

aggressively interventionist foreign judges" who "without a secure constitutional basis. . . created a degree of judicial power undreamt of by our most aggressive Supreme Court justices." Judge Posner concluded that to Justice Barak, "the judiciary is a law unto itself."

These and other examples, over a period of more than two decades, fit consistently together. They indicate that for most of her career, Ms. Kagan has endorsed, and has praised others who endorse, an activist judicial philosophy. She appears to have accepted that judges may base their decisions on their own sense of fairness or justice, their own values of what is good and right, their own vision of the way society ought to be. This activist philosophy, she has said, is a thing of glory and best represents the rule of law. That is what her record shows, and we will have to see what next week's hearing uncovers on this important subject.

There are also some specific subjects or controversies that must be explored. These might have been less important if Ms. Kagan did not have the record I just described. If she had not endorsed and praised judges making decisions based on their personal values and objectives, then evidence of her own personal values or objectives would obviously be less relevant. But as Ms. Kagan said in a 2004 interview, since a judge's personal attitudes and views make a difference in how they reach their decisions, "the Senate is right to take an interest in who these people are and what they believe."

I wish to note two of the areas in which it appears Ms. Kagan's personal or political views have driven her legal views. The first is abortion. When she clerked for Justice Marshall, she recommended against the Court reviewing the decision in a case titled *Lanzaro v. Monmouth County Correctional Institutional Inmates*. The U.S. Court of Appeals for the Third Circuit held that prison inmates have a right to elective abortions and that by refusing to pay for them, the county violated the Constitution's eighth amendment ban on cruel and unusual punishment. Ms. Kagan properly rejected this bizarre holding, even calling parts of the analysis ludicrous. Yet she urged against the Court reviewing this decision because, as she put it, "this case is likely to become the vehicle that this court uses to create some very bad law on abortion and/or prisoners' rights." Broader policy objectives seemed more important than even reviewing a ludicrous constitutional decision.

The record also shows that later Ms. Kagan was a key player behind the Clinton administration's extreme abortion policy. In May 1997, after President Clinton had vetoed the Partial Birth Abortion Ban Act, Ms. Kagan wrote a memo recommending that he support the substitutes for the ban being offered by Senators Daschle and FEINSTEIN. She recommended this solely for political reasons, because it

might attract some votes from Senators who would otherwise vote to override his veto. Had that strategy worked, of course, the substitutes would not have passed and partial birth abortion would have remained legal. The barbaric practice of partial-birth abortion would have remained legal.

Significantly, however, Ms. Kagan noted that the Office of Legal Counsel had concluded that these substitute amendments were unconstitutional under the Supreme Court's *Roe v. Wade* decision. There is no indication that she disagreed with this conclusion. The point is that Ms. Kagan urged a purely political position on abortion that was at odds with what the Clinton administration then believed the Constitution required. Once again, it looks as though politics trumped the law.

Another controversy involved the military's ability to recruit at Harvard Law School during Ms. Kagan's tenure as dean. Ms. Kagan made her personal views and values as plain as anyone could make them, saying repeatedly that she abhorred the military's policy with regard to homosexuals and calling it a profound wrong and a "moral injustice of the first order." Federal law, known as the Solomon amendment, denies Federal funds to schools with policies or practices that have the effect of preventing military recruiters the same access to campus or to students that other employers have. A group called the Forum for Academic and Institutional Rights, or FAIR, challenged the law in court.

Ms. Kagan first joined a legal brief filed in support of FAIR's challenge with the U.S. Court of Appeals for the Third Circuit. Within 24 hours of the court enjoining enforcement of the Solomon amendment, Ms. Kagan again banned military recruiters from access to Harvard's Office of Career Services. She was not required to do this because the Third Circuit does not include Massachusetts. She kept the ban in place even after the Third Circuit stayed its own injunction while it was being appealed to the Supreme Court. In other words, Ms. Kagan denied military recruiters access even though the law still required access. She could have opposed the military's policy in various ways, but chose to do so in a way that undermined military recruitment during wartime. And the recruitment ban was lifted only after the president of Harvard University stepped in and overrode Ms. Kagan's decision.

Ms. Kagan then joined a group of law professors filing a brief with the Supreme Court. To its credit, FAIR actually agreed with the government about the proper reading of the Solomon amendment. But Ms. Kagan and her fellow professors urged the courts to read the statute in an artificial and unnatural way that actually contradicted both the plain terms of the statute and the position of the very party on whose behalf she had filed her brief. The statute required that the military be treated the same as employers who are

granted access to campus. Ms. Kagan argued instead that the military be treated the same as employers who are denied access to campus. Not surprisingly, the Supreme Court unanimously rejected Ms. Kagan's position, saying that her group of law professors simply misinterpreted the statute in a way that would literally negate it and make it "a largely meaningless exercise." She did everything she could, including defying Federal law and making legal arguments that even Justice Stevens could not accept, to pursue her political objective.

In closing, I wanted to come to the floor today to describe for my colleagues the approach I am taking to evaluate Ms. Kagan's nomination to the Supreme Court. The most important qualification for the position is her judicial philosophy, the kind of Justice she will be. The evidence for her judicial philosophy comes primarily from her record, and I have touched on some areas of concern that must be examined more closely.

This is a grave decision. It is about more than simply one person. The liberty we enjoy in America requires that the people govern themselves and that, in turn, depends upon the kind of Justices who sit on the highest court in the land. George Washington said this in his farewell address: "The basis of our political systems is the right of the people to make and alter their constitutions of government. But the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all." Judges who bend the Constitution to their own values and who use the Constitution to pursue their own vision for society take this right away from the people and undermine liberty itself.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Texas is recognized.

Mr. CORNYN. I ask unanimous consent to speak for up to 15 minutes as in morning business.

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

IMMIGRATION

Mr. CORNYN. Madam President, last week the media reported that 17 Afghan military trainees had gone AWOL—absent without leave—from the Defense Language Institute at Lackland Air Force base in San Antonio, TX. The shocking thing about this is not that 17 Afghan trainees left the military base without leave, but that we hadn't heard anything about it. Even though these officers went missing over a period of 2 years, neither the Department of Homeland Security, the U.S. Air Force, nor the Department of Defense notified me. No one advised the Congress or the American people, to my knowledge, that this had happened. Obviously, it created a lot of consternation and concern.

The fact is, this is just one example—really the tip of the iceberg—of some of the problems with our broken immigration system—our inability to track individuals who come into the United States with visas, whether it is a tourist visa, a student visa, or a visa like those issued to the Afghan military officers. We have virtually no ability to track individuals who overstay their visa and then simply choose to melt into the great American landscape.

This is true in spite of the fact that in 2007, Congress passed on a recommendation of the 9/11 Commission, which highlighted visa overstays as a potential national security threat to our country. All we have to do is recall people like Ramzi Yousef, the mastermind of the 1993 World Trade Center bombings, an example of people who came into the country and overstayed their visa. The recent attempt of a would-be terrorist to bomb a skyscraper in Dallas, TX, is another example of people who enter the country legally and do so with the clear intent to overstay their visa and do us harm.

Congress passed a law in 2007 that required the Department of Homeland Security to come up with a plan by June 2009 to track every entry into the country pursuant to a visa and biometrically track those individuals who overstay their visas. Obviously, that has not happened yet or else the Department of Homeland Security would have been able to track the 17 Afghan military officers. As far as we have been informed, we don't have clear information as to exactly where all of these individuals are.

We have talked a lot about border security, and appropriately so, particularly in light of the exploding violence in Mexico and the cartel drug wars that have killed 23,000 people since 2006. Many have expressed concerns that our borders, which are still too porous, will allow people to come across but not just people who want to work. Our porous borders will allow people to enter who want to smuggle drugs, smuggle weapons, and who potentially want to do us harm. Last year alone, about 50,000—or closer to 45,000 individuals from countries other than Mexico—so-called OTMs—have been detained coming across our southern border. These OTMs have come from countries such as Somalia, Yemen, Afghanistan, Iran, China—you name it. The southern border is being used as a means to enter our country without detection and in violation of our laws.

The problem I wish to highlight today is that apparently the Administration is just now waking up to this danger along our border. I say that because only in the last couple of days, the President has requested an emergency supplemental appropriation of \$600 million for southern border enforcement. Unfortunately, in spite of the fact that it is a large sum of money, it simply does not go far enough.

Recently, I introduced a border security amendment that was defeated—

even though it got a majority vote, but didn't get the 60 votes it needed to pass. It was on the Defense supplemental appropriations bill. It would have been paid for; it was not deficit spending. It would have provided an additional \$2 billion to make up for shortfalls in funding to Federal, State, and local agencies that are on the front line and need that funding to get the job done.

Some critics have said that Members of Congress have focused too much on border security and that the real solution is to pass a comprehensive immigration reform bill. I disagree. Until we have credible border security and a credible system of tracking visa overstays, the American people are simply not going to believe we have either the credibility or the competence to enforce whatever law we pass. All you have to do is to look at where we find ourselves now. You also need to look back to 1986, when President Ronald Reagan signed an amnesty for 3 million people. He did so premised on the belief that we were actually going to pass an immigration law that could be and would be enforced. We know, from our sad experience, that even though an amnesty was adopted, enforcement did not follow. That is why I say the American people simply don't believe we have the credibility or even the competence, as demonstrated so far, to get the job done.

I don't think the American people believe we have done a good job of controlling illegal immigration, let alone national and domestic security. If Washington was doing its job, we would not see States such as Arizona and Nebraska passing laws trying to deal with immigration at the State and local level. If Washington was doing its job, we would not continue to hear about the many illegal immigrants who have committed heinous crimes in the United States and who have been deported multiple times, only to reenter the United States and commit further crimes. If Washington had been doing its job, we would not continue to hear about terrorists exploiting our lax immigration enforcement—terrorists who are in this country right now trying to do us harm, such as the Christmas Day bomber, who had a valid visa—amazing as it sounds—and the foreign national who overstayed his visa who I mentioned a moment ago, who tried to blow up a Dallas skyscraper recently—a plot foiled by the FBI.

I believe we need credible immigration reform, but first we need to demonstrate to the American people that we are serious about border security by making sure the resources—both the boots on the ground and the technology—are in place to help, as a force multiplier, provide the kind of border security that will allow us to know with a much greater certainty who is coming into the country and why they are here.

The other component of our nation's security has to do with the visa over-

stay issue, which is a huge part of the problem. Put another way, even if we were able to secure the border today and know with certainty who was coming across our southern or northern border and what their purpose was for entering, we would still have a huge, gaping hole in our immigration enforcement system because of the problem of visa overstays.

Most Americans probably don't realize that between 40 and 50 percent of the people who have come into the country and who are here without a valid visa—an estimated 4.5 to 6 million people—are visa overstays. In other words, they came in legally but simply ran out the clock and overstay their visa, and now they have attempted to just melt into the American landscape.

Unfortunately, notwithstanding the recommendations of the 9/11 Commission and Congress's mandate to the Department of Homeland Security to come up with a way to biometrically track visa overstays coming in through our airports—the Department of Homeland Security still has yet to come up with a credible and workable solution to deal with this very real problem. We know the visa overstays come from countries all around the world, not just Mexico or countries to our south. These overstays come from places such as Iraq, Iran, Pakistan, Afghanistan, Syria, and Sudan.

It seems just as plain as the nose on my face to say that America's security depends on our tracking not just people who illegally come over the border, but also those who come in legally and then illegally overstay their visas. Our failure to track visa overstays and enforce our immigration laws has already put our country in jeopardy.

I mentioned some of the examples a moment ago. The World Trade Center mastermind was a visa overstay. The 9/11 hijackers, lest we forget, were visa overstays, people who came in under false pretenses as students, only to try to do our Nation harm and then killing thousands of people in the process. I mentioned the Dallas office tower attempted bomber, who was a visa overstay. Most recently, the 17 Afghan pilots in training at Lackland Air Force Base in San Antonio, TX, my hometown. These were visa overstays. Yet when you ask the Air Force, the Department of Defense, and the Department of Homeland Security where they are now and what they are doing, we have yet to get a comprehensive and complete report. Why? Because the U.S. Government simply doesn't have a workable and effective and efficient means of tracking people who come into the country legally on a temporary visa but then choose to overstay.

Foreign nationals overstaying their visas is not a new issue, but, as we have seen, it can be a national security issue. Even the Department of Homeland Security, the Government Accountability Office, the Pew Hispanic

Center have highlighted the number of overstays in the United States.

Like its predecessor, the Immigration and Naturalization Service, the Department of Homeland Security has a real inability to track down and remove aliens who overstay their visas. Each year, approximately 300,000 foreign nationals who come to the United States legally, overstay their visa. That is 300,000 a year.

My amendment, which was defeated last month by a narrow vote, would have given the U.S. Immigration and Customs Enforcement the personnel and money needed for additional investigators, detention officers, and detention space.

We need a plan, our government needs a plan from the administration to enforce our immigration laws regarding visa overstays or the American people will continue to see threats to our national security materialize before their very eyes.

Madam President, I ask unanimous consent to have printed in the RECORD my letter to Secretary Napolitano at the conclusion of my remarks.

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

(See exhibit 1.)

Mr. CORNYN. Madam President, there are a number of think tanks—and I will allude to just one—that have come up with a strategy to do what needs to be done to deal with visa overstays. I refer to a Backgrounder, published by the Heritage Foundation, dated January 25, 2010, entitled “Biometric Exit Program Shows Need for New Strategy to Reduce Visa Overstays.”

I think we need to put our best minds together and devote our efforts to dealing with this problem. Just like our broken border, unless Congress and the Administration come up with a credible plan to deal with this problem of visa overstays, I don't think the American people will have the confidence they demand and are entitled to when it comes to enacting a credible immigration enforcement program.

I thank the Chair and yield the floor.

EXHIBIT 1

U.S. SENATE,

Washington, DC, June 22, 2010.

Secretary JANET NAPOLITANO,

U.S. Department of Homeland Security, Nebraska Avenue Complex, Washington, DC.

DEAR SECRETARY NAPOLITANO: Last week, the media reported that 17 Afghan military officers had gone Absent Without Leave (AWOL) from a Defense language training institute at Lackland Air Force Base in Texas. Needless to say, I was deeply disturbed by this report and by the fact that I had not received official notification from either the Departments of Defense or Homeland Security.

On Friday, I sent a letter to Secretary of the Air Force Michael Donley requesting an immediate explanation and report on how such a serious violation of security occurred, as well as an assessment of the potential threat posed by these 17 officers. In statements to the media, the Air Force stated that they work in close coordination with DHS and “[w]hen the Defense Department learns an international student has gone missing, DHS Immigration and Customs En-

forcement is immediately notified and appropriate action is taken.”

I have been informed by ICE the majority of these missing Afghan officers have not been located. According to the recent media reports, these Afghan officers disappeared over a 2-year period. Two years is a significant period of time and I find it alarming that we are still unable to locate these officers in the United States.

I recognize that tracking visa overstays in the United States is a challenge. However, I continue to see a disturbing pattern that began with Ramzi Yousef and the 1993 World Trade Center bombings, came to fruition with the 9/11 hijackers, and has continued recently with Hosam Maher Hussein Smadi's planned attempts to bomb a skyscraper in Dallas, Texas—terrorists using legal visas to gain entry into the United States with the clear intent to overstay and do harm. The 9/11 Commission pointed out this area as a vulnerability and the Government Accountability Office (GAO) has echoed concerns about visa overstays and our ability to track and remove them from the United States.

According to one study, the number of current overstays in the United States ranges anywhere from 4.5 million to 6 million, approximately 40 to 50% of the total illegal immigration population. Overstays come from every continent, and from many nations known to harbor terrorists, including Iraq, Iran, Afghanistan, Pakistan, Syria, and Sudan. Given that this number is growing each year by approximately 300,000 additional aliens, it is imperative that your Department make identifying and removing visa overstays a national priority.

In a public statement, ICE indicated that they notified the U.S. law enforcement community about the missing officers and had “no information that any of these individuals pose a national security threat.” As you can imagine, I am not assured by this statement, especially given the fact that these officers remain at large in the United States with their whereabouts unknown to the U.S. government. I view this situation as a clear security failure that needs to be remedied immediately.

I would appreciate a response as soon as possible on how you intend to locate these officers immediately and remove them from the United States. I would also ask that you provide me with the Department's strategic plan to deal with visa overstays.

Sincerely,

JOHN CORNYN,
U.S. Senator.

The ACTING PRESIDENT pro tempore. The Senator from Rhode Island is recognized.

TAX EXTENDERS

Mr. WHITEHOUSE. Madam President, I wish to say a few words about an amendment I had offered to the original tax extenders bill as No. 4324, which has also been offered as an amendment to the current package. It very much appears that in the crucible of the pressures the bill has had to go through in order to get to its present status, this amendment will not succeed.

The chairman of the Finance Committee is on the Senate floor. I thank him for his persistent efforts to try to get it into the agreed package and for his patience with my even more persistent efforts to try to get it into the agreed package.

It is a bipartisan amendment. I thank the five Republican colleagues who cosponsored it. I particularly

thank Senator SESSIONS, who is the ranking member on the Judiciary Committee. He was an early, initial cosponsor. We introduced it together in the Judiciary Committee. It passed out of the committee uneventfully. It was a pleasure to work with Senator SESSIONS. I was delighted he was willing to not only support it as a bill on the Senate floor but also to cosponsor it as an amendment to this tax extenders package. I extend a particular appreciation to him and to his staff for working with us on this legislation.

Let me say briefly what it is about. If you are an American business and you are doing business in a different State, in a State in which you are incorporated and domiciled, you would ordinarily have to file an agent for service of process in that State so that if your conduct or product injures somebody in that State, service can be achieved in the place of the injury.

We have a world economy, and we are undoubtedly the world's greatest importer of goods. Some of these goods are harmful. Most of them are good for Americans, good for the economy, good for our consumers, but some are not. The wallboard that came from China filled with sulfur so that when it was installed in houses, the sulfur leached, corroded piping, made the occupants unhealthy, required a complete stripout and rebuild not only of the walls but also of plumbing and other fixtures and air-conditioning—that was a disastrous imported product.

Toys with lead that children could absorb: We all know what damage lead will do to developing brains of young children, particularly Chinese toys with lead in them. Pharmaceutical products with unacceptable chemicals added to them: There have been a lot of products that have come in from overseas and have harmed Americans.

If you are a big, legitimate foreign manufacturer, you probably have an office here. If somebody is hurt, it is not too hard for the person representing you to find the office and file suit and seek recovery for whatever injury was sustained. Many foreign manufacturers even have manufacturing facilities in this country. That makes it very easy to locate them. But some do not. Some live in a shadowy world where they send their products into the United States, get the money out, but when their defective product injures an American, trying to find them is like trying to grasp a handful of fog. They have disappeared, and they hide behind complicated international treaties and foreign laws in their home countries, making both service of process, getting the papers on the lawsuit to them, and actually getting your hands on them legally under our due process—long-arm statutes—is very challenging and difficult.

We heard from people who spent literally tens of thousands of dollars trying to have their pleadings translated