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House of Representatives

The House was not in session today. Its next meeting will be held on Tuesday, September 14, 2010, at 2 p.m.

Senate

TUESDAY, AUGUST 3, 2010

The Senate met at 9:30 a.m. and was called to order by the Honorable CARTE P. GOODWIN, a Senator from the State of West Virginia.

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Eternal Lord God, who comforts us in all our troubles, be near to our law-makers today. When they feel tired or unappreciated, remind them that You keep a record of their labors and will reward them for their faithfulness. May the realization that You are close beside them keep them from becoming weary in their efforts to keep America strong. As they remember that pleasing You should be their first priority, fill them with a peace the world can't give or take away. Lord, lead them into a future of faith, love, and peace. We pray in Your sacred Name. Amen.

PLEDGE OF ALLEGIANCE

The Honorable CARTE P. GOODWIN led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. INOUE).

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, August 3, 2010.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable CARTE P. GOODWIN, a Senator from the State of West Virginia, to perform the duties of the Chair.

DANIEL K. INOUE,
President pro tempore.

Mr. GOODWIN thereupon assumed the chair as Acting President pro tempore.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, leadership time is reserved.

EXECUTIVE SESSION

NOMINATION OF ELENA KAGAN TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will proceed to executive session to consider the following nomination, which the clerk will report.

The assistant legislative clerk read the nomination of Elena Kagan, of Massachusetts, to be Associate Justice of the Supreme Court.

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The majority leader is recognized.

Mr. REID. Mr. President, while we continue working this week to create

jobs and finish the unfinished business of this work period, we will also turn to the nomination of Supreme Court nominee Elena Kagan.

Giving the President the Senate's advice and consent, as prescribed by the Constitution for a lifetime appointment to the highest Court in the country, is one of this body's most solemn obligations.

Chairman LEAHY and Ranking Member SESSIONS oversaw, through the lengthy process, very thorough and respectful confirmation hearings. All of them were fair and I think were probative. I thank them both for their leadership.

Several Senators have already made known how they will vote on Ms. Kagan's nomination. Those Senators and many others will come to the floor in the next few days to explain their positions. I will be one of them speaking in support of this exceptional nominee. I will certainly give her my vote.

As the debate moves to the Senate floor and as we move toward a final vote, I look forward to a continuation of the passionate but civil discussion we have seen in the committee thus far. In this respect, perhaps we can draw inspiration from Ms. Kagan herself. In her confirmation hearing last year for the position she currently holds—as our Nation's Solicitor General, that is our Government's lawyer in cases that come before the U.S. Supreme Court—Ms. Kagan testified that one of the attributes she would bring to the job was an “understanding of how to separate the truly important from spurious.”

• This “bullet” symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



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In the final days of this process, I suggest we keep those words in mind. I hope my fellow Senators will bring to this debate the same appreciation for what is critical to the Court and to our country, that will keep it separate from what is not.

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

MEASURE PLACED ON CALENDAR—H.R. 5901

Mr. LEAHY. Mr. President, I understand that H.R. 5901 is at the desk and due for a second reading.

The ACTING PRESIDENT pro tempore. Without objection, the clerk will read the title of the bill for the second time.

The assistant legislative clerk read as follows:

A bill (H.R. 5901) to amend the Internal Revenue Code of 1986 to exempt certain stock of real estate investment trusts from the tax on foreign investment in United States real property interests, and for other purposes.

Mr. LEAHY. I object to any further proceedings on this measure at this time.

The ACTING PRESIDENT pro tempore. Objection is heard. The bill will be placed on the calendar.

Mr. LEAHY. Mr. President, what is the order?

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from Vermont, Senator LEAHY, will control the first 30 minutes, and the Senator from Alabama, Senator SESSIONS, will control the second 30 minutes.

The Senator from Vermont is recognized.

Mr. LEAHY. Mr. President, more than 12 weeks ago, President Obama nominated Elena Kagan to succeed Justice John Paul Stevens as an Associate Justice of the Supreme Court of the United States. When the President announced his choice on May 10, he talked about her legal mind, her intellect, her record of achievement, her temperament and her fair-mindedness.

Having heard from Solicitor General Kagan at her confirmation hearing 5 weeks ago, I believe the American people have a sense of her impressive knowledge of the law, her good humor, and her judicial philosophy. In her testimony, she made clear that she will base her approach to deciding cases on the law and the Constitution, not on politics, not on an ideological agenda. She indicated that she will not be the kind of Justice who will substitute her personal preferences, and overrule the efforts of Congress to protect hard-working Americans pursuant to our constitutional role. Solicitor General Kagan made one pledge to those of us who were at that hearing: that she will do her "best to consider every case impartially, modestly, with commitment to principle, and in accordance with law."

Incidentally, I might say, at the outset, I compliment Republicans and Democrats alike for the amount of time Senators spent at the hearing. I

certainly compliment the ranking member, Senator SESSIONS. We may have disagreed on the outcome and on the vote, but I think Senators worked very hard to get questions asked, to make sure that the American people knew who Elena Kagan was. I note that Senator SESSIONS and I set the times for witnesses and all. We were constrained somewhat by the distinguished Presiding Officer's predecessor, who died that week, and we were trying to arrange time for many of us to go to the funeral. I wanted to publicly thank Senator SESSIONS for his help in working out that schedule.

No one can question the intelligence or achievements of this woman. No one should question her character either. Elena Kagan was the first woman to be the Dean of the prestigious Harvard Law School and the first woman in our Nation's history to serve as Solicitor General, a position often referred to as the "Tenth Justice." As a student, she excelled at Princeton, Oxford and Harvard Law School. She worked in private practice and briefly for then-Senator JOE BIDEN on the Judiciary Committee. She taught law at two of the Nation's most respected law schools, and counseled President Clinton on a wide variety of issues. She clerked for two leading judicial figures, Judge Abner Mikva on the Court of Appeals for the District of Columbia Circuit, and then for Supreme Court Justice Thurgood Marshall, on one of the most extraordinary lawyers in American history.

I have been here since the time of President Gerald Ford, and I have long urged Presidents from both political parties to look outside what they call the "judicial monastery," and not feel restricted to considering only Federal appellate judges to fill vacancies on the Supreme Court. This, of course, is what Presidents used to do. With his second nomination to the Court, President Obama has done just this; he has gone outside the judicial monastery. When confirmed, Elena Kagan will be the first non-sitting judge to be confirmed to the Supreme Court in almost 40 years, since the appointments of Lewis Powell and William Rehnquist.

I know there was criticism by some Republicans that this nominee lacks judicial experience. Of course, that ignores one key fact. President Clinton nominated her to the DC Circuit Court in 1999. The Senate was controlled by Republicans at the time and it was Senate Republicans who refused to consider her nomination. She was pocket filibustered. Had the Republicans not done so, Elena Kagan would have been confirmed and would have had more than 10 years judicial experience. To give you some idea of her abilities, instead, when she was not allowed to have a vote for the DC Circuit Court, she went on to become an outstanding law professor, the first woman Dean of Harvard Law School—one of the most prestigious law schools in the country, actually the world—and the first

woman to serve as the Solicitor General of the United States. Her nomination to the Supreme Court received the highest possible rating from the American Bar Association's Standing Committee on the Federal Judiciary. Her credentials and legal abilities have been extolled by many across the political spectrum. Two of these individuals were Justice Sandra Day O'Connor and Justice Antonin Scalia. In addition, Michael McConnell, Kenneth Starr and Miguel Estrada have given praise to this nomination. Like Justices Hugo Black, Robert Jackson, Earl Warren, William Rehnquist and so many others, Solicitor General Kagan's experience outside the judicial monastery will be valuable to her when she is confirmed. No one can question the intelligence or achievements of this woman. I hope nobody would question her character either.

From the moment her nomination was announced, Solicitor General Kagan has spoken about the importance of upholding the rule of law and enabling all Americans to have a fair hearing. She said that "law matters; because it keeps us safe, because it protects our most fundamental . . . freedoms; and because it is the foundation of our democracy." Like her, I believe the law does matter in people's lives. That is why I went to law school. That is why I practiced law and then became a prosecutor. That is why I ran for the Senate. I believe that the law matters in people's lives, because the Constitution is this amazing fabric of our Nation; it is our protection. She understands this, as did her mentor, Justice Thurgood Marshall.

In her contribution to the 1993 tribute to Justice Marshall by the Texas Law Review, Elena Kagan recalled how Justice Marshall's law clerks had tried to get him to rely on general notions of fairness, rather than a strict reading of the law, so they could allow an appeal to proceed on a discrimination claim. She wrote that the then 80-year-old Justice referred to his years trying civil rights cases and said: All you could hope for was that a court would not rule against you for illegitimate reasons. You could not expect that a court would bend the rules in your favor. That is the rule of law. Just as Sir Thomas More reminded his son-in-law in that famous passage from "A Man for All Seasons," that the law is our protection, Justice Marshall reminded his law clerks that the existence of rules and the rule of law is the best protection for all, including the least powerful. Elena Kagan concluded, as I do, that Justice Marshall "believed devoutly . . . in the rule of law." He was a man of the law in the highest sense. He understood the Constitution's promise of equality.

I was disappointed to see the manner in which his legacy was treated by some during the recent confirmation hearing, and to read that there are Republican Senators, currently serving, who recently said they would vote