

I suggest the absence of a quorum.

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

The assistant bill clerk proceeded to call the roll.

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 President, I ask unanimous consent that the order for the quorum call be rescinded.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

#### KAGAN NOMINATION

Mr. SESSIONS. Mr. President, the week before last, we had the hearing on Elena Kagan for her nomination to the U.S. Supreme Court, which is a tremendously serious and important position. Five members of the Supreme Court—not just nine but only five—can redefine the meaning of words in our Constitution and really alter, in many ways, the very structure of our government. We have seen activist judges that I think have tended in that direction, and it is dangerous and harmful because judges are given lifetime appointments. They are not accountable to the public. They are protected. Even their salaries are not reducible while they serve in office. So we have to know and believe they will be neutral, impartial, unbiased, and will render judgments based on the law and the facts and not on any preconceived commitments they may have had.

Ms. Kagan is now the Solicitor General of the United States. She has taken some sort of leave of absence in recent weeks since this nomination occurred, but she holds that title. The Department of Justice Solicitor General represents the U.S. Government in Federal court, usually before the Supreme Court, and in important cases before the courts of appeals and often is involved in setting legal policy for the United States and helping to advise on that. So it is important that the American people know, before she is confirmed—if she is confirmed—that she has not been involved in matters that would bias her and cause her not to be able to serve impartially under the law and under the Constitution of the United States. That is an important question.

The day before yesterday, I believe, the Wall Street Journal had an editorial entitled “Kagan and ObamaCare” in which it raised questions about the objectivity she might bring to the Court and whether she had been involved legally in the discussions or drafting the ideas concerning the development and promotion of the health care reform bill so massively affecting health care in America. It raised the question: Should she recuse herself if that comes up, if she has been involved in that? I think that is a very important question.

The seven Republican members of the Senate Judiciary Committee wrote yesterday and asked Ms. Kagan to give detailed explanations as to what extent she may have been involved in any dis-

cussions regarding the promotion or legality of the health care reform bill. I think we are entitled to that. It is an important matter.

I see my friend Dr. BARRASSO on the floor, who has been a great expert in our debates on health care reform. He has repeatedly explained how this legislation will impact health care throughout America. As a physician, he understands that, and he has been able to explain it to us in ways that any of us should be able to understand. In fact, he gave us some very serious warnings about the fact that the promises made for this legislation were not legitimate, weren't real, weren't accurate, and in study after study and report after report that has come out, Senator-Dr. BARRASSO has been proven correct. The warnings he gave us that it is not going to reduce costs and that other difficulties will arise have been proven true—too much, in fact—and it is a matter of real seriousness.

So I guess I wish to say that a judge should recuse himself or herself if their impartiality might reasonably be questioned on any matter that came before them.

I believe Dr. BARRASSO has raised previously his concern about what it really means if the U.S. Government tells an individual American citizen who is minding his own business that he has to have an insurance policy. I will recognize him at this point and ask him to at least share his thoughts on that important issue and why he believes having a fair judge on the Supreme Court is important.

The ACTING PRESIDENT pro tempore. The Senator from Wyoming.

Mr. BARRASSO. Thank you very much, Mr. President.

I come to the floor today with my friend and colleague because I have just gotten back from a week of traveling all across the State of Wyoming, a beautiful State this time of year. People are out and at parades. I had a chance to visit at several senior centers. The question that continued to come up was, Can the government force me to buy health insurance?

A lot of people in Wyoming carry their copy of the Constitution with them. They carry it in their breast pocket. They carry it with them. It is in the pickup truck. It is with them all the time. They continue to look to the 10th amendment, which says:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The people quote that. It just makes sense to the people of Wyoming that Washington should not be able to come into their communities, into our State, into their homes, and say: You must buy this product.

So when I see the number of States—20 now—that have filed suit against the Federal Government because of a new health care law, a law that I think is going to end up, if it is not repealed and replaced, being bad for patients,

bad for payers, the taxpayers in the country and the people who pay their own health care bills as well, and bad for providers—it is a bill that I think is bad medicine, to the point that Senator TOM COBURN and I, the other physician—there are only two physicians who practice medicine in the U.S. Senate, and I have been taking care of people and their families in the State of Wyoming since 1983—we have come up with a report called “Bad Medicine: A Checkup on the New Federal Health Care Law.”

There are people who say: I don't like this. Now we have a nominee to the Supreme Court who is very likely, if this works its way to the Supreme Court, to have an opportunity to make a ruling, a ruling for the people of the United States, on whether this body—this Senate, this House—has a right to tell the American people what product they must buy, whether it is health insurance, whether it is cars, whether it is the kind of cereal they eat for breakfast in the morning. The American people are very concerned.

So I come to the floor also with this editorial from Tuesday, July 13, this editorial entitled “Kagan and ObamaCare,” because the fundamental question is, Should this nominee recuse herself if she is, in fact, confirmed by this body? One might say: Well, when would someone recuse themselves from making a decision? Because, after all, she has been serving in this administration, serving this President, serving the President who has promoted such a piece of legislation that forces American citizens, forces the citizens of this country to buy a product.

The editorial says:

Recusal arises as a matter of judicial ethics if as a government official she expressed an opinion on the merits of the health-care litigation. This is what she would have to render a judgment on were she to be confirmed for the High Court.

It goes on:

It is also the question on which she is likely to have participated given her role at the Justice Department.

I would have to turn to my colleague who is the ranking member of the Judiciary Committee.

It says as well that:

The Solicitor General is the third ranking official at Justice, its senior expert on Constitutional issues, so it's hard to believe she wouldn't have been asked at least in passing about a Constitutional challenge brought by so many states. The debate about the suit was well underway in the papers and on TV. The matter surely must have come up at Attorney General Eric Holder's senior staff meetings, which the Solicitor General typically attends.

The editorial goes on to say:

We doubt Ms. Kagan would have stayed mum about the cases in internal Justice councils on grounds that Mr. Obama might later nominate her to the Court. At the time the Florida suit was filed on March 23, she was only one of several potential nominees whose names were being floated by the White House.

So here we have this, and that is when you get back to that opening

paragraph I read: "Recusal arises as a matter of judicial ethics."

So I say to my friend and colleague from Alabama, is this not a legitimate area of concern, especially in light of the fact that across this great country people are offended by this law? I just saw a poll that came out today. The popularity of this new law, which has never been very popular and which was forced down the throats of the American people, is now 7 percentage points less popular now than it was even 2 months ago. So something exceptionally unpopular is getting even more unpopular. By a ratio of 2 to 1, people think it is going to raise their costs and lessen their quality of care.

Mr. SESSIONS. Mr. President, let me ask the Senator, on that question, are the American people right or are the people who promoted this bill right? Are costs going up and is the quality of health care going down? What is the Senator's opinion?

Mr. BARRASSO. Mr. President, I spent Friday visiting with colleagues, friends, patients at the Wyoming Medical Center. Across the board, after talking to physicians, talking to patients, talking to others in the hospital as well as around the State of Wyoming, people believe it is going to be bad for patients, those waiting to get their care; bad for payers, the taxpayers of this country, the individuals who are paying for their insurance as well; and bad for providers, the nurses and the doctors whom I talked to. They have incredible concerns about what the impact is going to be on nurses and doctors when taking care of patients. The patients' concerns are, are they going to get the kind of care they want, the kind they are accustomed to, because no matter where I go in Wyoming, I hear people saying: This is a bill that wasn't passed to help me; it was passed and forced down our throats to help someone else, and they are going to make me buy a product that I might not want to buy, according to a number of criteria the government puts forward.

They may not want what the government says they have to buy, and then you get back to the Constitution. Does this government and does Congress have a right to tell the American people what they must purchase?

Mr. SESSIONS. This is a fundamental question. The Constitution gives the U.S. Government the right to regulate interstate commerce, that is true. The Supreme Court, at times, has taken a most minimal effect on interstate commerce and says the Federal Government can regulate it. But I am not aware of a circumstance in which an individual in Wyoming, or Alabama, minding their own business and not participating in an interstate commerce health insurance policy in any way, and the Federal Government waltzes in and says you must participate in this in interstate commerce—you are not participating in it and they require that you do participate in it.

If you believe—and there is only one view—that the Constitution is a government of limited power, it has only powers that are delegated to it—and they are enumerated powers—then have we crossed a divide here that we have not crossed before. That is why these lawsuits are being filed. They are very real. The one in Florida may be farther along than most of them; it is already out there. Ms. Kagan, at this very moment, sits as a Solicitor General of the United States—in title, if not fully acting—and was, I think, before this lawsuit was filed fully acting, and it impacts the Federal Government. The question we have asked that I think must be answered by her is exactly what kind of relationship and discussion she may have had concerning this legislation.

First, I ask Senator BARRASSO—and not being a lawyer can be a benefit in this body, but I assume from the tone of his comments that he is a little uneasy that this high official in the Obama administration—an administration that has committed the whole of its resources to the passing of this legislation—is now about to rise to the Court and would be asked to decide what could be a deciding issue of whether this health care bill stays law or is struck down. So without the niceties at this moment on recusal issues, does that make the Senator nervous?

Mr. BARRASSO. The whole health care law makes me nervous. I look at this and say that the underpinning of this law—the thing that holds it together—is the mandate on the American people that everyone buy insurance, that everyone has to have insurance at work or through Medicare or Medicaid, but if none of those work, you have to buy insurance. It is the government telling someone they have to buy it.

So I have great concerns when a government thinks it is so powerful, and this body thinks it is so powerful—more powerful than the American people. I reject that, and I want to make sure that, as it gets to the Supreme Court, there are people on the Court who side with the American people and, most importantly, with the Constitution—what to me the tenth amendment means—and the people of Wyoming, which is that the government cannot come into our homes and say you must do this—you must buy this product.

Mr. SESSIONS. Well, I think that is exactly correct. I will say that whether or not being a high official in this administration, which is so committed to passing this legislation, whether that in itself legally requires a person to recuse themselves on the Supreme Court from hearing such a case, I am not prepared to say at this moment, but it makes me uneasy.

I believe a judge who decides that question must be impartial and cannot be corrupted by friendship or empathy or bias in favor of the person who appointed them. That is important.

Secondly, I ask Senator BARRASSO, our question goes to a more specific situation that could mandate recusal, and that is whether the nominee has participated in any discussions, strategies, or making legal advice designed to promote this legislation. I think that would be a clear situation that would require recusal.

Also, specific questions could come up regarding to what extent have these lawsuits that have been filed affected her and has she expressed any opinions concerning the lawsuits.

Finally, I do not believe the President is entitled to launch onto the Supreme Court a political loyalist who will be a legal rubberstamp for anything that gets proposed, whether it is the takeover of AIG or of automobile companies or other things that may be decided. I think we need to be careful about this.

This nominee needs to answer those questions because what the Senator is hearing is what I hear.

Mr. BARRASSO. I ask my colleague this, as he participated in the hearings and the questioning. Apparently, Ms. Kagan says she will recuse herself from participating in a number of cases—I think 11—on which she represented the government in her current job as Solicitor General.

It seems that in a case such as this—the area that the President of the United States put all of his credibility and effort into forcing through this body and through the House and, in my opinion, jamming down the throats of the American people—if she is already going to recuse herself on 11 other issues, it seems to me that we should also get that sort of a commitment on this issue.

As the Senator has said—and he has practiced law—recusal arises as a matter of judicial ethics. Now we are talking about the ethics of the individual involved, and the decisions that person would then make based on the position to which they are nominated.

Mr. SESSIONS. I believe that is correct. The standard is, among other things, if your impartiality might reasonably be questioned—and many judges are very sensitive about this—if you own a bunch of stock and you have one share in a big company like GE, and a case involving GE comes before you, you are expected to recuse yourself, even though it is unlikely to have an impact on your finances. But it doesn't look good.

I think we are entitled to know how sensitive this nominee is going to be to the dangers of her impartiality being questioned, even if her actions are not such that clearly, as a matter of judicial ethics, mandates her recusal. I think we need to talk about that, and I feel like the American people that we meet with, who are concerned about governmental overreach, who wonder if we have lost all sense of the limited power of this government in Washington, I believe those people are entitled to have absolute confidence that

anybody confirmed to the Supreme Court will not sit on a case if they can't be impartial, or if their impartiality could even reasonably be questioned.

I thank the Senator for his leadership on the issue, and I am glad we had this colloquy. I hope we are going to get a complete answer from the nominee soon about any involvement she may have had explicitly, and then to perhaps also inquire further about to what extent she will be prepared to not participate if her impartiality can be questioned.

Mr. BARRASSO. If I can ask a final question. The final paragraph of this editorial that the Senator will introduce into the RECORD says:

As someone who hopes to influence the Court and the law for decades—

We are talking about an appointment that could last a lifetime, 30 or 40 years.

Ms. Kagan should not undermine public confidence in her fair-mindedness by sitting in judgment on such a controversial case that began when she was a senior government legal official.

It seems to me—and I ask the Senator at this time—where someone may be embarking on a long career on the Court, wanting to do the right thing and head in the right direction, that the best decision would be to recuse herself from this case as well, if she is confirmed, rather than get involved in it and potentially have an impact on her reputation for decades to come.

Mr. SESSIONS. I think that is correct. I appreciate the way the Wall Street Journal expressed that. I think that is a legitimate position. I hope the nominee will take very seriously those concerns and will respond promptly to the questions we have asked of her.

I ask unanimous consent that the Wall Street Journal editorial be printed in the RECORD.

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

[From the Wall Street Journal, July 13, 2010]

#### KAGAN AND OBAMACARE

Elena Kagan breezed through her recent confirmation hearings, but there's some crucial unfinished business the Senate should insist on before voting on her nomination to the Supreme Court. To wit, she ought to recuse herself from participating as a Justice in the looming legal challenges to ObamaCare.

In response to Senate queries, Ms. Kagan has said she'll recuse herself from participating in 11 cases on which she represented the government in her current job as Solicitor General. The challenge to ObamaCare isn't one of them, though the cases brought by Florida and 20 other states were filed in March, well before President Obama announced her nomination on May 10.

Ms. Kagan was never asked directly at her hearings about her role as SG regarding the healthcare lawsuits. The closest anyone came was this question from Oklahoma Republican Tom Coburn: "Was there at any time—and I'm not asking what you ex-

pressed or anything else—was there at any time you were asked in your present position to express an opinion on the merits of the health-care bill?"

Ms. Kagan: "There was not."

Regarding a potential recusal, that's not the right question. Ms. Kagan was unlikely to have been consulted on the merits of health-care policy, and even if she did express an opinion on policy this would not be grounds for recusal. The legal precedents on that are clear.

Recusal arises as a matter of judicial ethics if as a government official she expressed an opinion on the merits of the health-care litigation. This is what she would have to render a judgment on were she to be confirmed for the High Court. It is also the question on which she is likely to have participated given her role at the Justice Department.

The SG is the third ranking official at Justice, and its senior expert on Constitutional issues, so it's hard to believe she wouldn't have been asked at least in passing about a Constitutional challenge brought by so many states. The debate about the suit was well underway in the papers and on TV. The matter surely must have come up at Attorney General Eric Holder's senior staff meetings, which the SG typically attends.

We doubt Ms. Kagan would have stayed mum about the cases in internal Justice councils on grounds that Mr. Obama might later nominate her to the Court. At the time the Florida suit was filed on March 23, she was only one of several potential nominees whose names were being floated by the White House.

Under federal law (28 U.S.C., 455(b)(3)), judges who have served in government must recuse themselves when they have "participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy."

Though their public chance has passed, Senators can still submit written questions to Ms. Kagan for the record. We hope someone asks her directly whether the legal challenges to ObamaCare ever arose in her presence at Justice, whether she was ever asked her views, and what she said or wrote about the cases.

We also think there are grounds for recusal based on her response during her Senate hearings on the substance of the state legal challenge. The Florida case boils down to whether Congress can compel individuals to buy health insurance under the Commerce Clause. Ms. Kagan danced around the history of Commerce Clause jurisprudence, but in one response to Senator Coburn she did betray a bias for a very expansive reading of Congress's power.

The Commerce Clause has "been interpreted to apply to regulation of any instruments or instrumentalities or channels of commerce," she said, "but it's also been applied to anything that would substantially affect interstate commerce." Anything? This is the core question in the Florida case. If she already believes that the Commerce Clause justifies anything that substantially affects interstate commerce, then she has all but prejudged the individual mandate question.

A federal judge is required by law to recuse himself "in any proceeding in which his impartiality might reasonably be questioned." This has been interpreted to mean that the mere public expression of a legal opinion isn't disqualifying. But this is no routine case.

Ms. Kagan would sit as Mr. Obama's nominee on the nation's highest Court on a case

of momentous Constitutional importance. If there is any chance that the public will perceive her to have prejudged the case, or rubber-stamped the views of the President who appointed her, she will damage her own credibility as a Justice and that of the entire Court.

As someone who hopes to influence the Court and the law for decades, Ms. Kagan should not undermine public confidence in her fair-mindedness by sitting in judgment on such a controversial case that began when she was a senior government legal official.

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

Mrs. MURRAY. Mr. President, I ask unanimous consent to speak as in morning business.

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

#### FINANCIAL REGULATORY REFORM

Mrs. MURRAY. Mr. President, I have been fighting hard for a Wall Street reform bill that protects my State's families, holds Wall Street accountable, and includes a guarantee that American taxpayers will never again have to pay to bail out Wall Street or to clean up after big banks' messes. I am proud to say that, finally, after months of hard work, we are so close now to passing legislation that does exactly that.

This should not be a partisan issue. It should not be about right versus left or Republican versus Democrat. It should be about doing what is right for our families and small business owners in my State of Washington and across the country. It should be about who it is we choose to stand up for and who we think needs our support right now.

Some people have spent the last few months standing up for Wall Street and big banks, trying to water down this reform, and fighting against any changes that would prevent the big banks from going back to their "bonus as usual" mentality.

I have been proud to stand with so many others to fight against the Wall Street lobbyists and special interest groups and stand up for the families I represent in Washington—families who want us to pass strong reform that cannot be ignored or sidestepped in the future, who want us to end bailouts and make sure Wall Street is held accountable for cleaning up their own messes, and who want us to put into place strong consumer protections to make sure big banks can never again take advantage of our families, our students, or our seniors.

For most Americans, this debate is not complex; it is pretty simple. It is not about derivatives or credit default swaps; it is about fundamental fairness. It is about making sure that we have good commonsense rules that work for our families and our small business owners. It is about the person