministry paper says Russia needs to show itself as a democracy with a market economy to gain Western favor. But Mr. Putin and Mr. Medvedev have yet to take steps in that direction. There have been no arrests in the more than a dozen outstanding cases of murdered journalists and human rights advocates; a former KGB operative accused by Scotland Yard of assassinating a dissident in London still sits in the Russian parliament.

Perhaps most significantly, the Russian leadership is allowing the trial of Mikhail Khodorkovsky, a former oil executive who has become the country's best-known polit-

ical prisoner, to go forward even though it has become a showcase for the regime's cynicism, corruption and disregard for the rule of law. Mr. Khodorkovsky, who angered Mr. Putin by funding opposition political parties, was arrested in 2003 and convicted on charges of tax evasion. His Yukos oil company, then Russia's largest, was broken up and handed over to state-controlled firms.

A second trial of Mr. Khodorkovsky is nearing its completion in Moscow, nearly a year after it began. Its purpose is transparent: to prevent the prisoner's release when his first sentence expires next year. The new charges are, as Mr. Putin's own former prime minister testified last week, absurd: Mr. Khodorkovsky and an associate, Platon Lebedev, are now accused of embezzling Yukos's oil production, a crime that, had it occurred, would have made their previously alleged crime of tax evasion impossible.

Mr. Khodorkovsky, who acquired his oil empire in the rough and tumble of Russia's transition from communism, is no saint, but neither is he his country's Al Capone, as Mr. Putin has claimed. In fact, he is looking more and more like the prisoners of conscience who have haunted previous Kremlin regimes. In the past several years he has written numerous articles critiquing Russia's corruption and lack of democracy, including one on our op-ed page last month.

Mr. Obama raised the case of Mr. Khodorkovsky last year, and the State Department's most recent human rights report said the trial "raised concerns about due process and the rule of law." But the administration has not let this obvious instance of persecution, or Mr. Putin's overall failure to ease domestic repression, get in the way of its "reset" of relations with Moscow. If the United States and leading European governments would make clear that improvements in human rights are necessary for Moscow to win trade and other economic concessions, there is a chance Mr. Putin would respond. If he does not, Western governments at least would have a clearer understanding of where better relations stand on the list of his true priorities.

Mr. WICKER. The editorial points out that Russia's Government is trying to think of ways to attract more foreign investment, and it juxtaposes this desire for more Western openness and investment with the Khodorkovsky matter and says that this trial has become a showcase for the Russian regime's cynicism, corruption, and disregard for the rule of law.

It goes on to say: The new charges are, as Mr. Putin's own Prime Minister testified last week, absurd. Mr. Khodorkovsky and his associate, Platon Lebedev, are now accused of embezzling Yukos Oil's production—a crime that, had it occurred, would have made their previously alleged crime of tax evasion impossible.

So the cynicism of these charges is that they are inconsistent with each other. Yet, in its brazenness, the Russian Federation Government and its prosecutors proceed with these charges.

The article goes on to say: Mr. Khodorkovsky is looking more and more like a prisoner of conscience who haunted the previous criminal regime.

It says:

Mr. Obama raised the case of Mr. Khodorkovsky last year, and the State De-

partment's most recent human rights report said the trial "raised concerns about due process and the rule of law."

I will say they raised concerns.

Let me say in conclusion of my portion—and then I will allow my good friend from Maryland to close—this prosecution and violation of human rights and the rule of law of Lebedev and Khodorkovsky has brought the censure of the European Court of Human Rights that ruled that Mr. Khodorkovsky's rights were violated. A Swiss court has condemned the action of the Russian Federation and ruled it illegal. A Dutch court has said it is illegal. It has been denounced by such publications as Foreign Policy magazine, the Washington Post, a former Prime Minister who actually served under Mr. Putin. It has been denounced in actions and votes by the European Parliament, by other national parliaments, by numerous human rights groups, and by the U.S. State Department.

I submit, for those within the sound of my voice—and I believe there are people on different continents listening to the sound of our voices today—it is time for the Russian President to step forward and put an end to this farce, admit that this trial has no merit in law, and it is time for prosecutors in Moscow to cease and desist on this show trial and begin to repair the reputation of the Russian Federation when it comes to human rights and the rule of law.

Mr. CARDIN. Mr. President, I thank Senator WICKER for bringing out the details of this matter. It has clearly been recognized and condemned by the international community as against international law. It is clearly against the commitments Russia had made when the Soviet Union fell. It is clearly of interest to all of the countries of the world. Originally, when Yukos oil was taken over, investors outside of Russia also lost money. So there has been an illegal taking of assets of a private company which have affected investors throughout the world, including in the United States. It has been offensive to all of us to see imprisoned two individuals who never should have been tried and certainly should not be in prison today. All that is offensive to all of us. But I would think it is most offensive to the Russian people.

The Russian people believed their leaders, when the Soviet Union collapsed, that there would be respect for the rule of law; that there would be an independent judiciary, and their citizens could get a fair trial.

We all know—and the international community has already spoken about this—that Mikhail Khodorkovsky did not get a fair trial. So the commitment the Russian leaders made to its own people of an independent and fair judiciary has not been adhered to. This is not an isolated example within Russia. We know investigative reporters routinely are arrested, sometimes arrested with violence against them. We know

opposition parties have virtually no chance to participate in an open system, denying the people a real democracy. But here with justice, Russia has a chance to do so.

I find it remarkable that Mr. Khodorkovsky's spirits are still strong, as Senator WICKER pointed out. Let me read a recent quote from Mr. Khodorkovsky himself, who is in prison:

You know, I really do love my country, my Moscow. It seems like one huge apathetic and indifferent anthill, but it's got so much soul. . . . You know, inside I was sure about the people, and they turned out to be even better than I'd thought.

I think Senator WICKER and I both believe in the Russian people. We believe in the future of Russia. But the future of Russia must be a nation that embraces its commitments under the Helsinki Final Act. It has to be a country that shows compassion for its citizens and shows justice. Russia can do that today by doing what is right for Mr. Khodorkovsky and his codefendant: release them from prison, respect the private rights and human rights of its citizens, and Russia then will be a nation that will truly live up to its commitment to its people to respect human rights and democratic principles.

Again, I thank Senator WICKER for bringing this matter to the attention of our colleagues. It is a matter that can be dealt with, that should be dealt with, and we hope Russia will show justice in the way it handles this matter.

Mr. WICKER. I thank my colleague and yield the floor.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. I thank my colleagues for their remarks. It is worthy of all of us giving most serious consideration. Perhaps we have been too silent in failing to criticize some of the activities of Russia. We want to be friends with them, but good friends tell friends the truth. I believe my colleagues are speaking the truth.

#### NOMINATION OF ELENA KAGAN

Mr. SESSIONS. Mr. President, the Judiciary Committee is now reviewing the record of Elena Kagan, President Obama's nominee to the Supreme Court. The truth is, her legal record is thin. She has never been a judge and has very limited experience even in the practice of law. She has never tried a case, never cross-examined a witness or made a closing argument in a trial.

A lack of judicial experience is not a total disqualifier for the job of Supreme Court Justice, but it is true and fair to say this nominee has less real legal experience than any nominee confirmed to the Court in the last 50 years. That fact concerns me and many Americans. Ms. Kagan's lack of experience puts even greater emphasis on the central question in the nomination process: If confirmed, what kind of judge will Elena Kagan be? Will she take the

traditional view that judges are impartial umpires who decide cases based on the rule of law under the Constitution? Or is she from the activist school, which teaches that judges may take sides and reinterpret the meaning of our laws to advance certain political agendas the judge may find acceptable or desirable or better? Are judges empowered to do that in the American system?

The American people have a right to know. This is no time for a stealth candidacy to the Court. We know one thing. We know her political views are leftist and progressive. That is clear from her record. She has a rather extensive political record. But with no judicial record and little legal record, clues to Ms. Kagan's judicial philosophy can be found perhaps by looking at people she admires, her mentors, judges she thinks represent the best way of conducting their office.

The three judges Ms. Kagan most often mentions are Judge Abner Mikva, Justice Thurgood Marshall, and former Israeli Judge Aharon Barak. Together I think it is fair to say these three judges represent the vanguard of a judicial activist movement that has certain intellectual roots and is quite afoot in our law schools and some of our legal commentators.

Each of these judges affirms the concept that a judge's own views, their personal views, may—sometimes even should—guide their interpretations of the law. In effect, this philosophy argues that the outcome of the case is more important than the legal process that guides the decisions, more important than fidelity to the Constitution. These Kagan heroes believe judges should have the power to make law. This results-oriented philosophy raises questions about whether Ms. Kagan may see judicial power as a way to advance her philosophy. It is a liberal, big government agenda for America. She has been active in that philosophy throughout her lifetime.

Let's look at some of her heroes in more detail. Judge Mikva is someone with whom she has been close. He was appointed to the bench by President Carter a number of years ago to the DC Circuit Court of Appeals.

She clerked for Judge Mikva in 1986 and 1987 and later worked for him in the Clinton White House. After he had resigned from the bench and came into the Clinton White House, she was hired to work with him in that office. On the day she accepted President Obama's nomination, Ms. Kagan noted that Judge Mikva "represented the best in public service" and that working for him was part of the "great good fortune" that had marked her career. He served five terms as a Congressman from Chicago, where he earned the reputation as "the darling of American liberals." He has advocated for strict gun control, reportedly referring to the National Rifle Association as a "street-crime lobby." He was a fierce opponent of the war in Vietnam and has said he

supports the results in *Roe v. Wade*. The results.

Regarding how to interpret the Constitution or statute, Mikva has said that for "most law, there is no original intent." The general view is that one should find out what the law was intended to mean when it was passed.

Some people dismiss that and are cynical about that, think that is an impossible goal. That is what Judge Mikva apparently believes. He has defined judicial activism as "the decisional process by which judges fill in the gaps" in the law and the Constitution. That is similar to President Obama's theory—which I think is flawed—that for "the five percent of the cases that are truly difficult," the judge's decision depends on "the depth and breadth of one's empathy."

So the critical ingredient is supplied by what is in a judge's heart. Whatever a heart is, it is not the mind and it is not, therefore, objective judgment. It is more akin to something else. I have said this kind of thinking is more akin to politics than law. It is certainly not law, not in the American tradition of law.

Ms. Kagan also clerked for Justice Thurgood Marshall, whom she refers to as her hero. Indeed, Marshall is a historic figure. He was courageous at a time when courage was definitely needed and an effective leader in the civil rights movement. He was a great attorney and a fierce advocate for his clients and his ideals. He could be a hero of anyone as an American advocate and a person who played a fundamental role in the breakdown of segregation in America. But he also became one of the most active judges on the Court in our Nation's history.

In describing his own judicial philosophy, Marshall said that "[y]ou do what you think is right and let the law catch up." He dissented in all death penalty cases because he and Justice Brennan declared the prohibition of "cruel and unusual" punishment that is in the Constitution barred any death penalty.

That might sound plausible in one sense. But in truth, this can never be a fair interpretation of the cruel and unusual clause in the Constitution, since there are multiple references in the Constitution to the death penalty and how it should be carried out.

How could you possibly construe the document as a whole to say that "cruel and unusual" prevents the death penalty? Well, they did not like the death penalty; Marshall and Brennan did not. They thought it was wrong. They thought the world had developed and moved forward to a "higher land" and they were just going to declare it and the law would follow.

Well, according to Kagan, in Justice Marshall's view, "constitutional interpretation demanded . . . that the courts show a special solicitude for the despised and disadvantaged." Certainly the courts should be sure that the despised or disadvantaged have a fair day