judges who have actually presided over the 14–year history of this case.

Mr. BARRASSO. So there are issues of policy dealing with transparency, dealing with the production of records by the attorneys who are involved in this. When you read one of these editorials, the one in today's Hill, ''Unconscionable Cobell,'' written by a law professor at the University of Wisconsin-Madison:

Number of published court opinions in the case: 80-plus

Amount awarded to plaintiffs by courts at present: $0

Amount to attorneys under settlement: $100 Million. . . .

Amount to each account holder under [this] settlement:

We are talking now about those who have been affected by this—

$1,000.00

What an incredible disparity.

Well, if we were all to take the time to look through these two editorials, the changes to the settlement I have been proposing would not only seem reasonable, they would be absolutely necessary. They point out several real problems with the settlement, including the way the attorneys' fees are handled. I am continuing to work with my colleagues on dealing with that. These are the blunt facts.

So I agree with my colleague from North Dakota, the problems with the Cobell settlement are by no means insurmountable. They can and they must be resolved. In fact, I do not think it would be difficult to resolve the differences we have regarding the Cobell settlement. We can sit down, and we plan to do that, to discuss the issues directly. I think we can get beyond this impasse, and that is what I am committed to do.

I yield the floor.

The PRESIDING OFFICER. The Senator from North Dakota is recognized.

Mr. DORGAN. Mr. President, as I indicated, I intend to withhold the unanimous consent request because it would clearly be objected to. There are some people who disagree with the method by which this settlement would be paid for.

But I also wish to mention that I have some hope that later today, finally at long last, we may be able to come to the floor of the Senate with an agreement that would be able to withstand the unanimous consent request. If we do that before we break, we would have resolved a very longstanding issue, not just 15 years of litigation, or a century of mismanagement, but also since last December, when this agreement was reached and the Congress was given time to approve it, but then that deadline had to be extended six times. At long last, perhaps we will be able to decide we can do this together.

I very much appreciate the work Senator BARRASSO is doing and Senator KYL and Senator BAUCUS and others. My hope is that later this afternoon I will be able to come to the floor with such a unanimous consent request.

Mr. CARDIN. Mr. President, I rise today to talk about the Pigford II settlement pending full action by the U.S. Senate.

We all know that farming is a difficult occupation. The hours are long, the weather is unpredictable, and the challenge of competing in a global marketplace is intense. Tens of thousands of Black farmers have had to face all those normal challenges. Tragically, they have also had to deal with a challenge that was unique to them based solely on race. The U.S. Department of Agriculture, USDA, was discriminating against them.

More than 12 years ago, Black farmers across America brought a class action suit against the USDA for racial discrimination. The history of that discrimination is a sad one, and it is well documented. Farmers, like all businesses, need access to loans. They need to borrow money for expensive equipment and they need funding to help them when droughts strike or when markets collapse. The Congress has recognized this need for decades, and we have established special loan programs in the USDA to support these special needs. But when it came to lending, tens of thousands of Black farmers were the victims of systemic discrimination. During the 1980s and 1990s, the average processing time for a loan application by White farmers was 30 days; the average time for a loan application by Black farmers was 387 days. Black farmers had to wait 12 times as long to receive a loan. This discrimination earned the USDA the regrettable nickname ''the Last Plantation.''

Black farmers finally sought justice through a class action lawsuit in 1997. More than 20,000 farmers initiated claims citing racial discrimination in the USDA farm loan programs. Two years after the action was initiated, the U.S. District Court for the District of Columbia entered a consent decree approving a class action settlement to compensate these farmers for years of racial discrimination by the USDA. Each farmer who could prove discrimination was entitled to damages. Out of the initial 20,000 farmers, 15,000 were meritorious in the claims they brought.

As the legal process continued, additional farmers began to join the class action and filed their own claims. Approximately 80,000 farmers eventually brought claims. Unfortunately, many of these farmers did not know about the class action suit, and by the time they learned of its existence, the filing deadline had passed.

In 2008, Congress recognizing the injustice of stopping 80 percent or more of the farmers who potentially suffered discrimination by our government—decided to take action and created a new cause of action for farmers previously denied access to justice. In the 2008 farm bill, with bipartisan support, Congress included $100 million for payments and debt relief as a downpayment to satisfy the claims filed by deserving claimants denied participation in the original settlement because of timeliness issues.

After years of litigation and negotiation between the Department of Justice, which represented the USDA, and lawyers for the farmers, a settlement was finally reached in February 2010. The Pigford II settlement agreement will provide $1.25 billion, which is contingent on appropriation by Congress, to African-American farmers who can show they suffered racial discrimination in USDA farm loan programs. Once the money is appropriated farmers can pursue their individual claims through the same nonjudicial process used in the first case.

To address this funding need, President Obama included $1.15 billion in additional funding for his fiscal year 2010 and fiscal year 2011 budgets. Both Chambers of Congress have worked to pass appropriations to fulfill the settlement agreement since February. The House of Representatives has passed funding language for the Pigford case twice; once as part of the war supplemental and the other on a tax extenders bill. But the Senate has not been able to do the same. Despite the majority leader's efforts in finding ways to pay for the legislation and move the legislation for full Senate consideration, we have been unable to proceed to a rollcall vote. This bill has come before the Senate a half dozen times. There are no known objections to the settlement, yet we have failed to pass the funding therefore denying the process for funding to these farmers who were discriminated against by our own government.

We must move to appropriate these funds. The settlement that was reached is only valid until August 18, 2010. Failure to appropriate the money by then could cause the agreement to be voided. William Gladstone once said that ''justice delayed is justice denied.'' Let us not be in the business of delaying and denying justice for African-American farmers. Let us be in the business of allowing the justice system to work and provide them with adequate redress. I urge my colleagues to support this funding.

The PRESIDING OFFICER. The Senator from Connecticut is recognized.

Mr. DODD. Mr. President, I think my friends and colleagues on the other side have blocked out some time. If they would not mind, I would be very grateful if I could take 5 or 6 minutes to make some comments about the Kagan nomination. I see heads nodding affirmatively, so I appreciate it.

EXECUTIVE SESSION

NOMINATION OF ELENA KAGAN TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES—Resumed

The PRESIDING OFFICER. The Senate will proceed to executive session to

consider the following nomination, which the clerk will report.

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

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, I rise this afternoon to express my very strong support for the nomination of Solicitor General Elena Kagan to serve as an Associate Justice on the U.S. Supreme Court. I would like to thank Chairman LEAHY and Ranking Member SESSIONS for their work during the Judiciary Committee's recent hearings, as well as Majority Leader REID for moving Solicitor General Kagan's nomination through the Senate confirmation process as he has.

There are very few powers exercised by this body that are more important than its constitutionally mandated duty to give advice and consent on the President's judicial nominations. The very essence of our Nation's government rests on the supremacy of the rule of law, and the Constitution is the highest embodiment of that principle. The men and women whom we confirm to this Court are more than just judges. As the chief interpreters of that seminal document, the Constitution, they are guardians of the supremacy of the rule of law, upon which the integrity of our entire system of justice has been built.

It is, therefore, no surprise that nominees to our Nation's highest Court are subjected to such an intense level of scrutiny during the Senate's confirmation process. Nevertheless, the Constitution does not lay out a precise roadmap for how to do this. Therefore, each Senator must decide for him or herself what criteria to use when evaluating the merits of an individual Supreme Court nominee.

For my part, I have used the same, simple three-part test for Supreme Court nominees since 1981, when I voted to confirm Sandra Day O'Connor as the Court's first female Justice. Indeed, this is the 13th Supreme Court nomination I have considered during my 30-year tenure in the Senate—from Justice O'Connor to Elena Kagan today.

First, does the nominee have the technical competence and legal experience to do the job of a Justice on the U.S. Supreme Court?

Second, does the nominee have the proper character and temperament to serve on the High Court?

Third, does the nominee's record demonstrate respect for and adherence to the principles underlying our legal system—that of equal justice under the law?

For anyone who has read about her life or watched her performance during the confirmation hearings held by the Judiciary Committee earlier this summer, I believe it is abundantly clear that Elena Kagan passes all three of these tests with flying colors.

On the question of Solicitor General Kagan's competency and experience, I think there is little doubt that we are dealing with a superbly qualified nominee.

Since her graduation from Harvard Law School in 1986, Elena Kagan has enjoyed an illustrious legal and academic career.

After her graduation, Solicitor General Kagan had the honor of clerking for two extremely distinguished and highly influential Federal judges: U.S. Court of Appeals for the District of Columbia circuit judge Abner Mikva, with whom I served in the House of Representatives, and has been a great friend of mine for many years; and Thurgood Marshall, the Nation's first African-American Supreme Court Justice.

Subsequently, after nearly a decade of legal work in the private sector, as a professor at the University of Chicago Law School, and as an Associate Counsel in the White House under the administration of President Clinton, Ms. Kagan returned to her prestigious alma mater, serving first as a professor of law and then as dean of the Harvard Law School.

In an auspicious return to public service, Elena Kagan became the Federal Government's chief lawyer before the Supreme Court last year when she was confirmed by this body as our Nation's 45th Solicitor General—a position often referred to, I might add, as the Court's ''10th Justice'' because of the extensive legal knowledge and close working relationship with the Federal bench it requires.

I realize some of my colleagues have questioned Solicitor General Kagan's nomination because of her lack of judicial experience—that because Solicitor General Kagan has never been a judge in either a State or Federal court she cannot be an effective Supreme Court Justice.

I would, however, gently remind my colleagues that there is absolutely no constitutional requirement that a Supreme Court nominee have served previously as a judge. In fact, there is no requirement to be a lawyer to serve on the Supreme Court of the United States. Since our country's founding, well over one-third of the 111 individuals who have served on our Nation's highest Court never put on a judge's robe before their confirmation.

Indeed, William Rehnquist, who served as Chief Justice from 1986 until his death in 2005, had no prior work experience as a judge when he was first appointed to the Court by President Nixon in 1971.

Nor did Justice Robert Jackson, a very close and dear personal friend of my father who served with him at the Nuremberg Trials in 1945 and 1946. Robert Jackson served as U.S. Attorney General under Franklin Roosevelt before being appointed to the Supreme Court in 1941.

I would, therefore, submit to my colleagues that there are other important measures of the quality of a Supreme Court nominee besides the depth of his or her experience on the bench. Solicitor General Kagan's impressive list of career accomplishments and extensive base of legal knowledge will, I believe, hopefully put those unfounded doubts over her experience to rest.

Moving on to the two remaining parts of my test, Elena Kagan once again proves she would make an excellent addition to our Nation's highest Court.

As to her character, her graceful performance before the Judiciary Committee and extensive list of enthusiastic recommendations from Democrats, Republicans, and others across the entire spectrum reveal her to be a person of the utmost integrity, professionalism, and sound judgment. They also reveal, I think, a key aspect of her legal philosophy—a deep and abiding respect for the rule of law and our Nation's cherished principle of equality under the law.

As I said previously, Supreme Court Justices are not just judges, they are stalwarts of our Nation's democratic values, guardians of the idea that the rule of law should always transcend the rule of men. Each of the Federal judicial nominees confirmed in this body has the ability to shape every facet of the law and, in a larger sense, American society in general. As a result, it is absolutely critical, in my view, that we have members of the Supreme Court whose first obligation, above all else, is to safeguard those guiding constitutional principles that form the foundation of our democratic system of government and to fight for the principle of equal justice under law.

I firmly believe that, when confirmed, Solicitor General Kagan will hew closely to those critically important values and work to ensure they are protected.

Once again, I wish to thank Chairman LEAHY, our colleague Senator SESSIONS, the ranking minority member, and the members of the Judiciary Committee, who I think gave her a very fair, competent, and thorough hearing during the nomination process. I also wish to commend Majority Leader REID for his hard work during this process. I urge my colleagues to join those of us who believe this is a quality nominee who will serve our country well as an Associate Justice of the United States Supreme Court.

Mr. President, I thank my colleagues on the other side for giving me a few minutes to express my views on this issue.

I yield the floor.

The PRESIDING OFFICER. The Senator from Alabama is recognized.

Mr. SESSIONS. Mr. President, I ask unanimous consent to participate in a colloquy with a number of my Senate colleagues.

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

Mr. SESSIONS. Mr. President, we wish to enter into a discussion this

afternoon about a very critical issue in this confirmation process, and that is the second amendment and the right to keep and bear arms as provided for in our Constitution; the threat that now exists to that right that is plainly stated in the Constitution, and why we think it is worthy of serious consideration.

I will say that most Americans are totally unaware, perhaps, that the second amendment and the power of the second amendment hangs by a mere thread. Two five-to-four decisions recently have affirmed the second amendment, but had that vote been different—one Justice voting a different way—the second amendment would not apply to the District of Columbia. It would not be considered a right that would apply even to a Federal Government entity such as the District of Columbia as a result of the Heller case.

A more recent case in Chicago, McDonald v. the City of Chicago, dealt with whether the second amendment actually applies to the States and does it only apply to the Federal Government. That was a big deal. If it does not apply to the States, then any State in any city—and many cities are perfectly willing to do this—would have the power to ban firearms entirely, even though the Constitution plainly says you have the right to keep and bear arms. This was the effect of that decision.

I see my colleague Senator WICKER from Mississippi here. I wish to ask him if he would share with us: Does he believe Ms. Kagan's record would provide us any insight into her views on the second amendment? Because she would be one of the votes that would be critical as we go forward in the future as to whether that amendment still has power and force.

Mr. WICKER. I thank the ranking member for that question. I would answer: Yes, indeed, her record, taken together with her committee testimony, tells us a lot about Ms. Kagan's insight and feelings about the second amendment.

Let me agree with my colleague from Connecticut, however, and say I don't believe it is necessary for someone to have judicial experience to be an effective member of the Supreme Court. Clearly that is not called for in the Constitution. However, in a situation such as this, where the nominee has never written a judicial opinion of her own, where she has hardly any experience at all in the courtroom, I do think it is appropriate—and actually necessary—for us to examine her life experience and see what insights we can gain on her views on the second amendment.

I would also say this: The debate is drawing to a close. The issue is probably not in doubt, but I think we owe it to the RECORD, we owe it to our constituents, we owe it to the American people to outline our concerns with regard to the second amendment to the Constitution, to the second article in the Bill of Rights. So I ask my colleagues to indulge me by going through some of the life experiences this nominee has.

Ms. Kagan began her law career clerking for a very antigun judge, Abner Mikva, who later brought Ms. Kagan to the White House to serve as his deputy. Judge Mikva once likened the National Rifle Association to ''a street crime lobby.''

Next, Ms. Kagan's own hostility to the second amendment rights became evident during her time as a law clerk for Justice Thurgood Marshall where as a clerk she wrote that she was ''not sympathetic'' to the argument that the DC handgun ban violated an individual's second amendment rights. This is disappointing and troubling. In this memo she didn't cite text, precedent, or analyze the law or look to the Constitution. Ms. Kagan inserted her personal beliefs and said: I am not sympathetic to this individual right argument.

The case that comment involved was Lee Sandidge. A business owner was arrested and convicted in the District of Columbia for possessing ammunition and an unregistered pistol without a license. The law provided up to 10 years in jail for this offense. Mr. Sandidge's second amendment claim—the one that Ms. Kagan was not sympathetic toward—challenged the very same DC total gun ban that was struck down later by the Supreme Court in the Heller decision. Ms. Kagan's lack of sympathy for Sandidge's claim demonstrates she failed to recognize that we have an individual right as citizens to bear arms. I am very pleased that the Supreme Court has now recognized this on two occasions, in Heller as well as this year, in 2010, in McDonald.

Then Ms. Kagan embarked on what can only be described as a quest against gun ownership and second amendment rights during her years in the Clinton White House. She worked extensively on gun issues during President Clinton's administration which was well known for such gun control efforts. The record leaves no doubt that Ms. Kagan was a key player in shaping Clinton White House restrictive gun policies. During those years, she coauthored policy memos that advocated increased restrictions on lawful gun owners, including legislation requiring background checks for all secondary market gun purchases, a gun tracing initiative, and a call for a new gun design ''that can be shot only by authorized adults.'' According to the records of the Clinton Presidential Library, Ms. Kagan also drafted an Executive Order restricting the importation of certain semiautomatic rifles that were not covered by statute. In other words, she authored an Executive Order that went beyond the statute in her quest against gun ownership.

At the time of the import ban, a senior staffer who worked in the Clinton domestic policy shop that was run by Ms. Kagan, described the administration's plan as follows: ''We are taking the law and bending it as far as it can to capture a whole new class of guns.'' This was the office our nominee ran during that administration.

In addition, Ms. Kagan appears to have been in charge of the Domestic Policy Council's effort to respond to the Supreme Court's 1997 ruling in Printz v. the United States. The Printz case struck down parts of the 1994 Brady handgun law on tenth amendment grounds. According to the Clinton Library, even after the Supreme Court had ruled, the Clinton administration, with Ms. Kagan involved, worked to preserve unconstitutional provisions considered in many legislative and executive branch responses to the Court's decision.

I would reiterate what my friend from Alabama has said. The right of every American—the individual right we have to keep and bear arms under the second amendment to the Constitution—hangs by a single vote, and I am concerned that personal sympathies and a strong record of opposition to the second amendment would influence the way this person would act as a judge.

But there is one other thing, and I wish to ask my friend from Nevada about this. During her testimony before the Judiciary Committee, Ms. Kagan stated she had never had an occasion to look at the history on which Heller is based, and, therefore, she could not say whether she believed there is a preexisting individual, fundamental right to keep and bear arms.

Here is a talented and intelligent and articulate and brilliant law student and law professor and staffer who worked extensively on the issue of second amendment rights for years, and she taught constitutional law at one of the most prestigious institutions in this country, yet she stated in her testimony that she had never had occasion to look at the history on which this was based and, therefore, she could not say whether there was a fundamental right to keep and bear arms. I think her credibility was quite damaged by that statement.

I ask my friend Senator ENSIGN whether he was surprised when Ms. Kagan made that statement based on her extensive experience and interaction involving this issue?

Mr. ENSIGN. As a matter of fact, I was surprised. I think she did a real disservice to her prior employers, Justice Marshall, President Clinton, by not studying the history of the second amendment before she provided them with legal advice. I also think she did a disservice to her students, one that a professor of constitutional law should understand.

Ms. Kagan confirmed the importance of studying founding documents when interpreting second amendment rights when she said during her Solicitor General hearing:

The individual rights view and the collective rights view present cogent and sometimes powerful arguments. And I have come

away thinking that immersion in the primary sources, which I have never attempted, would be necessary to choose between them with any degree of confidence.

That is what she said. She confirmed this when I met with her as well. Yet the choice between the individual and collective rights view was crucial to her work for Justice Marshall in the Sandidge case and was certainly important to her work during the Clinton administration.

Mr. THUNE. Would the Senator from Nevada yield for a question on that?

Mr. ENSIGN. Yes.

Mr. THUNE. I heard my colleague say—and I would be interested in having him confirm—didn't Ms. Kagan teach constitutional law and would it not have been appropriate at that time for her to have looked at the Founding Fathers' intent on the second amendment?

Mr. ENSIGN. As a matter of fact, she did teach constitutional law. I suspect that in the course of her career, she came to understand where the Founders included these words in the second amendment in the Bill of Rights:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

I don't think there was a lack of time or certainly a lack of ability to find this source material, but I suspect it may be more of her unwillingness to accept and ultimately admit that the Constitution and the second amendment run contrary to her political beliefs. I find this extremely troubling.

I also think it shows this nominee's tendency to rely on her own personal beliefs and to read these into her decisions instead of the intent of the Framers of the Constitution.

Mr. THUNE. Mr. President, I say to my friend from Nevada, it is troubling—very troubling, and maybe even telling—that the President would ask us to confirm an individual who admittedly has not reviewed the justification for the second amendment in the Bill of Rights.

Mr. ENSIGN. I think my friend from South Dakota makes an excellent observation. This admission of her failure to study the history surrounding the second amendment is also in stark contrast to her emphasis on the importance of students studying international law at Harvard Law School.

When Solicitor General Kagan became dean of the Harvard Law School, she spearheaded a sweeping overhaul of the academic curriculum to require law students to take an international and comparative law course during their first year.

When asked, ''What specific subjects or legal trends would you like [Harvard] to reflect?'' she responded:

First and foremost, international law. . . . we should be making clear to our students the great importance of knowledge about other legal systems throughout the world. For 21st century law schools, the future lies in international and comparative law, and this is what law schools today ought to be focusing on.

She also said:

Our goal, then, has been to . . . better equip graduates to be proactive and creative problem solvers . . . to work with a global perspective, whether the particular problem involves a local contract dispute, or an international treaty.

Thanks to Dean Kagan, international law is a required course at Harvard Law School for first-year law students. However, constitutional law—U.S. constitutional law—is not only not a first-year requirement—in fact, somebody graduating from Harvard Law School can graduate without ever taking U.S. constitutional law.

Mr. SESSIONS. If the Senator will yield, this is a troubling thing. Justice Scalia has been a fierce critic of this, pointing out: What country do you pick? Do judges get to pick their own?

It seems to me, from what the Senator said, it is clear that the President's nominee to our highest Court in the United States has felt that the world of international law is more important than studying our own Constitution.

Mr. ENSIGN. That is the way it appears to me. This is another example of where her personal beliefs come in to affect the way she is going to be as a judicial activist.

Mr. SESSIONS. I agree. I think we must study what our Constitution says, what the people who wrote it meant, and what rights the people retained for themselves when they created it and gave certain limited rights to the Federal Government. I do believe the history of the second amendment is important. What is the history surrounding the founding of our country and the drafting of the second amendment?

Mr. ENSIGN. I am glad the Senator from Alabama asked that critical question. I think it is so important for Americans, people in this body, but especially our Supreme Court Justices, to understand.

We have to remember that the founding generation had just finished fighting the Revolution against a tyrannical government. They knew the true value of having an armed citizen population.

Thomas Paine wrote in ''Thoughts on Defensive War'' in 1775:

Arms discourage and keep the invader and plunderer in awe, and preserve order in the world, as well as property. . . . Horrid mischief would ensue were the law-abiding deprived of the use of them.

Thomas Jefferson once said in a 1787 letter to William Smith:

And what country can preserve its liberties, if its rulers are not warned from time to time that this people preserve the spirit of resistance? Let them take arms. . . .

Patrick Henry said:

Are we at last brought to such an humiliating and debasing degradation that we cannot be trusted with arms for our own defense? Where is the difference between having our arms under our own possession and under our own direction, and having them under the management of Congress? If our defense be the real object of having those arms, in whose hands can they be trusted with more propriety, or equal safety to us, as in our own hands?

In fact, if you only take a cursory look at the 20th century, every single government that has perpetrated genocide has first disarmed its citizens. It is my understanding that every known dictator who has come to power has followed this course.

Mr. SESSIONS. Well, did our Founding Fathers actually know this? What was their intent with regard to preserving the right to keep and bear arms when this language went into the Constitution?

Mr. ENSIGN. I know that our Founders certainly looked at writings of prominent philosophers when debating the importance of the right to keep and bear arms.

William Blackstone, whom the Supreme Court has called the ''preeminent authority on English law for the founding generation,'' cited the right to keep and bear arms as ''one of the fundamental rights of Englishmen,'' calling it ''the natural right of resistance and self-preservation—the right of having and using arms for self-preservation and defense.''

Judge St. George Tucker, who wrote the first commentary on the Constitution in 1803, describes the second amendment as ''the true palladium of liberty.''

He continued:

The right to self-defence is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.

Judge Tucker also said:

If, for example, a law passed by congress, prohibiting the free exercise of religion . . . or abridging the freedom of speech, or of the press; or the right of the people to assemble peaceably, or to keep and bear arms; it would, in any of these cases be the province of the judiciary to pronounce whether any such act were constitutional. . . . The judiciary, therefore, is the department of the government to whom the protection of the rights of the individual is by the constitution especially, confided, interposing its shield between him and the sword of usurped authority, the darts of oppression, and the safety of faction and violence.

I would like to ask my colleague from Mississippi, what did Ms. Kagan say about this natural right of self-defense?

Mr. WICKER. I simply look to her own testimony. I think it is troubling—particularly for a law professor and somebody who dealt with the issue for decades—when asked at her hearing whether she personally believes there was a right to self-defense that existed before the Constitution, she said she ''didn't have a view of what are natural independent of the Constitution.''

Maybe Solicitor General Kagan was tired by that time. Maybe she had been told by her handlers—the people at the Department of Justice—that it is best

to simply not answer that. But I say to my colleagues, we are endowed by our Creator with certain inalienable rights. We don't get them from the Constitution. Those rights are there. Certain rights are enumerated, including the second amendment rights, in the Constitution. For a Justice of the Supreme Court not to understand that causes me problems, and it causes me to think that she just doesn't have a very well-founded view of the second amendment.

Mr. ENSIGN. Well, I think her statement was shocking. It also proves she doesn't believe the second amendment codifies the preexisting natural right to self-defense.

Her statement is in stark contrast with the belief of our Founders, who fervently believed that the right to keep and bear arms was a natural right. Our Founders discussed natural rights in one of the founding documents, the Declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.

Yet Ms. Kagan doesn't ''have a view of what are natural rights independent of the Constitution.'' The failure to recognize the natural right to self-defense as articulated by our Founders and expressed in the Bill of Rights, I believe, is deeply disturbing.

The Constitution doesn't create these inalienable rights, as the Senator from Mississippi said. It recognizes and protects these rights that are considered bestowed upon us by our Creator.

Mr. WICKER. The Senator is correct. The phrase ''a right of the people'' is used two other times in the Constitution and the Bill of Rights—in the first amendment's assembly and petition clause, the fourth amendment's search and seizure clause, and a very similar phrase is used in the ninth amendment, where the Founders stated that ''the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.''

In all three instances, the Framers were referring to individual rights and not to collective rights. Nowhere in the Constitution does a ''right'' attributed to ''the people'' refer to anything but an individual right. It is the same with the second amendment.

This has been affirmed in the Heller case. Judge Sotomayor, when testifying before us, said she thought that was settled law. The decision this year, in which she dissented, makes me wonder about that, and it gives me grave concern, with a 5-to-4 Court, about what might happen to precedent and what I believe now is settled law.

Let me ask the ranking member, during Ms. Kagan's hearing, she was questioned about her statement that she believes precedent trumps original intent. What does this mean with regard to the second amendment rights, based on the pre-Heller precedent?

Mr. SESSIONS. It is a troubling statement. I think, clearly, it allows her to justify voting—if confirmed to the Supreme Court—to eviscerate the second amendment. There are some earlier cases before the 14th amendment was even passed, or before the first 10 amendments, the Bill of Rights, were applied to the States in any systematic way that you could rely on as precedent, which could indeed trump, in her words, the original intent of the Constitution.

What did the people ratify? They ratified the Constitution that, in fact, just before the Founders signed it, they said ''we do ordain and establish this Constitution for the United States''—not some other judicial opinion 100 years later.

I think it raises troubling questions about where she stands on that. In the light of Heller and McDonald, which were razor-thin 5-to-4 decisions, made within the last 2½ years, we have to acknowledge that the Supreme Court is not, with clarity, committed to the plain application of the second amendment.

Mr. THUNE. If I might ask the Senator from Alabama this—because he is the ranking member on the Judiciary Committee. I know he has dealt with numerous nominees to the Supreme Court in the past, as well as probably hundreds of other judicial nominees. Does the Senator recall how often those nominees had a record on second amendment rights?

Mr. SESSIONS. Well, most nominees have not had a record on it, but it is interesting, and perhaps noteworthy, that President Obama, who himself has not been a strong supporter of the second amendment rights, and many of his supporters and Cabinet members are openly hostile to it, the two nominees for the Supreme Court he has submitted, Justice Sotomayor and Kagan, have had records that indicate a hostility to it. Even though Judge Sotomayor, in her testimony, indicated she considered this settled law—the Heller decision—her decision less than a year later in the Chicago McDonald case, on a similar but somewhat different issue, was not consistent with the belief that the Supreme Court had settled the question in Heller. So this was a troubling thing. I think the Attorney General of the United States, Eric Holder, has argued very vociferously to restrict gun rights.

This is the top law enforcement officer in the country. I do believe this is a matter of some concern, in fact, that we may be moving into a period in which the government, the big city in Washington, the elites who control this, who come out of an environment where they are not comfortable with guns, are oblivious and insensitive to the right that I believe was critical to our Founders in ratifying the Constitution. They wanted to know that they had a right to keep and bear arms, and it was important to them that the right was in the Constitution.

I ask Senator THUNE, have any of the outside groups that are concerned about these issues spoken out about this nomination?

Mr. THUNE. They have. I simply say to my colleague from Alabama, in his remarks he noted the pattern we are starting to see that exists with regard to—the Senator from Alabama mentioned the Attorney General of this administration and their nominees to the Supreme Court. What that has done is galvanized those at the grassroots level who are very concerned about what they see happening and how it might threaten and put in danger the second amendment right that many of them have enjoyed and believe is something that ought to be protected in the future—it ought to be protected by the Supreme Court, it ought to be protected by the Congress, it ought to be protected by the President of the United States.

We see some of these grassroots people who are concerned about this issue give voice to their concerns through organizations such as the NRA, for example, and Gun Owners of America. I wish to point out, if I may, that both of these organizations have written letters in opposition to Ms. Kagan's nomination.

I ask unanimous consent to have printed in the RECORD these letters.

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

NATIONAL RIFLE ASSOCIATION
OF AMERICA,
Fairfax, VA, July 1, 2010.

Hon. PATRICK LEAHY,
Chairman, Senate Committee on the Judiciary, Dirksen Senate Office Building, Washington, DC.

Hon. JEFF SESSIONS,
Ranking Member, Senate Committee on the Judiciary, Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN LEAHY AND RANKING MEMBER SESSIONS: We are writing to announce the National Rifle Association's position on the confirmation of Solicitor General Elena Kagan as Associate Justice of the United States Supreme Court.

Other than declaring war, neither house of Congress has a more solemn responsibility than the Senate's role in confirming justices to the U.S. Supreme Court. As the Senate considers the nomination of Solicitor General Kagan, Americans have been watching to see whether this nominee—if confirmed—would respect the Second Amendment or side with those who have declared war on the rights of America's 80 million gun owners.

During confirmation hearings, judicial nominees make carefully crafted statements regarding issues with which they do not personally agree. They often speak in terms of ''settled law'' or ''I understand the right''. When those statements are contradicted by an entire body of work over a nominee's career, however, it would be foolhardy to simply take them at face value. In Ms. Kagan's own words, ''you can look to my whole life as to what kind of justice I would be.'' We agree.

As she has no judicial record on which we can rely, we have only her political record to review. And throughout her political career, she has repeatedly demonstrated a clear hostility to the fundamental, individual right to keep and bear arms guaranteed under the U.S. Constitution.

As a clerk for Justice Thurgood Marshall, Ms. Kagan said she was ''not sympathetic'' to a challenge to Washington, D.C.'s ban on handguns and draconian registration requirements. As domestic policy advisor in the Clinton White House, a colleague described her as ''immersed'' in President Clinton's gun control policy efforts. For example, she was involved in an effort to ban more than 50 types of commonly-owned semi-automatic firearms—an effort that was described as: ''taking the law and bending it as far as we can to capture a whole new class of guns.'' And as U.S. Solicitor General, she chose not to file a brief last year in the landmark case McDonald v. Chicago, thus taking the position that incorporating the Second Amendment and applying it to the States was of no interest to the Obama Administration or the federal government. These are not the positions of a person who supports the Second Amendment.

During her confirmation hearings last year, Justice Sonia Sotomayor repeatedly stated that the Supreme Court's historic Heller decision was ''settled law''. Even further, in response to a question from Chairman Leahy, she said ''I understand the individual right fully that the Supreme Court recognized in Heller.'' Yet last Monday in McDonald, she joined a dissenting opinion which stated: ''I can find nothing in the Second Amendment's text, history, or underlying rationale that could warrant characterizing it as 'fundamental' insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes''.

We would also note that both Heller and McDonald were 5–4 decisions. The fact that four justices would effectively write the Second Amendment out of the Constitution is completely unacceptable. Ms. Kagan has repeatedly declined to say whether she agrees with the dissenting views of justices Stevens, Breyer, Ginsburg and Sotomayor, which leaves unanswered the very serious questions of whether she would vote to overturn Heller and McDonald or narrow their holdings to a practical nullity.

This nation was founded on a set of fundamental freedoms. Our Constitution does not give us those freedoms—it guarantees and protects them. The right to defend ourselves and our loved ones is one of those. The fundamental, individual right to keep and bear arms is another. These truths are what define us as Americans.

Any individual who does not believe that the Second Amendment guarantees a fundamental right and who does not respect our God-given right of self-defense should not serve on any court, much less receive a lifetime appointment to the highest court in the land. Justice Sotomayor's blatant reversal on this critical issue requires that we look beyond statements made during confirmation hearings and examine a nominee's entire body of work. Unfortunately, Ms. Kagan's record on the Second Amendment gives us no confidence that if confirmed to the Court, she will faithfully defend the fundamental, individual right to keep and bear arms of law-abiding Americans.

For these reasons, the National Rifle Association has no choice but to oppose the confirmation of Solicitor General Elena Kagan to the U.S. Supreme Court. Given the importance of this issue, this vote will be considered in NRA's future candidate evaluations.

Thank you for your attention to our concerns. Should you have any questions or wish to discuss further, please do not hesitate to call on us personally.

Sincerely,

WAYNE LAPIERRE,
Executive Vice President, NRA.
CHRIS COX,
Executive Director, NRA–ILA.

GUN OWNERS OF AMERICA,
Springfield, VA, August 5, 2010.

DEAR SENATOR: You will soon vote on the confirmation of Elena Kagan to the U.S. Supreme Court.

During her confirmation hearings, Kagan ducked and dodged questions about the Second Amendment and refused to declare whether she believes the Second Amendment protects an individual right.

Kagan insisted that the Supreme Court decisions in Heller and McDonald should be treated as precedent and ''settled law,'' but this in no way precludes her from ruling that almost any gun law—including gun owner registration, purchasing limits, waiting periods, private sale background checks, and more—is consistent with the Constitution.

Recall the confirmation hearings of Sonia Sotomayor, the newest Supreme Court Justice. Sotomayor assured the Senate, and the American people, that she accepted the Court's ruling in Heller that the Second Amendment protects an individual right.

Yet, in the McDonald case, Sotomayor joined the dissent in writing that ''I can find nothing in the Second Amendment's text, history, or underlying rationale that could warrant characterizing it as 'fundamental' insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes.''

Ms. Kagan has made the same promises to the Senate, but the available evidence portrays her as a forceful advocate of restrictive gun laws and as a person driven by political considerations rather than the rule of law.

While Ms. Kagan does not have a record of judicial opinions, her views on the Second Amendment are no mystery. Some considerations that have come to light since her nomination include:

While serving in the Clinton administration, Ms. Kagan drafted an executive order to ban certain semi-automatic firearms;

Ms. Kagan suggested that the President could issue another executive order—bypassing Congress—to ban gun purchases without prior approval from the federal government;

As a law clerk, Elena Kagan advised against the Supreme Court considering Sandidge v. United States in a case that questioned the constitutionality of the D.C. gun ban, writing that she was ''not sympathetic'' to the gun owner's Second Amendment claims; and,

Kagan was part of the Clinton team that pushed the firearms industry to include gun locks with all gun purchases and was in the Clinton administration when the President pushed legislation that would close down gun shows.

Elena Kagan poses such a threat to the Second Amendment that it would be better for the Supreme Court to begin its 2010–2011 session with only eight Justices, than for this radical nominee to be confirmed.

On behalf of over 300,000 members of Gun Owners of America, I urge you to ''NO'' on this nominee's confirmation.

Sincerely,

JOHN VELLECO,
Director of Federal Affairs.

Mr. THUNE. Mr. President, I continue by saying that after reviewing Ms. Kagan's record of testimony at the confirmation hearing, Gun Owners of America concluded:

. . . the available evidence portrays her as a forceful advocate of restrictive gun laws and as a person driven by political considerations rather than the rule of law.

The NRA went on to write:

. . . Ms. Kagan's record on the Second Amendment gives us no confidence that if confirmed to the Court, she will faithfully defend the fundamental, individual right to keep and bear arms of law-abiding Americans.

For these reasons, the National Rifle Association has no choice but to oppose the confirmation of Solicitor General Elena Kagan to the U.S. Supreme Court. Given the importance of this issue, this vote will be considered in the NRA's future candidate evaluations.

Yes, the answer to the question of the Senator from Alabama is both the NRA and Gun Owners of America have opposed not only this nomination but also Justice Sotomayor's nomination.

Mr. President, I ask unanimous consent to have printed in the RECORD the NRA's letter in opposition to the Sotomayor nomination.

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

NATIONAL RIFLE ASSOCIATION
OF AMERICA,
Fairfax, VA, July 23, 2009.

Hon. HARRY REID,
Majority Leader, U.S. Senate, The Capitol, Washington, DC.
Hon. MITCH MCCONNELL,
Republican Leader, U.S. Senate The Capitol, Washington, DC.

DEAR LEADER REID AND LEADER MCCONNELL: We are writing to express the National Rifle Association's opposition to the confirmation of Judge Sonia Sotomayor as Associate Justice of the United States Supreme Court.

From the outset, the National Rifle Association respected the confirmation process and hoped for mainstream answers to bedrock questions. Unfortunately, Judge Sotomayor's judicial record and testimony during the Senate Judiciary Committee hearings clearly demonstrate a hostile view of the Second Amendment and the fundamental right of self-defense guaranteed under the U.S. Constitution.

We are particularly dismayed about the U.S. Court of Appeals for the Second Circuit's recent decision in the case of Maloney v. Cuomo, in which Judge Sotomayor refused to follow Supreme Court precedent by conducting a proper incorporation analysis of the Second Amendment, concluding instead that the right to keep and bear arms does not protect all law-abiding Americans living in every corner of this nation.

In addition, Judge Sotomayor was a member of the panel in the case of United States v. Sanchez-Villar, where (in a summary opinion) the Second Circuit dismissed a Second Amendment challenge to New York State's pistol licensing law. That panel, in a terse footnote, cited a previous Second Circuit case to claim, ''the right to possess a gun is clearly not a fundamental right.''

It is only by ignoring history that any judge can say that the Second Amendment is not a fundamental right and does not apply to the States. The one part of the Bill of Rights that Congress clearly intended to apply to all Americans in passing the Fourteenth Amendment was the Second Amendment. History and congressional debate are clear on this point.

We believe any individual who does not agree that the Second Amendment guarantees a fundamental right and who does not

respect our God-given right of self-defense should not serve on any court, much less the highest court in the land. Given the importance of this issue, the vote on Judge Sotomayor's confirmation will be considered in NRA's future candidate evaluations.

Thank you for your attention to our concerns. Should you have any questions or wish to discuss further, please do not hesitate to call on us personally.

Sincerely,

WAYNE LAPIERRE,
Executive Vice President, NRA.
CHRIS COX,
Executive Director, NRA–ILA.

Mr. THUNE. Mr. President, the NRA wrote in that case:

. . . Judge Sotomayor's judicial record and testimony during the Senate Judiciary Committee hearings clearly demonstrate a hostile view of the Second Amendment and the fundamental right of self-defense guaranteed under the U.S. Constitution.

Mr. ENSIGN. Mr. President, I ask my friend from South Dakota, why is it so significant that both of these groups have opposed her nomination?

Mr. THUNE. I say to my colleague from Nevada, it comes down to their horrible record on gun rights. It made it impossible for these two organizations to conclude that they would be impartial constitutional judges on this issue even though they tried to convince Senators otherwise during their confirmation hearings.

These groups had their concerns about Justice Sotomayor validated on June 30, 2010, when she ruled again that the second amendment is not a fundamental right. Justice Sotomayor assured Senators during her hearing that she believed the second amendment guaranteed an individual right to keep and bear arms. But then in her first ruling on the second amendment as a Supreme Court Justice, she joined the minority opinion in McDonald v. Chicago and failed to protect this individual right, as confirmed by the majority of the Court, for citizens living in the 50 States.

Specifically, at Justice Sotomayor's hearing, she said that she ''understood the individual right fully that the Supreme Court recognized in Heller'' and ''knew how important the right to bear arms is to many Americans,'' and that she did not consider the right ''unfundamental.''

This is in stark contrast to the opinion she signed onto in McDonald that I said—this is a quote from the McDonald opinion:

I can find nothing in the Second Amendment's text, history, or underlying rationale that could warrant characterizing it as fundamental, insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes.

I know that many in this body, especially those who supported her confirmation, were surprised by what is seemingly a 180-degree turn.

While I had hoped we could trust her word, I was concerned that her record did not fit her statements at the hearing. I had concerns that her true feelings were much more hostile toward the second amendment right than what she was letting on.

Specifically, I had concerns with two different cases she decided as a circuit court judge, including one after the Supreme Court already recognized the second amendment was an individual right, where she held in that case that the second amendment was ''clearly not a fundamental right'' and did not apply to the States.

There were some Senators at the time who were not as concerned by this record as I was and some of the others of us in the Chamber were and went so far as to say—this is a quote from one of our colleagues:

I do not see how any fair observer could regard her testimony as hostile to the second amendment personal right to bear arms, a right she has embraced and recognized.

That is something said by one of our colleagues in the Senate during the Sotomayor confirmation.

While what Justice Sotomayor said during the hearing certainly gave the impression that she believed in the individual right to keep and bear arms, her prehearing record demonstrated her true beliefs.

I am here today to urge those Members who proclaim to strongly support the second amendment not to be fooled a second time. Ms. Kagan was asked about the second amendment on a number of occasions at her hearing, and each time her response was merely a mimic of Justice Sotomayor's statements on the second amendment at her hearing.

Ms. Kagan would go no further than to acknowledge that the important Supreme Court decisions in Heller and McDonald are ''precedent'' and ''settled law entitled to all the weight the precedent usually gets.''

I believe there is no question that Ms. Kagan will follow in the footsteps of Justice Sotomayor and revert to the beliefs demonstrated by her anti-second amendment record rather than her posturing during her confirmation hearing.

That is the reason the NRA and other groups that treasure the fundamental right to keep and bear arms, such as Gun Owners of America, oppose her nomination, just as they did Justice Sotomayor's.

The only question that remains for us in the Senate is whether pro-second amendment Senators who voted for Justice Sotomayor have learned their lesson and will vote against the Kagan nomination.

I say to my colleagues from Nevada and Alabama, as the old saying goes: Fool me once, shame on you; fool me twice, shame on me. For the sake of gun owners across the country, I hope they will not be fooled again.

I say to my colleagues from Nevada and Alabama, with all the unanswered questions that remain after the Heller and McDonald cases, are there not lots of reasons why those grassroots people across this country—those gun owners, those people who care profoundly about the right to keep and bear arms—ought to be concerned? For example, what is a sensitive place? Who needs to register? There are going to be registration laws that are put in place. How is the issue of microstamping and the mandates and requirements that might be associated with that going to impact this fundamental second amendment right?

Mr. ENSIGN. Mr. President, I ask the ranking member about the McDonald case, and maybe he can go into some details about the McDonald case and the significance of that when it comes to future decisions.

Mr. SESSIONS. The McDonald case was a hugely important case. It dealt for the first time in recent memory with the question of whether the second amendment, which had been held in Heller to apply to the Federal Government, whether it passed through the 14th amendment to apply to all the States—and cities are creatures of States, so whether it applied to cities.

This is a big deal because it is not generally so much the Federal Government that is willing to deny gun rights, but certain States and certain cities seem very aggressively willing to deny people's second amendment rights.

The question for the Court was: Is it a fundamental right in the Bill of Rights, a stated fundamental right, and if it is fundamental, it passes through the 14th amendment and all States must comply with it, just as States must comply with the right to free speech and other rights in the Constitution.

By a razor thin 5-to-4 majority, the Supreme Court in McDonald held that it is a fundamental right and does apply to the States, and no State, therefore, and no city can deny an individual right of an American citizen to keep and bear arms. This is a big, important case.

Justice Sotomayor—who suggested otherwise in her testimony—as Senator THUNE said, her record suggested she would rule that way, rule with the four that it did not apply to the States. It is a big deal.

Mr. ENSIGN. In the McDonald case, as I understand, there were several restrictions put on citizens when it came to their second amendment right: paying a $100 processing fee and a $15 fee for each gun registered; undergo and pass a firearms safety test which consists of 4 hours of training and 1 hour target range practice, which, by the way, costs about $100 for each one of those activities; undergo and pass a vision test, if you do not have an Illinois driver's license; provide fingerprints; be at least 21 years of age or 18 years with parents' permission; wait 45–120 days for processing; own only one operational firearm; and reregister every 3 years.

I ask the ranking member, why are these restrictions necessary?

Mr. SESSIONS. The question becomes: Does it impact a fundamental

right? At some point it does. We decided you cannot put a poll tax on people to say you have to pay money for your right to vote. People do not have to pay for the right to speak out about advocate beliefs because you have a right to free speech.

I do think these restrictions, as they increase, can reach a point of denial of people's individual right to keep and bear arms. We want to be sure that a judge not only recognizes it is a constitutional individual right but that the judge recognizes that some of these restrictions we accept and are legitimate go too far.

Mr. ENSIGN. I will add, concluding my remarks, that this issue is of critical importance. Without the second amendment, the rest of the Bill of Rights can go away. That is what our Founders recognized. Our colleagues, before they vote on Solicitor General Kagan, need to understand that. That is why this colloquy is so important today. We have brought out some very important points.

It was an honor to be with my colleagues to discuss Solicitor General Kagan's views on the second amendment and how that potentially could impact her decisions in the future.

Mr. THUNE. Mr. President, I close by saying as well, I think in all cases, you have to judge people not by what they say but by what they do. Clearly, the record would suggest, as it did with Justice Sotomayor, a certain hostility toward the second amendment right. Obviously, statements at the Judiciary Committee hearings suggesting an openness to this or acknowledging settled law or precedents or all those sorts of things were meaningless in regard to the Chicago case with regard to Justice Sotomayor.

If we look at the long history of Ms. Kagan with regard to this issue, I think we can conclude where she is going to end up.

It is a critical issue because these are 5-to-4 decisions. These are very narrow decisions that strike at the very heart of a fundamental constitutional right that people in this country deserve to have their leaders, both elected leaders and people on the Court, protect. I am very concerned about where that is headed with this nominee.

I yield to the Senator from Alabama.

Mr. SESSIONS. I thank my colleagues for this nice and valuable discussion. I will say that one of the unjustifiable actions of the judicial activist philosophy that is too much afoot in America today is their willingness to completely be oblivious to plain constitutional rights, things that are flatly stated, and then to create rights that do not exist.

For example, the Constitution gives the right to free press, but we had Solicitor General Kagan arguing before the Supreme Court in defense of this campaign finance bill that a corporation could be prohibited from producing a pamphlet before an election that might be critical of a politician. I mean, that is what the first amendment was about. It wasn't about pornography or flag burning, for heaven's sake. It was about political speech, plainly in the Constitution. Yet we had four members of the Supreme Court—a vote in an opinion recently—who said the government could ban the pamphlets. Actually, another lawyer for the government argued you could ban books.

The Supreme Court, by a 5-to-4 majority did, in fact, say that you could take a man's private drugstore—the government could—and give it to another man who had a competing drugstore; in other words, taking private property for private use. The Constitution says you can't take private property except for public use under condemnation. A plain violation, 5-to-4 approved.

By two 5-to-4 decisions—the narrowest of margins—we had the plain constitutional right that Americans have to keep and bear arms hang by one vote. We have another example of a judge in California yesterday declaring that the Constitution somewhere says a State must declare that a union between same-sex couples has to be defined in the same way and recognized in the same way as a marriage, even after California had a referendum in which millions of Californians voted differently. A single judge, with no clear constitutional authority at all—in fact, no real constitutional authority—declared that invalid and wiped it out.

So I would suggest that people who are using this court to promote their agendas need to be careful. Don't think you can play with the first amendment. Don't think you can play with the second amendment. Don't think you can play with the constitutional right to have your property not taken by the government except for public use. If you can start wiping those rights out, what right next will the Court come and take? What right next will the central government come and take from you?

So if you love this Constitution and respect it and believe it is a great bulwark for freedom, prosperity, and liberty, I suggest there is only one way to handle it, Mr. President: enforce it as written whether you like it or not.

I thank the Chair, and I yield the floor.

The PRESIDING OFFICER. The Senator from Texas.

Mr. CORNYN. Mr. President, I want to address the nomination of Solicitor General Kagan to serve on the U.S. Supreme Court. Earlier this week, I discussed my opposition to the nomination, but at that time I didn't go into any depth about my concerns with regard to her participation in the military recruiting policy that banned the U.S. military from the Office of Career Services at Harvard Law School.

While this incident has been discussed a lot, I think it is very important to establish for the record exactly what happened. I believe a due respect for the men and women of our military and the gravity of this debate demand a full review of the facts behind what Elena Kagan did as dean of the Harvard Law School to exclude and stigmatize the U.S. military.

Harvard Law School adopted an antidiscrimination policy in 1979. This policy states that any employer that wished to use the Office of Career Services at the law school had to sign a statement affirming that it does not discriminate on various bases, including sexual orientation. The military—not just because of its policy but because of the policy of the Congress and the law that we passed—could not sign this statement because of the don't ask, don't tell policy adopted during the Clinton administration.

In 1993, when a Democratic Congress and the Clinton administration changed the military's outright ban on gays in the military to adopt this don't ask, don't tell policy, Harvard took the position that the military was still not in compliance with its antidiscrimination policy. As a result of Harvard's policy, from 1979 through 2002, the U.S. military was barred from recruiting individuals at the Harvard Law School's Office of Career Services, where everyone else who was recruiting on campus was allowed to conduct interviews and recruit potential candidates.

While this ban on the services of the Office of Career Services was in effect, the Harvard Law School Veterans Association essentially took the place of the Office of Career Services and established an off-campus interview forum for law students interested in serving their country in the U.S. military. So because they were banned from the Office of Career Services, the military had to look for an alternative venue or forum provided by the Harvard Law School Veterans Association in order to conduct those interviews.

But then something very important happened. In 1995, Congress enacted another law, popularly known as the Solomon Amendment. The Solomon Amendment said you cannot receive Federal funds—if you are an educational institution—if you, in effect, prohibit military recruiting on your campus. In other words, they could have continued their policy of discrimination against the military, but they would have been denied Federal funds under the plain wording of the Solomon Amendment passed in 1995.

The Secretary of Defense, under the Solomon Amendment, has to make a finding that the school is not offering access to military recruiters that is ''equal in quality and scope to the access that the school provides other employers.'' That was the 1995 law. In 2002, the Secretary of Defense of the United States found that Harvard's exclusion of military recruiters from the Office of Career Services was not ''equal access.''

In response to this Federal law and the finding by the Secretary of Defense, Ms. Kagan's predecessor, Robert

Clark, essentially capitulated and gave the military access to the Office of Career Services in 2002. So Dean Robert Clark, Dean Kagan's predecessor, rather than be denied Federal funds to Harvard by violating the Solomon Amendment and denying access to military recruiters to the Office of Career Services, decided in 2002 to change Harvard's policy. Thus, when Ms. Kagan became dean of the law school in the spring of 2003, the military had full access to the Office of Career Services to recruit interested candidates for military service.

For a while, Dean Kagan maintained the military's access to the Office of Career Services in compliance with the Solomon Amendment. But it is clear that Dean Kagan did not like that because she voiced her political opposition to the don't ask, don't tell policy—in other words, the law enacted by Congress and to which the Department of Defense was accountable for enforcing—in an e-mail she sent to all of Harvard's law students saying that she ''abhorred'' the ''don't ask, don't tell policy'' and she considered it ''a moral injustice of the first order.''

In January 2004, Dean Kagan joined 53 other members of the Harvard law faculty in filing a friend of the court brief supporting a challenge to the Solomon Amendment in the Third Circuit Court of Appeals. So even though she maintained access for a while, inherited that policy under her predecessor, in 2004, when a lawsuit was filed to challenge the Solomon Amendment, Dean Kagan and other Harvard Law School faculty joined in a friend of the court brief to try to strike down the Solomon Amendment.

In November of 2004, a split panel on the Third Circuit Court of Appeals actually held that the Solomon Amendment was reasonably likely to be unconstitutional and sent the case back to the district court with instructions to issue an injunction halting the Solomon Amendment's enforcement.

Now, this is very important because the Third Circuit is one of our circuit courts of appeal in the United States, but it is not the U.S. Supreme Court. By that I mean when it makes a decision, its decision only applies to the territory or that part of the United States that is within the Third Circuit. That is important because Harvard is not in the Third Circuit. Harvard is in the First Circuit. So in effect, the Third Circuit panel's decision had no legal effect on Harvard Law School.

Nevertheless, the very next day, after the Third Circuit issued its decision, Dean Kagan changed the Harvard Law School policy to once again bar the military from using the services of the Office of Career Services. In other words, she was not compelled to do so by law but exercising her discretion as dean, she chose to reinstate this policy of barring military recruiters from the Office of Career Services.

Then, in January of 2005, the Third Circuit issued an order staying its enforcement pending a decision by the U.S. Supreme Court. After this, of course, the Third Circuit ruling did not even have any effect even in the Third Circuit, much less in the jurisdiction in the circuit with jurisdiction over Harvard. But even after the order was stayed, Ms. Kagan continued the policy of barring military recruiters from the Office of Career Services.

While her policy barring military recruiters from the Office of Career Services was in effect, Dean Kagan approached the Harvard Law School Veterans Association and asked them to serve as an alternate channel for military recruiting at Harvard Law School. In 2005, the law school veterans declined, writing:

> Given our tiny membership, meager budget, and lack of any office space, we possess neither the time nor the resources to routinely schedule campus rooms or advertise extensively for outside organizations, as is the norm for most recruiting events.

In short, the law school veterans told Dean Kagan that the separate access she wanted them to offer the military would not be equal because they didn't have the ability to match the resources of the Office of Career Services.

In May 2005, the Supreme Court of the United States then said they were going to hear an appeal of the Third Circuit's decision, and they granted the writ of certiorari to the Defense Department's appeal of that case to review their finding on the Solomon Amendment. Over the summer of 2005, the Defense Department notified Dean Kagan that it would rescind Harvard's funding—in other words, it would deny Federal funding to Harvard pursuant to the Solomon Amendment—if she continued to deny the military access to the Office of Career Services.

Faced with this ultimatum, on September 20, 2005, Dean Kagan finally ended her 10-month unlawful denial of access and announced that pending the Supreme Court's decision she would lift the ban and give the military access to the Office of Career Services. But in the meantime, she filed another friend of the court brief, this time in the Supreme Court of the United States, arguing the Solomon Amendment should not apply to her actions barring the military from the Harvard Law School's Office of Career Services.

Ultimately, the Supreme Court unanimously rejected Dean Kagan's position and unanimously upheld the Solomon Amendment.

To recap: Dean Kagan's ban on military recruiters lasted for 10 months—from November of 2004 through September of 2005. During that entire span of time, the Department of Defense position was always—was always—that the ban violated the congressionally passed Solomon Amendment. Never in that span of time did the Supreme Court, the First Circuit, or any other court with jurisdiction over Harvard adopt Dean Kagan's view regarding the scope or enforceability of the Solomon Amendment. In that span of time, only a split panel of the Third Circuit held that the Solomon Amendment was unenforceable, and for all but 2 months of that time, the Third Circuit's order was stayed.

Despite all of this, Dean Kagan persisted in barring military recruiters from the Office of Career Services and insisted that the military could obtain separate but equal access to Harvard Law School through alternate routes. Dean Kagan held that the Supreme Court's position ran afoul of the Solomon Amendment, the findings of the Secretary of Defense, and ultimately the legal judgment of the entire Supreme Court. I believe these are the undisputed facts of the case.

So why do Ms. Kagan's actions matter? I would argue that they matter for two reasons. First is the message her actions sent about her lack of respect for the U.S. military at Harvard Law School during her deanship. Ms. Kagan claims she holds the military in the highest respect, but I have to ask you, this notion that you are going to provide separate but equal access to interviewing services is not one that shows respect. It is one that provides an unnecessary and really reprehensible stigma on the U.S. military, which had no control over a policy passed by Congress under the Solomon Amendment.

Of course, she did this at a time when hundreds of thousands of young men and women deployed to Iraq and Afghanistan were wearing the uniform of their country to protect their fellow citizens and the rule of law. Dean Kagan's actions in taking every step legally possible to relegate the military to what she herself believed was separate but equal status placed an unmistakable stigma on the military during a time of war.

I believe her decision to stigmatize the military is reason enough to oppose her nomination to a lifetime seat on the U.S. Supreme Court, but her actions as dean are troubling for another reason as well. I believe her actions as dean indicate strong evidence that, as a Justice, someone sitting in judgment on the U.S. Supreme Court, she would tend to advance her political preferences rather than take a traditional approach of a judge in following the law.

Many of our colleagues have pointed out correctly that Ms. Kagan has never been a judge. While that is not a requirement to serve on the Supreme Court, this lack of judicial experience makes it difficult to tell whether Ms. Kagan would adopt a judicial activist philosophy if she takes a seat on the Court. Because she has never held the job of a judge—we don't have any record to judge her by—we must look to the jobs she has held and the actions she has taken to see how she is likely to perform her job as a member of the U.S. Supreme Court.

In the 10 months during which she banned the U.S. military from the Harvard Law School campus, I believe Dean Kagan showed a willingness to

bend the law and facts to advance her own political goals of protesting the don't ask, don't tell policy and, as I said, stigmatizing the military in the process. Despite the lack of any binding authority, she adopted an interpretation of the Solomon Amendment so tenuous that it could not garner the vote of a single Justice on the U.S. Supreme Court, and she did so for the express purpose of advancing her objections to a policy she said she abhorred.

Bending the law and the facts to reach a preferred result is exactly what judicial activists do, and there is a pattern in Ms. Kagan's legal career of bending the law and facts to advance her preferred policy results. So while Ms. Kagan has never been a judge, she has established a disturbing pattern of doing what judicial activists do. Ms. Kagan's actions in her previous jobs showed she is very likely not to embrace the role of a judge who decides cases based on the Constitution as written and the law as passed by Congress that she is responsible for enforcing if they are, in fact, constitutional but, rather, she gives every indication of someone who believes it is within her role and prerogative as a Justice to basically make the law rather than to enforce the law as written. No Member of this Chamber should be surprised if, for the rest of her life as a Supreme Court Justice, Ms. Kagan does not merely follow the law as written but, rather, bends the law to advance her progressive political agenda.

Our Constitution is too precious and the Supreme Court is too powerful for us to accept without question a President's nominee to the Supreme Court. The Framers of the Constitution recognized the importance of this appointment and the power given to a Supreme Court Justice, who serves for life without any political accountability to the electorate. That is why they gave us the responsibility to give our advice and consent.

The nomination and confirmation of a Supreme Court Justice is really a two-step process. First, the President makes his nomination. The President can nominate anyone the President wants who meets the qualifications of the Constitution. But then it is our responsibility to exercise our constitutional duty to provide advice and consent.

I believe Ms. Kagan has failed to embrace the traditional view of judging that I believe all judges must adhere to at the risk of, rather, them becoming a lawmaker, which is incompatible with the role of a Justice. I believe a judge who assumes a role of being a policymaker or a lawmaker is, in essence, a lawbreaker.

Indeed, Ms. Kagan's career up to this point shows a willingness to bend the law and the facts to advance her own beliefs, and I fear this trend will continue in an activist tenure on the Supreme Court. For these reasons, I oppose her nomination and will vote no.

Mr. BENNET. Mr. President, I rise in strong support of the President's nomination of Solicitor General Elena Kagan to be Associate Justice of the U.S. Supreme Court.

The Senate has no more important responsibility than to advise and consent on nominations to our Nation's highest Court. It will be an honor on behalf of the people of my State to cast my vote to confirm Elena Kagan.

Ms. Kagan is a distinguished lawyer with a remarkable legal background. She brings very diverse experiences to the Court that I believe will add to the important perspective of the high Court as it reviews cases of critical importance to the American people.

Throughout her career she has been a legal trailblazer and a role model. She will be the fourth woman to serve on the high Court, and for the first time in history, three women will be serving on the bench when oral arguments are heard this fall. Her nomination marks an historic milestone of progress for women in the legal profession and in serving as leaders for our Nation.

A graduate of Harvard Law School, Ms. Kagan began her career as a law clerk to former Supreme Court Justice Thurgood Marshall, who like her, served as Solicitor General prior to being promoted to the high Court. Justice Marshall made history as the first African-American Solicitor General at the time and Ms. Kagan has followed suit as the first female Solicitor General.

Following her clerkship, Ms. Kagan worked in the private sector where she handled first amendment, commercial and criminal litigation. She then served in the highest ranks of academia as a law professor. This ultimately led to her becoming dean at the Harvard Law School, one of our nation's most prestigious institutions. Her ascension to dean marked the first time in Harvard Law School's 186-year history that a woman held this position. As dean, Ms. Kagan bridged ideological divides among faculty, recruiting professors from across the ideological spectrum, managing the largest and most prestigious law school in our nation and improving the quality of life for students.

Prior to becoming dean, Ms. Kagan served in high legal and policy positions in the Clinton administration, where she learned the operations of the executive and legislative branches of our government, which will help the Court better understand how policy judgments are made and the effect that the decisions of our government and courts have on the lives of everyday Americans.

Most recently, Ms. Kagan has dutifully served our Nation as the U.S. Solicitor General. The Solicitor General is often referred to as the 10th Justice because of the frequency that he or she appears before the Court on behalf of the United States. This experience exposed Ms. Kagan to nearly every case that has come before the current Court and she has had to weigh all of the same legal considerations as the current Justices prior to deciding the position of the U.S. Government. Few positions provide better preparation for the high Court.

While she has not previously served as a judge, though she was previously nominated to be one, I see her varied background as an asset. We need different life experiences on the Supreme Court. If confirmed, Ms. Kagan will be the first nonjudge since former Chief Justice William Rehnquist was nominated by former President Richard Nixon.

Her mix of professional experience will help ensure that we do not have a Court out of touch with the American people. Ms. Kagan has taught the law in the classroom, practiced in the public and private sector, worked in the judiciary as a clerk and crafted the policies of the executive branch. Everywhere she has worked, Ms. Kagan has excelled. Her experience is the kind of experience we should aspire for all of our justices to have before serving on the high Court.

The Supreme Court is too important to not hold our justices to high standards of intellect and achievement—a standard Ms. Kagan meets. It is our best and brightest who should serve in these important positions. We need Justices who respect precedent, hew closely to the text of the law and do not pursue an agenda from the bench.

We do not need activist judges whether they come from the right or left. The American people do not want an ideologically driven Supreme Court that is pursuing a political agenda. We want a Court that respects precedent and helps resolve the legal questions of our time as they affect our daily lives.

I would like to close by thanking outgoing Justice John Paul Stevens for his service to our country. Justice Stevens presided on the Court during a period of great change and accomplishment for our nation. He is a member of the Greatest Generation and is a true patriot for his service during World War II. Justice Stevens has been an intellectual heavyweight on the bench and provided a voice of reason even while we have seen the Court drift so heavily in favor of the most powerful interests. He has left large shoes to fill and will be missed.

President Obama has nominated someone who can fill these shoes. Because of the breadth and diversity of her experience, Elena Kagan has a profound understanding of the law and effect the Supreme Court has on the lives of all Americans. She is an intellectual heavyweight in her own right and will help the Court bridge the divides of recent years.

I am proud to commit my vote in favor of this nominee.

Mr. HARKIN. Mr. President, I am proud to support the confirmation of Solicitor General Elena Kagan as the next Associate Justice of the United States.

Solicitor General Kagan is eminently qualified to serve on our Nation's highest Court. As a student, she excelled at

Princeton, Oxford and Harvard Law School. She has stellar legal credentials that have been recognized by liberal and conservative lawyers alike. And, throughout her career, including as a professor of law, as a key advisor to President Clinton, as dean of Harvard Law School, and as Solicitor General, she has demonstrated a great mind and intellect.

Moreover, Solicitor General Kagan will bring important diversity to the Court. First, when the Senate confirms her, she will be only the fourth woman to serve on the Court; and for the first time in history, three women will serve on the Supreme Court together.

Second, Solicitor General Kagan's experiences as someone who has worked in the legislative and executive branches will provide a vital perspective that is currently lacking among the Justices. In fact, for the first time in history, the current Court is comprised entirely of Justices who were promoted directly from the lower Federal courts. While judicial experience is important, it is also important to recognize that some of our most consequential Justices—Louis Brandeis, Felix Frankfurter, Earl Warren, Robert Jackson and William Rehnquist, to name just a few—did not have prior judicial experience. I am glad the President recognized how crucial it is to have on the bench Justices with varied life experiences.

Mind you, I am hopeful that next time the President will look to one of the many qualified lawyers who did not graduate from Harvard or Yale, or one who resides east of the Appalachian Mountains. But nominating someone from outside the Federal courts is a refreshing change.

As I evaluate Solicitor General Kagan's qualifications, an additional factor is important for me: she clerked and learned from two judges for whom I have enormous respect—Judge Abner Mikva and Justice Thurgood Marshall. These two jurists exhibited a deep and abiding passion for justice, and each strived throughout his career to ensure that ''equal justice under law'' is more than an ideal chiseled on a marble facade, but a concrete reality for all our citizens.

In her opening statement before the Judiciary Committee, Solicitor General Kagan noted:

> My first real exposure to the Court came almost a quarter century ago when I began my clerkship with Justice Thurgood Marshall. Justice Marshall revered the Court—and for a simple reason. In his life, in his great struggle for racial justice, the Supreme Court stood as the part of government that was most open to every American—and that most often fulfilled our Constitution's promise of treating all persons with equal respect, equal care, and equal attention.

In a 1993 law review article, she expressed a fondness for Justice Thurgood Marshall's vision of constitutional interpretation, which she described as ''demand[ing] that the courts show a special solicitude for the despised and disadvantaged.'' She described this vision as ''a thing of glory.'' I am hopeful that Solicitor General Kagan will follow in the best traditions of Judge Mikva and Justice Marshall and continue to strive to make our Nation's laws more just.

Considering her outstanding intellect and credentials, there simply is no doubt Solicitor General Kagan should be confirmed.

However, for me, there is another, equally important, consideration. I also believe that Solicitor General Kagan will be an important and needed voice on the Court to ensure that appropriate respect and deference is given to Congress, and proper effect is given to our most important statutes, such as the Americans with Disabilities Act, the Civil Rights Act, and the Age Discrimination in Employment Act, so all Americans receive the fullest protections of the law.

Too often debate regarding the Supreme Court seems to focus on a handful of divisive cultural issues. Indeed, many of my colleagues on the other side of the aisle have come to the floor to focus on gays in the military, abortion and guns. To be sure, these issues are important. But, what typically get overlooked in a debate like this are the many technical, statutory cases—often involving esoteric legal principles—that nonetheless have a tremendous impact on the everyday lives of ordinary Americans.

Unfortunately, the sad truth is that, in case after case, often in narrow 5–4 decisions, today's Court has too often slammed shut the courthouse door in the face of these ordinary Americans. The Court has used arcane legal doctrines and strained readings of Federal statutes to prevent citizens from vindicating their civil rights and consumer protections. The result is that many people who suffer grievous wrongs are not able to bring meritorious lawsuits, and to hold corporations and the government accountable.

In case after case, the Court has undermined vital protections and sided with the powerful against the powerless—for instance, in cases such as Ledbetter v. Goodyear, Gross v. FBL Financial, and Riegel v. Medtronic. In doing so, the Court has repeatedly ignored the clear intent of Congress in passing important laws.

In the ''Sutton trilogy'' the Court repeatedly misread the Americans with Disabilities Act and narrowed the scope of individuals deemed eligible for protection under that landmark statute. The result of these decisions was to eliminate protection for countless thousands of Americans with disabilities. These flawed, harmful decisions were reversed in the last Congress when we unanimously enacted the ADA Amendments Act.

Similarly, in June, 2009, the Supreme Court decided Gross v. FBL Financial, Inc. In a case involving an Iowan, Jack Gross, the Court made it harder for those with legitimate age discrimination claims to prevail under the Age Discrimination in Employment Act. In doing so, it reversed a well established, 20-year-old standard, consistent with that under title VII of the Civil Rights Act, that a plaintiff need only show that membership in a protected class was a ''motivating factor'' in an employer's action. Instead, the Court held that a plaintiff alleging age discrimination must prove that an employment action would not have been taken against him or her ''but for'' age. In other words, the plaintiff must now prove that age discrimination was not a cause or a motivating factor, but that it was the determinative cause of an adverse employment action. Proving ''but for'' cause is extremely difficult and will greatly limit potentially meritorious suits involving discrimination Congress sought to prevent.

In doing so, the Court did not even address the question on which it granted certiorari. As Justice Stevens noted in dissent, ''I disagree not only with the Court's interpretation of the statute, but also with its decision to engage in unnecessary lawmaking. The Court is unconcerned that the question it chooses to answer has not been briefed by the parties or uninterested amici curie. Its failure to consider the views of the United States, which represents the agency charged with administering the [Age Discrimination in Employment Act], is especially irresponsible.''

In University of Alabama v. Garrett, a case whose oral arguments I personally attended, the Court limited the rights of people with disabilities. In doing so, it ignored numerous congressional hearings and a task force which collected evidence through 63 public forums around the country attended by more than 7,000 persons. In United States v. Morrison and Kimel v. Florida Board of Regents, the Court completely ignored extensive congressional fact-finding and struck down parts of the Violence Against Women's Act and the Age Discrimination in Employment Act, respectively.

The contrast with Solicitor General Kagan is stark. She repeatedly made clear her approach to judging: respect for congressional intent and for long standing precedent. She consistently made clear that a judge's personal views should play no role in interpreting a statute and ''the only question is Congress's intent.'' Unlike some current members of the Court, moreover, she made clear that where the text of a statute is ambiguous she will look to legislative history—''a judge should look to other sources, should look to the structure of the statute, should look to the history of the statute in order to determine Congress's will.'' After her confirmation hearing and based on my personal meeting with her, I am convinced she will give full effect to our most important statutes.

Finally, as I listen to the debate surrounding Solicitor General Kagan's confirmation, I find it remarkable that conservatives continue to accuse every

Democratic appointed nominee of being ''activist.'' It is a tired bumper sticker slogan that not only has no meaning but is divorced from reality.

In fact, what is clear from this debate is that it is the conservatives who want to use the courts to achieve a desired political result and to thwart the democratic will of the people, as expressed through their elected representatives.

For example, the ranking member of the Judiciary Committee, Senator SESSIONS, noted his concern that Solicitor General Kagan ''will bring to the bench a progressive activist judicial philosophy which holds that unelected judges are empowered to set national policy from the bench.''

I find it ironic that this charge is bandied about by the same people most eager to have the courts strike down as unconstitutional the recently enacted health care reform bill. To strike down this law would require an unelected judge to ignore the clear language of the Constitution, reverse precedents that go back to John Marshall, disregard extensive fact-finding by Congress, and overturn a decision of a majority of both Houses of Congress and the President of the United States. That would be the height of judicial activism, the height of ''making national policy from the bench.''

The reality, is that, the Rehnquist and Roberts Courts have invalidated more laws than any previous Courts.

It is conservatives who not only want the Court to make national health care policy, but also to limit the ability of Congress to keep the corrupting influence of corporate spending out of our democracy, as the Court did in Citizens United.

It is conservatives who second guess decisions by Congress, including a unanimous Senate, to ensure the rights of all Americans to vote, as the Roberts Court suggested in Northwest Austin Municipal Utility District No. One v. Holder.

It is conservatives who want the judiciary to second guess decisions made by local sheriffs in keeping guns out of the hands of criminals.

It is conservatives who want the judiciary to second guess local zoning decisions, environmental and land use regulations.

It is conservatives who want the courts to invalidate efforts by Congress and local governments to eliminate racial discrimination.

Given the current Court's repeated disregard for Congress and for our efforts to expansively protect American citizens, I believe it is imperative that the next justice be someone who respects precedent, strives to apply congressional intent and purpose, and understands the importance of this nation's landmark civil rights protections. Based on her record and after meeting her, I am confident Solicitor General Kagan will be that type of jurist.

Solicitor General Kagan clearly has the intellect, experience and judgment to be an outstanding Justice. I am proud to support her nomination.

Mr. FEINGOLD. Mr. President, I want to speak briefly about the nomination of Elena Kagan to be an Associate Justice of the U.S. Supreme Court.

First, I commend the chairman of the Judiciary Committee and his staff for their efforts to make this confirmation process so thorough and transparent. The committee had the opportunity to review nearly 200,000 pages of internal memos and emails from Ms. Kagan's service as a law clerk to Justice Thurgood Marshall and as a White House aide during the Clinton administration—making the examination of her record one of the most thorough and searching in history. I appreciate that President Obama and President Clinton did not raise claims of executive privilege to try to stop the release of documents, which was a refreshing change and a practice that I hope future Presidents will follow in years to come.

All but a tiny fraction of these documents were made available online, granting extraordinary access to the public. I said after last year's hearings for Justice Sotomayor that Chairman LEAHY had set a new standard for transparency and public access to Supreme Court nomination hearings, and in these proceedings he did it again. I commend him and his staff for their tremendous work over the past few months.

There is no question that Elena Kagan is eminently qualified for a position on the Supreme Court. She has an impressive education, she has worked at the highest levels of government, and she has served as dean of a top law school. During the hearings, she demonstrated a keen mind, thoughtful analysis, and a wide-ranging command of the law. She has developed a reputation as someone who can reach out to those with whom she may not agree and work together, and that skill should prove very valuable on the Court. I believe that because she has not previously been a judge, she will bring a different and important perspective to a Court that is otherwise entirely populated by former appellate judges.

I appreciated Solicitor General Kagan's efforts to improve the confirmation process by being forthcoming in her answers. Fifteen years ago she quite fairly criticized the process in an article, arguing that the American people deserved more substantive discussions of the law. While I can't say that she quite lived up to the high standard that she set for nominees in 1995, I do believe that she tried to answer our questions as openly and comprehensively as she could, given what the confirmation process has become.

I came away from the confirmation process convinced that Elena Kagan understands the appropriate relationship between the courts and Congress. As she explained at the Judiciary Committee hearing, her work with Congress during her time at the White House taught her a healthy respect for the political branches and how difficult it can be for Congress to pass legislation. I hope that she will keep this in mind before she votes to overturn a bill that Congress may have spent years drafting and debating.

But while this deference is important, Solicitor General Kagan also demonstrated that she recognizes the critically important role of our judicial system in serving as a check on the other branches of government—in ''policing constitutional boundaries,'' as she put it. She spoke eloquently about the early experiences of Justice Marshall and his efforts to eradicate Jim Crow laws and racial segregation. She explained that what was so incredible about his struggle for equality was that ''the courts [took] seriously claims that were not taken seriously anyplace else. . . . In other words, it was the courts' role to make sure that even when people have no place else to go that they can come to the courts and the courts will hear their claims fairly.'' She said this was a miraculous thing about courts, and I agree with her. With regard to executive power, she emphasized that ''no person, however grand, however powerful, is above the law.'' She also talked about ''the importance of adhering to the law, no matter the temptations, no matter the pressures that one might be subject to in the course of one's career.'' These insights indicate that she will take seriously the Court's role in safeguarding individual rights and protecting the rule of law.

In addition to informing the committee about the nominee, the hearings also taught us more about the Supreme Court. We have heard a lot in recent years about ''judicial activism.'' But I think the hearings helped underscore that activism is in the eye of the beholder. As Justice Souter explained in a recent speech, the truth is that the Supreme Court has to decide hard cases—cases in which a judge cannot simply read the words of the Constitution and objectively evaluate the facts. That is, a judge cannot simply act as an umpire. Judges often have to choose between positive values in the Constitution that are in tension with each other, he noted.

Justice Souter reminded us that facts may look very different in different historical contexts. The quintessential example of this is the Court's historic decision in Brown v. Board of Education to overturn Plessy v. Ferguson—a case that by current standards would surely qualify as judicial activism but that is one of the most revered in our nation's history. What this shows us is that judging is not a ''robotic enterprise,'' as Solicitor General Kagan told the Senator from Minnesota, Ms. KLOBUCHAR. Judging is hard and it does, in fact, require judgment. But, Justice Souter explained, ''we can still address the constitutional

uncertainties the way [the Framers] must have envisioned, by relying on reason, by respecting all the words the Framers wrote, by facing facts, and by seeking to understand their meaning for living people.'' I believe Elena Kagan will fulfill that vision admirably.

So I will vote to confirm Elena Kagan to be an Associate Justice of the U.S. Supreme Court. I look forward to her confirmation as only the fourth woman in history to serve on our Nation's highest Court, and I expect she will serve with distinction—and with good humor, which she demonstrated throughout this arduous process—for many years to come.

Mr. CONRAD. Mr. President, I rise today to express my support for the confirmation of Elena Kagan to serve as the next Associate Justice of the Supreme Court.

Having carefully examined her record, monitored her confirmation hearings, and personally met with her, Solicitor General Kagan is clearly qualified to serve on the Court. Given her tremendous educational accomplishments at Princeton, Oxford, and Harvard, as well as her success as a constitutional and administrative law scholar at Chicago and Harvard, there is little question that she is intellectually qualified for the job.

General Kagan has had an impressive career, having clerked for Supreme Court Justice Thurgood Marshall, worked as the first female dean of Harvard Law School, and served as the first female Solicitor General of the United States. During that time, she has impressed all with whom she has worked with both her character and her talent.

Some of my colleagues are concerned that previous Federal judicial experience is not among her list of accomplishments. Historically, however, large numbers of our Supreme Court nominees have not had prior judicial experience. The last Supreme Court nominee appointed without any such experience served was former Chief Justice William Rehnquist.

Indeed, the outgoing Court represents the first time in history when all nine Justices had Federal judicial experience. That is what prompted Justice Antonin Scalia to say that he was ''happy to see that this latest nominee is not a federal judge.'' I share that view, and welcome the unique academic perspective that General Kagan will bring to the Court.

Others with concerns about General Kagan have pointed to her treatment of military recruiters as the dean of Harvard Law School or memos she wrote when she was an advisor in the Clinton administration. In addition to the explanations provided to me by General Kagan during our meeting, I am reassured about these controversies by the fact that she has received strong support from legal minds across the political spectrum.

General Kagan has earned high praise from conservatives like Jack Goldsmith and Miguel Estrada, as well as from every former Solicitor General since 1985, including Ted Olson and Ken Starr. These are not people who make such endorsements lightly. They would not speak well of someone who is outside the mainstream.

When considering my vote on nominees to the Supreme Court, my key test is whether or not the President's nominee is qualified to serve on the Court, not whether I agree with everything he or she have ever done. As Senators, we must examine the record, accomplishments, intellect, and character of each judicial nominee put before us, and determine whether each individual is worthy to serve on the bench. This is the standard I used when I voted to confirm Chief Justice John Roberts, Justice Samuel Alito, and Justice Sonia Sotomayor. And that is the standard I am using in voting to confirm Elena Kagan.

Mr. UDALL of New Mexico. Mr. President, I rise today to talk about Solicitor General Kagan's experience. Over the past few months, there has been a lot of talk from our friends across the aisle about whether Ms. Kagan is qualified to be our country's 112th Supreme Court Justice.

They say she has never been a judge. How conveniently they forget that some of the most well-respected Justices in the history of the Supreme Court also brought life experiences outside the ''judicial monastery,'' which President Obama so ably encouraged us to look beyond. Former Chief Justice William Rehnquist is one example. Former Justice Lewis Powell, Jr., is another.

They also conveniently forget that just a few decades ago, most Justices had little or no judicial experience. In fact, it is General Kagan's diversity of life experiences that, in my opinion, make her exceptionally qualified for the High Court. President Obama said one of the primary reasons he nominated General Kagan was because of her ''understanding of law—not as an intellectual exercise or words on a page—but as it affects the lives of ordinary people.'' I couldn't agree more.

The inscription that greets visitors to the Supreme Court building just across the street reads: ''Equal Justice Under Law.'' That inscription is at the heart of the experience General Kagan would bring as the newest member of the High Court.

That experience includes a reputation as one of the Nation's foremost legal minds; as a legal advisor to two Presidents; as the first woman to serve as Dean of Harvard Law School; and as the Nation's first female solicitor general.

It also includes more personal experiences, many of which mirror the lives of the American people she has committed her own life to serve.

She is the child of immigrants. She is the daughter and sister of public schoolteachers, and she has been a teacher herself. She is an advocate for her students. And she is a proponent of discussion and debate that educates, respects and improves upon the lives of all it impacts.

It is because of all of these experiences—as President Obama said on the day he introduced her—that General Kagan will make the Nation's highest Court ''more inclusive, more representative, more reflective of us as a people than ever before.''

I am confident that Solicitor General Kagan has the experience that will make her a stellar Justice, and I look forward to casting my vote in favor of her confirmation to the Supreme Court.

Mrs. LINCOLN. Mr. President, I come here today to discuss one of the most important duties we exercise as Senators the confirmation of a United States Supreme Court Justice.

As a U.S. Senator, I have a responsibility under the Constitution to determine if nominees to the Supreme Court are qualified for the job. In making this determination, I consider a nominee's knowledge of the Constitution and the law as well as their ability to be deliberate and to hear every case that comes before them impartially and without personal bias.

I believe Ms. Kagan passes that test and that she is qualified to serve on the U.S. Supreme Court.

I have made this decision after carefully reviewing the Judiciary Committee record on her nomination and visiting with Ms. Kagan personally on two occasions to discuss her nomination. I was impressed with her knowledge, humility, and candidness, and I believe she was as forthcoming in our conversations as any individual whose Supreme Court nomination I have considered.

As Solicitor General for the United States, Elena Kagan served as the Federal Government's lawyer in chief, representing all Americans, including Arkansans, before the U.S. Supreme Court.

A passion for public service and the law has been the driving force behind her career. Elena Kagan is the first woman to serve as Solicitor General, and the first woman to serve as the Dean of Harvard Law School. She previously worked in the Clinton White House as Deputy Assistant to the President for Domestic Policy and as Associate Counsel to the President. She spent several years in private practice after serving as a law clerk for the U.S. Court of Appeals for the District of Columbia, and for Justice Thurgood Marshall on the U.S. Supreme Court.

I believe the fact that Elena Kagan has not worked as a judge will benefit the Court. She will bring a fresh voice and unique perspective to the discussion on cases that come before the Court. There is already a persuasive precedent for a nominee with no judicial experience to serve on the U.S. Supreme Court. In fact, 41 Supreme Court justices, including Chief Justice William Rehnquist, had no experience

serving on a lower federal or state court. And many former justices who also did not previously work in the judicial branch have similar backgrounds to that of Solicitor General Kagan.

Since Ms. Kagan was nominated for this position in May, I have heard from many Arkansans both for and against her confirmation. In terms of the concerns that have been raised by those who oppose her confirmation, I have examined her record regarding those issues and have spoken to the nominee on two occasions to discuss those matters further. After careful thought and consideration in fulfilling my responsibility to judge her fitnesss for this position, I have found nothing that I believe disqualifies her from being confirmed.

There is no doubt Elena Kagan holds the Constitution and the Court's precedents in high regard. During her nomination hearings, Elena Kagan responded to numerous questions about a variety of issues. In response to one question regarding recent Supreme Court rulings involving the Second Amendment, she stated, ''there is no question that the Second Amendment guarantees Americans the individual right to possess and carry weapons in case of confrontation.'' Further, General Kagan explicitly said that the recent Heller and McDonald decisions that secure a fundamental and individual right to own a firearm for self protection is ''settled law.'' Ms. Kagan has personally assured me she has no desire or intention of working to overturn either decision.

It is true Ms. Kagan has not promised how she would decide future Second Amendment cases that may come before the Court. Neither Justice Roberts nor Justice Alito made any pledges or promises in that regard either during their confirmation hearings. To do so would betray one of the basic foundations of our system of government which is a fair minded and independent judiciary. Further, after reviewing the Judiciary Committee hearing record for Ms. Kagan, Justice Roberts and Justice Alito, in my view Ms. Kagan was as, if not more, forthcoming regarding her views on the Second Amendment than the two most recent nominees made by a Republican President.

One final comment General Kagan made to me during our last conversation about the Second Amendment was her desire to join Justice Scalia on one of his hunting trips to get better acquainted with her colleagues on the Court if she is confirmed. Sounds like a good idea to me.

Elena Kagan has also shared with me her deep respect and honor for the military and the men and women in uniform who risk their lives to defend our freedoms. Her father was a veteran, and she has taken with her the reverence for the military he instilled in her. In 2007, Elena Kagan was invited to speak at West Point military academy, where she spoke to cadets about fidelity to the Constitution and the rule of law. General Kagan said she accepted this invitation, something she rarely does, as an opportunity to thank the senior cadets for their contributions and service to our country.

Both in our personal conversations and in her testimony before the Senate Judiciary Committee, Ms. Kagan has explained her actions as Dean of Harvard Law School regarding military recruiting.

The bottom line for me is that Elena Kagan never denied military recruiters access to students on campus and that she holds the men and women in uniform who fight to defend the freedoms we cherish as Americans in high regard. Evidence of this is supported by military veterans themselves associated with the law school who have spoken favorably of Ms. Kagan's treatment of students in the military and the military in general. A group of Harvard Law School Iraq War Veterans published a letter stating that Kagan, ''has created an environment that is highly supportive of students who have served in the military.''

It is also worth noting that Solicitor General Kagan is supported by a long and distinguished list of law associations, organizations, members of Republican and Democratic administrations, unions, advocates and professionals. The list of supporters even includes every former Solicitor General since 1985, including Ted Olsen and Ken Starr.

As I have said with previous Supreme Court nominees selected by two different Presidents, I won't agree with every decision that he or she makes. However, the standard for evaluating Supreme Court nominees should be whether he or she is qualified for the job and is prepared to place the law and the integrity of our Constitution ahead of any personal or political beliefs he or she may have. I believe Ms. Kagan meets that standard which is why I will support her confirmation.

Mr. WYDEN. Mr. President, I rise in support of the nomination of Solicitor General Elena Kagan to serve as Associate Justice of the United States Supreme Court. A lifetime appointment to the highest Court in the land is a serious matter, and confirming each Justice is one of the most solemn duties of any Senator.

When I sat down with her, I was struck by Ms. Kagan's obvious intelligence and candor. It was also obvious that her wealth of professional experience has given her a real reverence for our country's rule of law. As the confirmation process went on, I paid close attention to the answers Ms. Kagan gave to my colleagues on the Judiciary Committee in her hearing. What comes across loud and clear when one listens to Ms. Kagan is that she has a strong belief in the Constitution and an understanding of its purpose to serve and protect the American people.

Throughout the arduous process of being a Supreme Court nominee, Ms. Kagan has impressed me at every turn with her intellect, integrity, and independence. These are fundamental traits our Nation needs in every member of the highest Court in the land.

But being a Supreme Court Justice requires more than surviving the confirmation process. If confirmed, Ms. Kagan would be ruling on the most important and urgent matters facing our Nation. Her voice would carry with it the rich and varied background of professional experience that would sound a note of true intellectual independence.

Although some have found fault with the fact that she has never served as a judge, I have never believed that lack of prior judicial experience should stop someone from serving with distinction on the Court. After all, some of our greatest jurists had no experience as a judge—Justices John Marshall, Louis Brandeis, Felix Frankfurter, and William Rehnquist among them. In place of that singular legal experience, Ms. Kagan brings expertise that she has earned in all three branches of government, as well as the private sector as an attorney in private practice and as the dean of Harvard Law School.

In talking with Ms. Kagan, I came away confident that she well understands the proper role of a judge and will not attempt to legislate from the bench. I discussed with Ms. Kagan her views and approach to some of the important issues the Court will address in upcoming years, such as national security, the limits of executive power, and the protection of civil liberties.

I also spoke with Ms. Kagan about an issue of particular concern to Oregonians one which they have endorsed twice at the ballot box—the right to control end-of-life decisions. Oregon voters twice approved death with dignity ballot measures. I have long believed that their decision should be respected by the courts, and I am pleased the Supreme Court has agreed with that view. While not taking a position on specific questions that could come before the Court, Ms. Kagan reassured me that she sees this as Oregonians do. She believes end-of-life decisions are protected by constitutional privacy rights, and she believes the Federal Government should not contravene State laws that protect individual rights on this issue.

Finally, I was also comfortable with the way Ms. Kagan explained her views on a frequently litigated constitutional issue, the limits of congressional power to act under the commerce clause. Ms. Kagan's answers assured me she has a very thorough and nuanced understanding of commerce clause jurisprudence and that she will rule on commerce authority cases with both deference and wisdom.

I am convinced, based on everything I have heard, that Ms. Kagan possesses the intellect, integrity, and independence to serve as an extraordinary Justice on the Supreme Court. With the retirement of Justice Stevens, Ms. Kagan certainly has large shoes to fill.

But I have no doubt she is more than up to the task, and our country's laws will be safely guarded in her hands. That is why Elena Kagan has my support, and I will vote to confirm her as an Associate Justice of the Supreme Court.

Mr. BEGICH. Mr. President, I am pleased to support the nomination of Solicitor General Elena Kagan as Associate Justice on the U.S. Supreme Court. By any objective standard, Elena Kagan offers a well-rounded combination of academic legal expertise and real world application of law and public policy. The President has nominated Ms. Kagan to a job she may hold for three decades or more, and in which she will have the opportunity to touch the lives of Americans in countless ways. So just being an intelligent and hard-working public servant is not enough for this vital position. That is why I have taken my time and my responsibility seriously, to thoroughly review her record before deciding to support her.

Decisions by the Supreme Court have immediate impacts on the lives of everyday Americans when the rulings are handed down. These decisions may continue to play a role in the lives of Americans for generations. Considering my vote on a Supreme Court nominee, a task I will perform soon for the second time in my brief Senate career, is a duty I take very seriously.

I approach this decision from the perspective of a government chief executive. It is the constitutional role of the President to nominate Supreme Court justices. In the case of a nominee to the Federal courts, especially to the Supreme Court, this choice is not about a President's ability to carry out a stated agenda. Rather, justices on the highest court in the land are there to protect and interpret the Constitution, so the highest standards must be applied.

In my meeting with Solicitor General Kagan, I found her to be intelligent and engaging, and open to hearing my thoughts on what is important to Alaskans. I listened as Ms. Kagan described the way she approached legal issues, and heard from her an approach to the law and the Constitution that indicated she will not be an activist judge. I agree with my colleague from South Carolina, Senator LINDSAY GRAHAM, who said the job of a senator is not to second guess the President's judgment in selecting Supreme Court nominees, but to determine if the candidate is qualified, of good character and understands the difference between being a judge and a politician. Ms. Kagan is such a person.

For me as an Alaskan, there were some issues I needed to make front and center in our discussion, especially the rights we enjoy and which the Supreme Court has recently spoken to under the second amendment of the Constitution.

Alaskans take their second amendment rights very seriously. In a State where the daily life for many includes subsistence hunting, personal protection and basic survival, our right to keep and bear arms is not an academic question. It is a fundamental part of our lives. The State of Alaska has gone so far as to pass laws requiring firearms be kept in survival gear carried in private airplanes. Unlike much of the ''Lower 48,'' the wilderness in Alaska is reachable within minutes from even our largest cities. Even in the greater Anchorage area encounters with wildlife are commonplace and serious injuries occur regularly. That is why firearm ownership and use in Alaska transcends the debates in Washington over what the second amendment means.

Much of the opposition to Ms. Kagan's nomination has focused on what some charged was her alleged lack of support for second amendment rights. Some oppose Ms. Kagan's nomination because she worked for Justice Thurgood Marshall and President Bill Clinton. When she was asked by Judiciary Chairman LEAHY if, after the Supreme Court's decisions in Heller and McDonald that the second amendment secures an individual's fundamental right to own a firearm and use it for self-defense, Ms. Kagan's response could not have been more clear: ''There is no doubt, Senator LEAHY. That is binding precedent and entitled to all respect to binding precedent in any case. That is settled law.'' Instead of second-guessing or making assumptions about her views, I am taking Ms. Kagen at her word.

Even before the Court's decision in McDonald applied the reasoning of Heller beyond the District of Columbia, Ms. Kagan was clear about the fundamental nature of the rights protected by the Second Amendment. During her confirmation hearing to be Solicitor General, Ms. Kagan responded to a question about the meaning of Heller from Senator GRASSLEY: ''There is no question, after Heller, that the second amendment guarantees Americans the individual right to possess and carry weapons in case of confrontation.''' In subsequent questioning, Ms. Kagan responded regarding Heller that she would give that decision and its reasoning ''the full measure of respect that is due to all constitutional decisions of the Court.''

What Elena Kagan said about the second amendment, especially in light of the Heller and McDonald decisions that I supported, cannot be considered anti-gun, or anti-second smendment.

In our meeting, I also asked Ms. Kagan about unique status of Alaska Native people and issues. I pointed out that Alaska is home to nearly half the 562 federal recognized tribes in the United States and that Alaska Natives comprise nearly 20 percent of our State's population. Ms. Kagan admitted to being no expert in ''Indian law,'' but expressed a willingness to learn about the challenges and opportunities facing Alaska Native people. She also expressed support for encouraging the courts to adopt procedures making it easier for people whose first language may not be English to understand court proceedings.

Another significant issue for Alaskans is the Supreme Court's decision in the Exxon Valdez case. Thousands of Alaskans were damaged by that oil spill, yet Exxon took every possible advantage in the U.S. court system to delay payment of damages as long as they could. As a result, an estimated 20 percent of those damaged by the spill died before they could collect any compensation. Ms. Kagan agreed with the tragedy of that case and expressed frustration with it dragging on so long.

Mr. President, because of what I have learned in looking at the career and record of Ms. Kagan, and reviewing her statements and testimony on matters that are important to the people of Alaska I am privileged to serve, I am pleased to confirm Elena Kagan as an Associate Justice on the U.S. Supreme Court.

Ms. SNOWE. Mr. President, I rise today to speak to the nomination of Solicitor General Elena Kagan to be the next Associate Justice of the Supreme Court of the United States. After a careful and considered review of her testimony before the Senate Judiciary Committee, her overall record, and my personal meeting with her in May, I have concluded that General Kagan should be confirmed as the next Associate Justice of the Supreme Court.

General Kagan would succeed Justice John Paul Stevens who has served our country as a decorated war veteran, a distinguished Federal appellate judge, and a Supreme Court Justice for nearly 35 years. I appreciate his service to our Nation, and believe that all of us in public service can learn from his dignified manner and sound advice to ''understand before disagreeing.''

As with the previous nominees to the Court that I have had the responsibility to review, I have not arrived at my decision lightly. It has been said that, of all the entities in government, the Supreme Court is the most closely identified with the Constitution—and that no other branch or agency has as great an opportunity to speak directly to the rational and moral side of the American character; to bring the power and moral authority of government to bear directly upon the citizenry.

The Supreme Court passes final legal judgment on the most profound social issues of our time. The Court is uniquely designed to accept only those cases that present a substantial and compelling question of Federal law; cases for which the Court's ultimate resolution will not be applied merely to a single, isolated dispute—but, rather, will guide legislatures, executives, and all other courts in their broader development and interpretation of law and policy. Ours is a government of liberty and order, of State and Federal authority, and of checks and balances, and the remarkable challenge of calibrating these fundamental balance

points is entrusted ultimately to the nine Justices.

To help meet this extraordinary challenge, any nominee for the Court must, as I stated for previous nominees under both Republican and Democrat administrations, have a powerful intellect, a principled understanding of the Court's role, and a sound commitment to judicial method. A nominee must have the capacity to engender respect among the other Justices in order to facilitate the consensus of a majority. And to warrant Senate confirmation, the nominee must have a keen understanding of, and a disciplined respect for, the great body of law that precedes her.

It is with these high standards that we should also evaluate the record of General Kagan to serve as the Court's 112th Justice. General Kagan is a distinguished graduate from Princeton, Harvard, and Oxford Universities where she earned several distinct honors. She served as a law clerk to two judges, United States Court of Appeals Judge Abner Mikva and United States Supreme Court Justice Thurgood Marshall. General Kagan then worked in private practice as an associate at a leading D.C. law firm and a law professor at two of the Nation's most regarded law schools.

General Kagan has also served as a special counsel for the Senate Judiciary Committee; a lawyer in the Office of the Counsel to a President; a policy advisor to a President; and dean of the Harvard Law School. Most importantly, she has served as the 45th Solicitor General of the United States where she has participated in six oral arguments and overseen briefs and certiorari petitions in approximately 100 cases.

For her work as Solicitor General, Ms. Kagan has won the support of every one of the 10 Solicitors General who have served since 1985, including 5 Republican appointees. She has also earned the support of over 50 deputy and assistant solicitors general who have served over the last 42 years.

As these highly skilled professionals have noted, the ''job of Solicitor General provides an opportunity to grapple with almost the full gamut of issues that come before the Supreme Court and requires an understanding of the Court's approach to numerous issues from the criteria for certiorari review to the Justices' approach to oral argument. The constant interaction with the Supreme Court that comes with being the most-frequent litigator before the Court also ensures an appreciation for the rhythms and traditions of the Court and its workload.''

Prior to her 15 months as Solicitor General, Ms. Kagan had relatively little experience as an active practitioner. The American Bar Association's principle expectation for a Federal appellate nominee is ''at least'' 12 years experience actually practicing law, and even now she continues to fall short of that. This is due in part to the fact that she does not appear to have performed any amicus curiae or pro bono work while serving as a law professor.

Such practical experience often helps the Justices remain connected to the effect of their decisions on the lives of everyday people. All Supreme Court Justices, regardless of judicial philosophy, weigh the Constitution's text, history, context and precedents when deciding the landmark cases. Active practice of law experience helps with that process because, as prior Justices and distinguished scholars alike have observed, the Justices' decisions in landmark cases are inevitably ''channeled and constrained by who [they] are and what they have lived through.''

General Kagan has not given us the clearest insight into those experiences that she has ''lived through'' that will ''channel and constrain'' her sense of constitutional boundaries. At the same time, I find that her experience in working at the highest levels of all three branches of government will provide her with valuable insights as she approaches her work on the Court. I also accept her comments from our personal meeting that she did indeed have a ''formative experience'' as a young lawyer in learning that ''behind legal questions are real people with real lives.''

As regards General Kagan's lack of prior judicial service, I do not find that to be disqualifying. Nearly 40 Justices have served on the Court without prior judicial experience, including in more recent times Louis Brandeis, Hugo Black, Robert Jackson, Earl Warren, Lewis Powell, and William Rehnquist. Especially on the current Court where all of the existing members come from the Federal appellate courts, General Kagan should bring a new and different perspective.

This brings us to the additional factors we must consider when providing our consent on a President's nominee for Associate Justice—judicial temperament, methodology, integrity and philosophy. By their very nature, these attributes are often challenging to measure, but they can be assessed through a careful analysis of a nominee's complete record.

With regard to the first consideration, judicial temperament, we all agree that it is absolutely essential that a judge be fair, open-minded and respectful. Our citizens simply must have confidence that a judge who weighs their legal claims does so with an even temperament. A judge must be truly committed to providing a full and fair day in court, while projecting a sincere equanimity and respect for the law. When these attributes are not clearly present in our judges, the public justifiably begins to lose faith in the integrity of our courts.

By all accounts, whether from conservative former Solicitors General Ken Starr and Ted Olson, and Assistant Solicitor General Miguel Estrada, General Kagan has a clear reputation for a sound judicial temperament. She projected poise throughout this process, during her hearing and in our personal meeting. Likewise, she has testified and spoken about the necessity of courts to provide a ''level playing field,'' of maintaining a fidelity to the law, and of the essential requirement not to prejudge any case, stating during her hearing that judging is about ''what the law says, whether it's the Constitution or whether it's a statute . . . the question is always what the law says . . . it's what the text of the Constitution says . . . what the law says, not a judge's personal views.''

Turning to the considerations of judicial methodology and integrity, General Kagan does not have a judicial service record to review. We can, however, examine her scholarship. Here, she has six scholarly articles, two scholarly book reviews and a variety of other commentaries. I have some concern that this collection is, by academia's standards, not especially prodigious, and that General Kagan did not continue her scholarship during her six years as Harvard's dean.

Her eight scholarly publications do, however, tackle the difficult subjects of Presidential power, the delegation doctrine, and hate speech. In particular, her Presidential Administration and Chevron's Non-delegation Doctrine article from 2001, as well as The Changing Faces of First Amendment Neutrality article from 1992, demonstrate both close attention to complicated legal detail and careful legal analysis—skills essential for the difficult work of the Court.

We can also review her approach to judicial methodology from her answer to my request to identify three of the Court's constitutional opinions—majority, concurring or dissenting—that in her view exemplify sound judicial methodology. First, General Kagan chose Justice Oliver Wendell Holmes' 1905 dissenting opinion in Lochner v. New York. In that case, the Court invalidated a State law prohibiting an employer from requiring a baker to work more than 60 hours per week. The Court reasoned that the statute ''necessarily interferes with the right of contract between the employer and employees,'' a right that is ''part of the liberty of the individual'' protected by the 14th amendment.

General Kagan cited this opinion as a ''concise and persuasive formulation of the proper role of the judiciary in relation to the political branches of government,'' highlighting these passages:

> I strongly believe that my agreement or disagreement [with the law] has nothing to do with the right of a majority to embody their opinions in law. . . . The Constitution is . . . made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. [Justices should not use their office] to prevent the natural outcome of a dominant opinion, unless it can be said that a rational

and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

Next, General Kagan selected a 1927 concurring opinion in Whitney v. California where the Court unanimously upheld a conviction for conduct threatening to overthrow our government by unlawful means. Calling the concurrence an ''inspiring example of a commitment to protecting constitutional rights'' and a ''stirring reminder of the value of freedom of speech in our society, including its importance to democratic self-governance,'' General Kagan cited her admiration for this paragraph:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

Finally, General Kagan identified a 1952 concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer. There, the Court held that President Truman exceeded his constitutional authority when he ordered the Secretary of Commerce to take possession of most of the Nation's steel mills in the face of a labor strike during the Korean war. Respecting a concurring opinion as the ''definitive framework for evaluating the constitutionality of presidential action,'' General Kagan observed that:

Two aspects of the opinion are notable. First, Justice [Robert] Jackson's opinion is a classic formulation of the propositions that executive authority is not unlimited even in wartime and that the President is not above the law. That is all the more remarkable given that its author had served in the Executive Branch for much of his career, including as Solicitor General and Attorney General. Second, Justice Jackson refused to oversimplify constitutional analysis. . . . [H]is analysis depended in large measure on an assessment of relevant historical practices and political processes. That analysis was resolutely legal in its nature; it was not based on the Justice's political preferences or personal views. But the analysis took into account the full complexities of constitutional interpretation in its relation to modern governance. That is what has given Justice Jackson's concurrence its staying power and has made it the Court's principal precedent on executive power.

These three replies by General Kagan are informative. Together they argue for a limited judicial role, and demonstrate her command of the philosophical underpinnings of core constitutional doctrine and her insight into the necessity of aligning those theories with the functional ''complexities of modern governance.'' They also convey an awareness of, and therefore perhaps a capacity for, judicial statesmanship. As Justice Felix Frankfurter once noted, ''breadth of vision'' and ''capacity to transcend one's own experience'' are often the defining qualities that matter most in guiding a Justice's work on landmark cases.

As regards her views on substantive subjects of law, conservative attorneys such as Charles Fried, Michael McConnell and Paul Clement have agreed that General Kagan is in the mainstream. For example, she has affirmed forcefully that stare decisis is a critical command for the Court. As she wrote to the committee, that command requires a careful inquiry into whether the precedent has ''been found unworkable, whether subsequent legal developments have left the rule an anachronism, or whether premises of fact are so far different from those initially assumed as to render the rule irrelevant or unjustifiable.'' Moreover, she testified that:

The entire idea of precedent is that you can think a decision is wrong. You can have decided it differently if you had been on the court when that decision was made. And nonetheless you are bound by that decision. That's—if the doctrine of precedent enabled you to overturn every decision that you thought was wrong, it wouldn't be much of a doctrine. . . . I think when the court looks as though it's flipping around and changing sides just because the justices have changed, that's bad for the credibility of the institution and it's bad for the system of law.

General Kagan has also stated that the Constitution protects a right of privacy and that Roe v. Wade is not only ''settled law'' but has been ''doubly settled'' by Planned Parenthood v. Casey. Likewise, she has stated that foreign law should not have precedential weight in ''any but a very, very narrow set of circumstances,'' such as limited cases involving ''ambassadors'' or the ''law of war.'' And finally, she has testified, as noted above, that Youngstown Sheet & Tube remains the ''determinative'' governing standard in assessing Presidential wartime powers.

With respect to the second amendment, in my view, as a long-time, ardent supporter of second amendment rights, I have carefully examined General Kagan's work as the President's attorney a decade ago on a variety of legislation affecting gun ownership rights. This is a fair question and, here, General Kagan testified as follows:

The work that I did in the Clinton White House was all work . . . before Heller was decided, and so we really . . . did not consider . . . regulations through the Heller prism . . . because Heller didn't exist at that time. . . . What President Clinton was trying to do back in the 1990s and what I as his policy aide was trying to help him do, was to propose a set of regulations that had very strong support in the law enforcement community, that had actually bipartisan support here in Congress to keep guns out of the hands of criminals, to keep guns out of the hands of insane people. It was very much an anti-crime set of proposals that I worked on back then in the '90s.

A former White House colleague corroborated General Kagan's testimony: ''In all these cases, [President] Clinton had already settled views on these questions. Our job was to make sure the government's policy reflected what he wanted. He'd already made up his mind on most of these contentious issues.''

As several members of the committee during General Kagan's hearing noted, this same point—that a lawyer's job is to represent the client's views, and not the lawyer's own views—was also made by Justices Roberts and Alito when they were asked during their confirmation hearings about advice they gave while serving as executive branch attorneys. Both nominees testified that their executive branch legal counsel reflected ways to advance their elected client's, not their own personal, legal interests and policy preferences.

With respect to the fact that, more recently, General Kagan did not file a brief for the United States in McDonald v. City of Chicago—McDonald did present an important question regarding the interplay of the second and 14th amendments, and I joined an amicus brief in support of Mr. McDonald's claim to incorporate the second amendment through the 14th amendment, so that the protections of the second amendment would apply not just against Federal acts, but against the acts of State and local governments as well. Here, several observations are warranted.

First, McDonald presented only the question of whether the second amendment applied to State and local governments, and not what the scope of the protections of the amendment is. As a result, McDonald, unlike Heller, presented no implications for the constitutionality of Federal gun laws. Accordingly, the United States was not a party in the case.

Second, the issue of incorporation is by its very nature one of primarily State and local, and not Federal, concern. This explains the amicus brief signed by 38 States in this case. This also explains why the Solicitor General's Office has a tradition of not weighing in on incorporation cases. General Kagan wrote to the committee in response to a supplemental question that:

It has long been the practice of the Office of the Solicitor General not to file an amicus brief in cases concerning the application of a constitutional provision to the states (so-called incorporation cases). Although incorporation cases raise important issues of constitutional interpretation, and may matter

greatly to individual citizens, those issues do not implicate the responsibilities and obligations of the federal government under the Constitution. Incorporation cases therefore do not fall within the category of cases in which the Office of the Solicitor General files amicus briefs: those where the federal government itself has a clear and specific interest in the resolution of the case.

This response is consistent with the reported statement of former Solicitor General Erwin Griswold, who was uniquely appointed by a Democratic President, President Johnson, and retained by his Republican successor, President Nixon. In 1970, General Griswold reportedly wrote that incorporation cases are rarely of direct interest to the Federal government because ''fundamental considerations of federalism militate against executive intrusion'' into issues of State and local law.

Further, although former Solicitor General Paul Clement did appear in Heller for the United States, under the Bush administration, Heller was not an incorporation case. Moreover, the broader question presented by Heller, unlike McDonald, did implicate the basic scheme of Federal firearms regulations.

Yet even then, General Clement argued in Heller for a somewhat narrower ruling regarding personal rights. He also argued for a somewhat higher level of judicial scrutiny of challenges to regulation of such rights in order to ensure that the longstanding existing Federal laws—like possession of machine guns, possession by convicted felons, or possession on Federal property—that his office is required to defend were protected. A majority of the Court ultimately respected and accepted General Clement's concern in both Heller and McDonald. As Senator CORNYN noted at the hearing, Justice Alito wrote for the majority in McDonald that:

> We made it clear in Heller that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill, . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.' We repeat those assurances here; . . . incorporation does not imperil every law regulating firearms.

Perhaps most importantly, General Kagan testified repeatedly that both McDonald and Heller are settled law. As regards McDonald, General Kagan said, ''I do think that . . . decision [McDonald] [is] settled law; entitled to all of the weight that any precedent of the Supreme Court has; [and] . . . can only be overturned if there is strong evidence the ruling [among all of the other stare decisis factors] is unworkable.''

On Heller, she said: ''I think that Heller is settled law and Heller has decided that the Second Amendment confers such an individual right to keep and bear arms. I have absolutely no reason to think that the court's analysis was incorrect in any way. I accept the court's analysis and will apply it going forward.'' She also said that Heller's finding that a personal right of possession is ''deeply rooted in this Nation's history and traditions'' is a ''central part of the rationale'' of Heller and, again, is ''settled law.''

Moreover, she testified that she has ''never believed that the president had the power to prohibit [the sale of firearms] without legislative authorization. . . . In fact, that's one [issue] that Heller and McDonald don't effect, that the president didn't have that power before and doesn't have that power after.'' She also testified that ''the Second Amendment question, as defined by Heller, was so peculiar to our own constitutional history and heritage that . . . foreign law didn't have any relevance.''

Turning to another important issue, I also share the concern for how General Kagan approached the issue of military recruiting at Harvard Law School. Under the Solomon amendment, universities like Harvard that receive Federal funding are required to permit military recruiters on campus. Opposing the military's don't ask, don't tell policy, General Kagan was one of several deans to relegate military recruiters to a less preferred position by withholding Office of Career Services' sponsorship.

General Kagan also participated in a lawsuit challenging the Solomon amendment as unconstitutional. Had she prevailed in that suit, colleges and universities across the country could have denied the military on-campus access to students across the country. Fortunately, the Supreme Court summarily and unanimously rejected this challenge in 2006 in Rumsfeld v. F.A.I.R.

General Kagan continues to defend her decision as a difficult mediation of competitive on-campus interests. But the prevailing recognition here is that the Nation was fully engaged in two wars designed to advance national security, and so I continue to be troubled that General Kagan chose to relegate the military rather than her institution's financial or policy interests.

Reviewing the final consideration of judicial philosophy, General Kagan has spoken directly to the important but appropriately limited role that the Court plays in our constitutional scheme of government. She recognizes that the Court is the ''least accountable'' of our governmental institutions and that the Court is not ''self-starting.'' Citing Alexander Bickel and his 1961 seminal article, General Kagan stated in our personal meeting that the ''passive virtue'' of the Court rests in what it does not do, and that the Court should work hard ''not do more than is called for'' and ''not go too far.'' Likewise, she said in her questionnaire that ''I think it is a great deal better for the elected branches to take the lead in creating a more just society than for courts to do so.''

We recently witnessed what happens when the Court does not adhere to such decision-making restraints. We are all familiar with Citizens United v. F.E.C. where the Court overruled a mere 7-year-old precedent to strike down the electioneering communications provision of the Bipartisan Campaign Finance Reform Act.

There, the majority effectively converted on its own motion an as-applied challenge into a facial challenge through its order for re-argument. According no deference to our 100,000-page factfinding record that took Congress over 10 years to assemble, and further dismissing the commands of stare decisis, the majority then rejected the relatively recent 1990 precedent of Austin v. Michigan Chamber of Commerce and the very recent 2003 precedent of McConnell v. F.E.C. Instead, the majority inflated the precedential value of the majority's very recent—only decided in 2006—and readily distinguishable F.E.C. v. Wisconsin Right to Life and eschewed arguments to decide the case on narrower statutory grounds. Consequently, and in striking contrast to claims of ''judicial modesty,'' the majority then struck down the electioneering communications provision of BCRA on the broadest of grounds.

Even granting that General Kagan was an advocate in the case, I was pleased to hear her say in our personal meeting that the Citizens' majority ''did not respond in the right way. Congress had gone through an enormous record and the Court had ruled only a few years earlier. From where I sat, the Court was wrong.''

I also agree with Justice Stevens' dissent in Citizens that the activist ''path'' taken by the Citizens'' majority will ''do damage'' to the Court itself. Citizens is not, of course, the only recent case in which Justices and scholars from across the political spectrum have viewed the Court's majority as overreaching. Indeed, opinions in Montejo v. Louisiana, Gross v. FBL Financial Services, Ashcroft v. Iqbal, and related commentaries have all expressed the same concern.

Finally, I note that, if confirmed, General Kagan will become the fourth female Justice ever to serve on the Supreme Court. She will follow Sandra Day O'Conner and join Justices Ruth Bader Ginsburg and Sonia Sotomayor. General Kagan has already become the first woman to serve as Solicitor General of the United States, and the fact remains that it does make a difference who women and girls see at the pinnacles of government and industry. As Justice Ginsburg observed at the time of Justice Sotomayor's nomination, ''women belong in all places where decisions are being made.''

Ultimately, when the Framers accorded us the special role of confirming judicial nominees that we are exercising here today, having delegated the power of nomination to the Office of the President, and having recognized that elections to that office may affect the overall composition of the Court, the Framers expressly intended that

we review judicial nominees not by their affiliations, but by their qualifications. This is why Alexander Hamilton wrote in Federalist 76 that the Senate should deprive a duly elected President of his or her nominee only for ''special and strong reasons.''

In reviewing the record of General Kagan's scholarship, the to, evidence of her reputation, and her responses to the committee and other Members throughout this process, I find in that General Kagan has a very capable intellect and a deep respect for the rule of law. She has a command of the important but limited role of the courts, and a demonstrated commitment to stability in the law. It is therefore my conclusion that Solicitor General Elena Kagan is qualified to serve as the next Associate Justice of the Supreme Court.

Ms. CANTWELL. Mr. President, it is with great pride that I express my strong support for the nomination of Solicitor General Elena Kagan to be the next Associate Justice of the United States Supreme Court. A trailblazer in many ways, Solicitor Kagan was the first female to serve as Solicitor General of the United States and the first female Dean of Harvard Law School, one of the most prestigious legal educational institutions in our Nation. Her nomination as Solicitor General garnered the bipartisan support of every Solicitor General who served from 1985 to 2009, including Charles Fried, Ken Starr, Drew Days, Walter Dellinger, Seth Waxman, Ted Olson, Paul Clement, and Greg Garre, a testament to her ability to build bridges across partisan lines and her fidelity to law above politics.

Solicitor Kagan brings a wealth of historic legal experience to the position of Associate Justice, including serving as law clerk to Justice Thurgood Marshall, the first African-American to serve on the Supreme Court, working as an associate at the law firm of Williams & Connolly, teaching as a law professor at the University of Chicago and Harvard University, and acting as policy counsel to President Clinton and special counsel to the Senate Judiciary Committee. In these capacities she handled legal and policy issues ranging from public health, to education, to war crimes, to campaign finance and welfare.

Solicitor Kagan's experience with different branches of government equips her with a unique perspective on the law and the challenges the Court will face in the coming years. Her confirmation honors the legacy of Justice John Paul Stevens, the outgoing Justice, who was well known for his service of dignity and intellect, without regard for partisan divides.

If we confirm her—and I am confident we will—Solicitor Kagan will be only the fourth woman in history to serve on the Supreme Court, and will be the third woman to sit on the current Court, the highest number of female justices to serve at one time.

Solicitor Kagan's confirmation will be an inspiration for generations of female lawyers and legal scholars to come, and will make an indelible impression on this country's legal landscape. Today, women comprise only 19.2 percent of federal district court judgeships, and 20 percent of federal appellate judgeships, highlighting the need for increased gender representation on our Nation's highest courts. Solicitor Kagan's confirmation is only a step towards reducing this gender disparity in our Nation's judiciary.

I followed closely Solicitor Kagan's hearings, and I am impressed by Solicitor Kagan's commitment to respect the rule of law. The hearings for Solicitor Kagan, who testified for more than 17 hours and answered over 540 questions, were thorough and fair. In her opening statement, Solicitor Kagan observed that, ''the Supreme Court's role in our society is to act as a safeguard to the rule of law by maintaining a commitment to impartiality, principle, and restraint; and the role of a Supreme Court justice is to approach each case with even-handedness and fair-mindedness, to ensure that everyone who comes before the Court receives a fair shake.''

Solicitor Kagan also expressed her admiration for Justice Thurgood Marshal; under whom she clerked, for his view of the Supreme Court as a means of access to justice for those left without redress after unfair treatment. Her expressed judicial philosophy of impartiality and fairness, to individuals of all classes, income levels, and interests, is a critical component to the High Court in a climate where we see increasing judicial activeness and partiality to special interests.

Solicitor Kagan's experiences as a scholar and policy advisor unquestionably qualify her for a position on the Supreme Court. I find it disingenuous that several of my conservative colleagues have attacked Solicitor Kagan's lack of judicial experience. The last two of the previous four chief justices of the Supreme Court, William Rehnquist and Earl Warren, had no judicial experience when first nominated to the Court. Nor did, Felix Frankfurter, Louis Brandeis, and John Marshall, known as the ''Great Chief Justice.'' Over one-third of the past 111 Supreme Court justices had no judicial experience when they were first nominated. Rather than being a product of the judicial monastery, Solicitor Kagan brings a real world perspective on the role of a justice, with a view to the practical contexts and implications of the Court's decisions. Solicitor Kagan's two decades of experience working in every branch of government exceptionally qualify her as an Associate Justice, and as one of the top legal thinkers in the country.

My conservative colleagues have also criticized Solicitor Kagan's enforcement of Harvard Law School's anti-discrimination policy. Solicitor Kagan did not assert her own personal agenda and oppose military recruitment on campus, as several of my colleagues have alleged. Instead, as Dean, Kagan was charged with enforcing an anti-discrimination policy in effect at Harvard since 1979 that prevented organizations discriminating against selected individuals from recruiting through the school's office of career services. Kagan's enforcement of this policy was consistent with her predecessors, Dean Robert Clark and Harvard President Larry Summers. However, Kagan ensured that military recruiters still had access to students. Kagan noted, ''[M]ilitary recruiters had access to Harvard students every single day I was dean . . . I'm confident that the military had access to our students and our students had access to the military throughout my entire deanship.'' Solicitor Kagan's work to ensure student access demonstrates her support of our military and her encouragement of the brightest students' involvement in our Armed Services.

Solicitor's Kagan's widespread support is a testament to her impact on not only her colleagues and peers, but also upon a large number of those in the legal profession. The American Bar Association, after conducting an investigation over several weeks that included peer reviews, concluded that Solicitor Kagan merited its highest rating of unanimously ''well qualified.'' To merit the Committee's rating of ''well qualified,'' a Supreme Court nominee must be a preeminent member of the legal profession, have outstanding legal ability and exceptional breadth of experience, and meet the very highest standards of integrity, professional competence, and judicial temperament.

In addition, Solicitor Kagan has received support from Democrats and Republicans and a range of civil rights, non-profit, and advocacy organizations, including the National Women's Law Center, the National Partnership for Women and Families, Earthjustice, the American Bar Association, the Alliance for Justice, the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund, the National Association of Women Judges, the Hispanic Bar Association, the Service Employees International Union (SEIU), and the Leadership Conference on Civil and Human Rights (LCCR). Solicitor Kagan is also endorsed by her colleagues in academia, and a group of over sixty-nine law school deans across the country expressed their written support for her nomination to the Senate Judiciary Committee in a June 15, 2010 letter. Her supporters also include her former students, including one, a former law clerk to Justice Antonin Scalia, who called Solicitor Kagan, ''a person of utmost integrity, extraordinary legal talent and relentless generosity.''

Solicitor Kagan's intellectual aptitude and commitment to justice was demonstrated early in her life. She was born in New York City, NY, the daughter of a school teacher and a public

housing lawyer. She graduated from Princeton University, received a Masters in Philosophy from Worcestor College of Oxford University, and received her law degree magna cum laude from Harvard Law School. She then clerked for Justice Thurgood Marshall, was an associate with Williams & Connolly, and then counsel to President Clinton, as Associate Counsel, Deputy Assistant to the President for Domestic Policy, and Deputy Director for the Domestic Policy Counsel. She led the Clinton administration's inter-agency effort to analyze all legal and regulatory aspects of the Attorney General's tobacco settlement and then participated actively in the development and congressional consideration of tobacco legislation. She also handled legislative issues involving constitutional issues, including separation of powers, governmental privileges, freedom of expression, and church-state relations.

As Dean of Harvard Law School, she joined other deans in opposing an amendment to strip the courts of the power to review detention practices, treatment and adjudications of guilt and punishment for detainees at Guantanamo Bay, Cuba. This reflects a fair view, with an eye to checks and balances on different branches of government.

In her first case as Solicitor General, Solicitor Kagan argued before the Supreme Court on behalf of the government in the Citizens United v. FEC case. As Solicitor Kagan notes, however, her role as Solicitor General was to argue on behalf of the country, not to advance her personal beliefs.

In my meeting with her, Solicitor Kagan confirmed her commitment to protecting the right to privacy enshrined in our Constitution. I believe she will preserve that right.

Solicitor Kagan is uniquely qualified to serve as Associate Justice because she not only possesses an impressive intellectual capacity and commitment to fairness, but also because she is committed equal justice. As she remarked in her opening statement, ''Equal Justice under the Law. It means that everyone who comes before the Court—regardless of wealth or power or station—receives the same process and the same protections . . .''

Solicitor Kagan demonstrates a readiness to serve on our Nation's Highest Court and I am confident that she will make a fine justice who will not only uphold the Constitution and legal precedent of the country, but continue to preserve one of the most treasured tenets of our legal system, equal access to justice for all Americans.

Mr. LEVIN. Mr. President, earlier this week I spoke on the Senate floor, calling for the confirmation of Solicitor General Elena Kagan to the position of Associate Justice of the Supreme Court. I added my voice to a chorus of bipartisan praise for her qualifications and abilities to be a Supreme Court Justice, joining supporters such as Miguel Estrada, Assistant Solicitor General in the George H.W. Bush administration; former Solicitors General Kenneth Starr and Drew S. Days and a number of my Republican colleagues, including Senator LINDSEY GRAHAM and Senator JUDD GREGG. These voices across the political spectrum recognize Elena Kagan's years of practical, pragmatic experience, and value, in the words of Professor Michael McConnell, director of the Constitutional Law Center at Stanford Law School, her ''fidelity to legal principle even when it means crossing her political and ideological allies.''

Despite her abilities and her tremendous legal career, Solicitor General Kagan continues to be the subject of baseless attacks. For instance, the National Rifle Association, NRA, has taken out full page advertisements in multiple newspapers and has aired national television commercials claiming Elena Kagan is unfit for the Supreme Court because of her supposed opposition to the second amendment rights of Americans. The NRA's charges are unfounded and are refuted by the nominee's own words during her confirmation hearing before the Senate Judiciary Committee.

For example, in regard to the Supreme Court's 2008 Heller decision, which ruled that the second amendment protects an individual's right to possess a firearm for private self-defense purposes in a Federal enclave, and the Supreme Court's recent McDonald decision, which applied the Heller holding to the States, the NRA has said that Solicitor General Kagan has left unanswered ''very serious questions of whether she would vote to overturn Heller and McDonald.'' Perhaps the NRA lobbyists were not watching her confirmation hearing when she replied to a question from Senator TOM COBURN saying, ''I very much appreciate how deeply important the right to bear arms is to millions and millions of Americans. And I accept Heller which made clear that the second amendment conferred that right upon individuals, and not simply collectively.'' In addition, in response to a related question from Senator CHARLES GRASSLEY, Solicitor General Kagan said ''those decisions are settled law . . . I will follow stare decisis with respect to Heller and McDonald as I would with any case.''

It seems pretty clear, contrary to the NRA's claims, that Solicitor Kagan has answered questions concerning her position on the second amendment rights of Americans, and she will defend those rights.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. REID. I ask unanimous consent that there now be 1 hour remaining for debate with respect to the Kagan nomination for the U.S. Supreme Court, with 15-minute blocks controlled as follows: Senator SESSIONS, Chairman LEAHY, Leader MCCONNELL, and Senator REID of Nevada; that upon the use of the allotted hour, the Senate proceed to vote on confirmation of the nomination; that upon confirmation, the motion to reconsider be considered made and laid on the table, the President be immediately notified of Senate's action, and the Senate then resume legislative session. Further, I ask that when Members cast a vote on the nomination, they do so from their seats.

The PRESIDING OFFICER. Is there objection?

Mr. REID. Will the Chair withhold please, Mr. President.

You have heard my request. What is the ruling of the Chair?

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

Mr. REID. Mr. President, at 3:30 today we will vote on the nomination of Elena Kagan to be an Associate Justice on the Supreme Court.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, in the midst of President Johnson's ''Great Society,'' Ronald Reagan explained that our Nation had arrived at a crossroads, at a time for choosing.

The choice, Reagan explained, was ''whether we believe in our capacity for self-government or whether we abandon the American Revolution and confess that a little intellectual elite in a far-distant capital can plan our lives for us better than we can plan it for ourselves.''

Forty years later, our Nation once again finds itself at a crossroads. Government is getting larger and larger. Spending is out of control, and a little intellectual elite, in a far distant capital, is trying harder than ever to plan the lives of the American people. Even basic choices about how we care for our own health are now made by career bureaucrats whose names Americans will never hear and whose faces they will never see.

Our Nation has a choice to make. We either restore or relinquish our great heritage of limited constitutional government. Part of that choice will be made here today. Part of that choice will be made as we consider the nomination of Elena Kagan to the Supreme Court. In recent years, the progressive wing of the Supreme Court has offered opinions that would have denied Americans their right to keep and bear arms, and severely diminish the right to free speech during election time.

These same progressive Justices succeeded only a short time ago in ruling that a citizen's property could be seized by the State for private commercial development. These Justices are ignoring the text of our Constitution, the plain rights guaranteed by our Constitution, in order to advance what

they think are better ideas, their vision, their political agendas, frankly.

This progressive, activist judicial philosophy strikes at the heart of our democracy and is a direct threat to our liberty. Judges are lifetime appointed. They are not accountable to the people. President Obama himself has said that judges must shed their neutral constitutional role and impose upon the nation ''their broader vision of what America should be.'' That is how he said he would pick judges, and this is certainly the kind of judge President Obama believes he has found in Ms. Kagan, someone who shares his progressive, elitist vision and is willing to advance it from the bench.

Indeed, throughout Ms. Kagan's career, she has been more deeply involved in politics than law, and has frequently put her politics above law. She has never been a judge, never argued even a case before a jury. She has practiced law for 3 years. She has less real legal experience than any nominee in the last half century.

The experience Ms. Kagan does have, however, is mostly that of a political lawyer and a policy advocate, and whenever her political views have clashed with her legal obligations, her vision of what America should be and not her duty have too often won the day.

As a Supreme Court clerk she pursued a progressive agenda without regard to the Constitution's text or history. She even wrote she was not sympathetic to an American's constitutional right to keep and bear arms. As a top aide to President Clinton she was closely involved in efforts to restrict private gun ownership, including a plan to block firearm importation into our country that one Clinton official admitted was ''taking the law and bending it as far as we can.''

She also worked aggressively to ensure the wide availability of partial-birth abortion. Instead of providing President Clinton with sound legal advice based on the best medical evidence, she pushed the President away from his moderate position, and away from his willingness to reach a compromise on this issue. She even helped revise a medical statement to imply a medical need for the gruesome partial-birth abortion procedure that did not exist, when the expert panel had indeed said it was never an appropriate procedure.

Next, as dean of Harvard Law, Ms. Kagan would once again sacrifice legal principle for political gain for advancement of an agenda she believed in. Ms. Kagan inherited a policy of equal and unfettered access for military recruiters on campus. That was the policy. But she reversed this policy, kicking the military out of the campus recruitment office as our troops at that very time were risking their lives overseas. She did this in clear, knowing violation of Federal law, the Solomon amendment. The Solomon amendment, passed by this Congress four times, requires unrestricted, equal access on campuses for military recruiters. Ms. Kagan knew what the law said, and as she herself admitted, knew that it was in force every single day she was dean. But she put her own views, her political ideas, her ideologies above the law and above the best interests of our soldiers, stripping the military of their official access availability on campus.

Ms. Kagan justified this conduct by saying she was objecting to don't ask, don't tell. That statute, however, was passed by Congress and implemented by President Clinton, her former boss. But instead of complaining to the politicians who made the rule, to those of us in Congress who were involved in passing it and maintaining it, working within the democratic system, Ms. Kagan took it upon herself to defy the law and to demean the people who were merely following the law, our noble men and women who serve our country.

Perhaps some of those on that campus recruiting had just come off the battlefield, having served their country, placing their lives at risk. For that there can be no justification.

After Harvard, Ms. Kagan assumed the post of Solicitor General of the United States. In that job it is her sworn duty to defend all Federal laws, including those she may personally oppose. These are the laws of Congress which the Solicitor General must defend. As every good lawyer knows, her job is to represent her clients, and the client of the Solicitor General is the United States of America.

Did she fulfill that duty? Did she faithfully represent her client? No, she did not. When the liberal Ninth Circuit issued a deeply flawed ruling against don't ask, don't tell, the law Ms. Kagan had so strongly opposed at Harvard, she did not appeal the ruling, despite great chances of success on appeal to the Supreme Court. Instead, she did exactly what the ACLU, the group who was leading the fight in representing the individual in that lawsuit, who opposed the statute and wanted it stricken, she did what they desired and let the ruling stand, and missed the opportunity to get a clear appeal. This was a test of Ms. Kagan's legal character, and she failed that test. I studied the case closely. I want to be fair to her about that.

The only explanation for her not appealing to the Supreme Court was that she did not want them to uphold the statute to win a victory for the United States. In short, she did not fulfill her duty. Her duty. Is that a word that is out of fashion today? And she did not live up to her explicit, sworn promise made to this Senate, to vigorously defend that very statute, when she was confirmed to be Solicitor General.

Given this record, it is not surprising that Ms. Kagan's judicial heroes are activists who reject and repudiate sometimes even the very idea of objectivity. But it is objectivity, the search for what is right and true, that makes our system of justice so extraordinary and so unique. The whole goal of our trials is to find the truth. These concerns were addressed during the hearing. Ms. Kagan was given every opportunity to respond. But she opted, I thought, for political spin at the expense of rigorous honesty and accuracy. In so doing, she only further demonstrated she lacked the qualities necessary to sit on the Court. Other Senators have the same impression of that testimony.

Some have said that Senators are opposing this nomination for partisan reasons, that her qualifications are not in question. But what qualification is more essential for the Supreme Court than impartial fidelity to the law? This is not an ideological litmus test but a core bipartisan standard to which any nominee of any party ought to be held.

Senators can and will disagree on the question of how much deference a President is due in his nomination. But surely that deference cannot extend so far as to include a nominee who is unable to serve under the Constitution as they take an oath to do.

The American people will not easily forgive the Senate if we confirm Ms. Kagan to the Supreme Court. They will not forgive the Senate if we further expose our Constitution to revision and rewrite by judicial fiat, to advance what President Obama says is a broader vision of what America should be. That is the Congressional role, not the judicial role, to figure out what the vision and the policy of this country should be.

Now more than ever we need this Court to be an impartial defender of our constitutional liberty. As Vice President BIDEN's own chief of staff and close friend of Ms. Kagan emphatically said, ''Ms. Kagan is clearly a legal progressive.'' If confirmed, I fear she will continue putting her politics above the law, as she has so often done before. So I invited those who supported this nomination to refute the record and the analysis I have stated over the several past weeks, but I do not think one error has been raised and identified by Ms. Kagan's supporters in what I have said.

So we are left with the same concern, that Ms. Kagan would ally herself not with the constitutional liberties of all Americans but with the big government agenda of the President who nominated her. In fact, at the hearing, Ms. Kagan was unable to identify any limits on the government's power to control America's economic decisions. What Ms. Kagan perhaps fails to realize is that the people should control their government, not the other way around.

That is why no Supreme Court Justice should simply rubberstamp any political agenda of a President or Congress, nor should any Senator. Our liberties are far more precious than any partisan allegiance.

After the Constitution was drafted, Benjamin Franklin was asked what kind of government had been created. Franklin replied: A republic, if you can keep it. Again, the choice is ours. Either we embrace our great, magnificent

constitutional heritage that I love so much or we let it slip away to judges who believe they can allow their own personal core beliefs and philosophies to help them decide how a case should go. Either we move forward more secure in our freedom or we fall back to the old bankrupt idea of big government—an idea that has failed at every place, every time it has been tried.

Let's take a step today in the right direction. Let's listen to the American people and strengthen our commitment to constitutional values. It is that commitment that impels me to vote against this nomination and why I urge my colleagues in both parties to do the same.

I see the chairman of the committee, Senator LEAHY. He and I don't agree on this nomination, but he is a proven professional chairman. He has gone through a host of these nominations. He is tough, but he is fair. He let us have our say. I thank the chairman for the privilege of working with him on this important constitutional effort.

The PRESIDING OFFICER (Mr. FRANKEN). The Senator from Vermont is recognized.

Mr. LEAHY. Mr. President, I thank the Senator from Alabama for his kind words. We both set out with the goal of making sure the United States had a chance to hear this nomination, to hear the debate on it, and to have Senators speak. We both decided before the debate that would happen, and it has. I thank the Senator from Alabama.

We are about to conclude debate on the nomination of Elena Kagan to be Associate Justice of the U.S. Supreme Court. This is the time when the 100 of us stand in the footsteps of 300 million Americans and make the decision whether she will be confirmed to a lifetime appointment. I predict right now she will be confirmed and I look forward to her bipartisan confirmation.

She has been nominated to succeed Justice John Paul Stevens, someone who served with integrity for so many years, a man I consider a friend. Her qualifications, intelligence, temperament, and judgment will make her a worthy successor to Justice John Paul Stevens.

When she is appointed by the President after we confirm her, three women will serve together on the Supreme Court of the United States for the first time in our Nation's history, three women on the nine-member Supreme Court. As I said 5½ weeks ago, when the Judiciary Committee began Solicitor General Kagan's confirmation hearing, we are a better country for the fact that the path of excellence Elena Kagan has taken in her career is one now open for both men and women. I look forward to the day when I see many more women on that Court.

Solicitor General Kagan's legal qualifications are unassailable. She earned her place at the top of the legal profession. No one gave it to her; she earned it. As a student, she excelled at Princeton, Oxford and Harvard Law School. She was a law clerk to a giant in American justice and American law, Justice Thurgood Marshall. She worked for then-Chairman BIDEN on the Judiciary Committee. These experiences, combined with her work as an advisor to President Clinton, give her background in all three branches of our government. She also taught law at two of the Nation's most respected law schools. In the decade since the Republican Senate majority pocket-filibustered her nomination to the DC Circuit—remember, when people say she does not have judicial experience, of course, Republicans did block her from going on the court—Elena Kagan became the first woman dean of Harvard Law School and then the first woman Solicitor General of the United States, often referred to as the 10th Justice.

The 100 of us who serve in the U.S. Senate stand in the shoes of more than 300 million Americans as we discharge this constitutional duty to consider nominations to our Nation's Federal courts. We will conclude our consideration of this nomination after 12 weeks. If we can do that for a Supreme Court nomination, we ought to be able to consider the other judicial nominations that have been stalled for months after being favorably reported by the Judiciary Committee.

This is the 15th time since I have been in the Senate that I have been able to consider a Supreme Court nomination. I have applied the same standards to this nomination as I have to the ones that preceded it. I looked to see whether Solicitor General Kagan would fairly apply the law and use common sense. That is the same standard I used on the first Supreme Court Justice I voted on, a man from Chicago, Justice John Paul Stevens, nominated by a Republican President. I proudly voted for him. For Solicitor General Kagan, I looked to see whether, as a Justice, she would appreciate the proper role of the courts in our democracy. Would she be the kind of independent Justice who would keep faith with each of the words inscribed in Vermont marble over the front doors to the Supreme Court: ''Equal justice under law.'' My answer to these questions, based on her record and testimony, is a resounding yes.

Solicitor General Kagan demonstrated an impressive knowledge of the law and fidelity to it. She spoke of judicial restraint and respect for our democratic institutions, her commitment to the Constitution and the rule of law. She made clear that she will base her approach to deciding cases on the law and the Constitution, not politics or an ideological agenda. So today I will cast my vote for Elena Kagan's confirmation.

I observed at the outset of this confirmation process that there was no one President Obama could nominate who would not be opposed by some. Some Senators announced their opposition to Solicitor General Kagan's nomination even before a hearing took place. The opening statement of others at the Judiciary Committee hearings struck me more like prosecutors' closing arguments. Senators who last year disregarded Justice Sotomayor's years of judicial service to focus on a few phrases taken out of context from her speeches reversed their course this year to proclaim that an extensive judicial record is imperative. Standards shift almost every time. They then faulted Solicitor General Kagan for not having been a judge, while ignoring the fact that it was Senate Republicans who pocket-filibustered her judicial nomination more than 10 years ago.

Senators can make their own judgments, and they have. I ask of them only two things: Fairly consider Solicitor General Kagan's testimony and adhere to the standards of fairness and objectivity that you are demanding of her as a Justice. History will judge whether Senators have fairly considered the nomination of Solicitor General Kagan. I commend those Senators who have shown the independence to join the bipartisan confirmation of this nomination.

I also defend the right of every Senator to vote as he or she chooses. I understand that some statements made in opposition to this nomination were seen as insulting to the nominee and to others. I disagree with the many inferences, conclusions and judgments expressed in opposition, but I do not think Senators intended their remarks to be disparaging.

Five years ago, I followed the Democratic leader's statement in opposition to the nomination of John Roberts with my statement in favor of that nomination. That was my judgment based on the record and his testimony, including his pronouncements on judicial restraint, deference to Congress, and respect for precedent. At the time, Senators on the Democratic side of the aisle—a number of them—disagreed with me, including one Senator who disagreed with me but, nevertheless, came to the floor to defend my position. That Senator was the then-junior Senator from Illinois. Of course, he now serves as President of the United States. As I told President Obama the other day, his defense of me meant a lot then, and 5 years later, it still does.

In the course of our consideration of this nomination, I have spoken several times about the key role real world judging and judicial independence have played in furthering the Constitution's purpose of forming a more perfect union. It is essential that judicial nominees understand that, as judges, they are not members of any administration. I believe Solicitor General Kagan has that understanding. Courts are not subsidiaries of any political party or interest group, and our judges should not be partisans. That is why the Supreme Court's intervention in the 2000 Presidential election in Bush v. Gore was so jarring and why the recent decision by five conservative activist Justices in Citizens United to

throw out 100 years of legal developments in order to invite massive corporate spending on elections for the first time in 100 years was such a jolt to the system.

It is also essential that judges and Justices understand how the law affects Americans each and every day. I expect Elena Kagan learned early on in her legal career, when she clerked for Justice Marshall, that Justices ought to understand how their decisions affect real Americans. In the hard cases that come before the Supreme Court, in the real world, we want and need Justices who have the good sense to appreciate the real world ramifications of their decisions. The American people live in the real world of great challenges. The Supreme Court needs to function in that real world.

It took a Supreme Court that, in 1954, understood the real world to conclude in Brown v. Board of Education that the seemingly fair sounding doctrine of separate but equal was in reality a straitjacket of inequality and inconsistent with the constitutional guarantee of equality. It took a Supreme Court 75 years ago that understood the real world and the Great Depression to reject conservative judicial activism to accept the constitutional authority of Congress to outlaw child labor, to guarantee a minimum wage, and to establish a social safety net for all Americans. Through Social Security, Medicare and Medicaid, Congress ensured that growing old no longer means growing poor and that being older or poor no longer means being without medical care. That progress continues today with our efforts to pass laws to ensure protection from natural and manmade disasters, to encourage clean air and water, to provide health care for all Americans, to ensure safe food and drugs, to protect equal rights, to enforce safe workplaces and provide a safety net for seniors.

Vermont did not vote to join the Union until the year the Bill of Rights was ratified. Those of us from the Green Mountain State are protective of our fundamental liberties. Vermonters understand the importance the Constitution, including the Bill of Rights and the subsequent constitutional amendments have had in expanding individual liberties over the last 220 years. I believe Solicitor General Kagan shares this understanding. As she said in her opening statement at the hearing:

> What the rule of law does is nothing less than to secure for each of us what our Constitution calls ''the blessings of liberty''—those rights and freedoms, that promise of equality, that have defined this nation since its founding.

All of us are better for our historic progress to greater freedom, equality, and security.

Every February, the Senate hears President George Washington's Farewell Address. It is usually read by the Senate's most junior Member. In that pronouncement by our first President, George Washington warns against the danger of factions, partisanship, and what he called ''the spirit of party,'' noting:

> [T]he common and continual mischiefs of the spirit of party are sufficient to make it the interest and duty of a wise people to discourage and restrain it.
>
> It serves always to distract the Public Councils, and enfeeble the Public Administration. It agitates the Community with ill-founded jealousies and public alarms; kindles the animosity of one part against another, foments occasionally riot and insurrection.

That was George Washington, a long time ago. But today our Nation faces many challenges. It is a time when we should be pulling together and working together. Instead, we have seen too much obstruction, negativity, and devotion to the failure of the other party instead of the success of the country.

The nomination of Solicitor General Elena Kagan is a matter on which I expect the President had hoped we would come together. Her nomination really is one worthy of broad bipartisan support.

With Elena Kagan's confirmation, the Supreme Court will better reflect the diversity that has made our country so great. We will write another chapter in the history of our Nation's highest Court. And we will take another step forward in fulfilling the hopes and dreams of the trailblazers who set the path for Elena Kagan to follow.

I will proudly vote for her confirmation.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. SESSIONS. Mr. President, I would like to express my appreciation to my staff who worked tirelessly during these past few months on this nomination. They spent many long hours combing through and distilling information in hundreds of thousands of documents provided by Solicitor General Kagan, the Clinton Library and the Pentagon. On a short timeline, my staff worked around the clock to prepare for the hearing before the Judiciary Committee, which occurred merely 49 days after President Obama announced Solicitor General Kagan's nomination to the Supreme Court. Because of their hard work and dedication, our members were well-prepared and well-informed, which allowed us to conduct a fair and thorough hearing.

Mr. President, I would like to thank my staff and Senator LEAHY's staff, the Judiciary Committee staff, for their fine work during this nomination process. It has gone on for a number of weeks, and it has been very stressful, with a lot of late nights, and people really have worked hard. I believe that has provided us with good and accurate information.

I particularly would like to express my appreciation to my staff director, Brian Benczkowski, on whom I have relied repeatedly through this process, for his good judgment and wise counsel, his integrity and experience as we have dealt with this difficult challenge. I would also note my chief counsel for nominations, Danielle Cutrona, who has also worked exceedingly hard, as well as my deputy staff director, Matt Miner.

I would like to acknowledge and thank the other hard-working and talented lawyers on my permanent staff who worked on this nomination, including William Smith, Ted Lehman, Bill Hall, Mark Patton, John Ellis, and Kimberly Kilpatrick.

I would also like to extend my appreciation to the talented lawyers who joined my staff as Special Counsels specifically to work on this nomination, including Ralph Johnson, Jason Tompkins, and Susanna Dokupil. And I would be remiss if I did not mention the efforts of our Law Clerks, two of whom dedicated their time while studying for the bar exam, including Amanda Lavis, Ed Liva, and Taylor-Lee Wickersham.

I would also like to acknowledge our dedicated support staff: Lauren Pastarnack, Sarah Thompson, Andrew Bennion, Allison Busbee, Kate Laborde, and Ivy Williams.

Finally, I cannot overstate the important work done by our press team. My Communications Director Stephen Boyd, Press Secretaries Sarah Haley and Stephen Miller, and Press Assistant Andrew Logan have worked tirelessly throughout this process.

All of these individuals shouldered the brunt of this enormous task, working late hours and through weekends and holidays. They deserve our recognition for their hard work, professionalism, and dedication to public service.

I would also like to thank the other talented lawyers on my staff who, among others I have just mentioned, handled the regular legislative business that came before the Judiciary Committee during this process: Joe Matal, Bradley Hayes, and Sam Ramer.

And let me express my gratitude to the Republican Leader and his staff, specifically John Abegg, Josh Holmes, and Webber Steinhoff; along with Republican Policy Committee Counsel Gregg Nunziata who provided invaluable assistance to my staff.

I'd also like to express my thanks to Chairman LEAHY for his work on this nomination. We didn't always agree on everything, but he was respectful of Republicans' rights during this process and he conducted a fair and thorough hearing. He would not have been able to do that without the help of his staff, including his Staff Director and Chief Counsel Bruce Cohen and his Chief Nominations Counsel Jeremy Paris.

Finally, I would like to thank the Judiciary Committee's Chief Clerk,

Roslyne Turner and her assistant, Erin O'Neill.

Every one of these talented staff members contributed to this process, and their dedication and hard work helped us conduct a fair and thorough hearing. I extend my heartfelt thanks to each of them. We could not have fulfilled our Constitutional duty of Advice and Consent without them.

Mr. President, there are in the hearing nine letters in opposition to the nomination of Elena Kagan to be Associate Justice of the Supreme Court from Gonzalo Vergara, Lt. Col., USAF (Ret); the Judicial Action Group; National Right to Life Committee; Military Families United; the Liberty Counsel; The Ethics & Religious Liberty Commission of the Southern Baptist Convention; the American Association of Christian Schools; the Center for Military Readiness; and the National Rifle Association of America.

I ask unanimous consent to have printed in the RECORD four letters from the National Right to Work Committee; the American Conservative Union; C. Everett Koop, former U.S. Surgeon General, and the Ethics & Religious Liberty Commission of the Southern Baptist Convention.

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

NATIONAL RIGHT TO WORK COMMITTEE,
Springfield, VA, July 1, 2010.

U.S. SENATE,
Washington, DC.

DEAR SENATOR: On behalf of the over 2.6 million members of the National Right to Work Committee, I strongly urge you to vote against confirmation of Elena Kagan for a lifetime seat on the United States Supreme Court. Her record as an high-level White House advisor to President William Jefferson Clinton demonstrates that her views about the First-Amendment and statutory rights of American workers are far outside the judicial mainstream.

In 1976, in Abood v. Detroit Board of Education, a case in which National Right to Work Legal Defense Foundation attorneys represented the plaintiff, public school teachers, the U.S. Supreme Court considered whether nonunion public employees can constitutionally be compelled as a condition of employment to subsidize their union monopoly bargaining agent's political activities. The Court, unanimously, held ''that a State cannot constitutionally compel public employees to contribute to union political activities which they oppose.''

The First-Amendment right of workers not to be forced to subsidize union politics, first recognized in Abood, has been reaffirmed by the Supreme Court in several subsequent cases brought to the Court for workers by National Right to Work Legal Defense Foundation attorneys, cases such as Ellis v. Railway Clerks (1984), Teachers Local 1 v. Hudson (1986), Lehnert v. Ferris Faculty Ass'n (1991), and Davenport v. Washington Education Ass'n (2007).

The Court's Abood ruling relied on the principle underlying the Supreme Court's 1976 decision about the Federal Election Campaign Act in Buckley v. Valeo, that ''contributing to an organization for the purpose of spreading a political message is protected by the First Amendment.'' The Court has reiterated that principle repeatedly, and relied upon it again as recently as this year in Citizens United v. Federal Election Commission.

However, in 1996, when she was Associate Counsel to President Clinton, Ms. Kagan rejected this long, unbroken line of Supreme Court precedent that protects the First-Amendment right of public employees—and of Americans generally—not to be compelled by government to subsidize political activities of private, voluntary associations.

In an e-mail message on October 31, 1996, to Paul J. Weinstein, Jr., Chief of Staff of the White House Domestic Policy Council, Ms. Kagan said (emphasis added):

It is unfortunately true that almost any meaningful campaign finance reform proposal raises constitutional issues. This is a result of the Supreme Court's view—which I believe to be mistaken in many cases—that money is speech and that attempts to limit the influence of money on our political system therefore raise First Amendment problems . . . I also think the Court should reexamine its premise that the freedom of speech guaranteed by the First Amendment entails a right to throw money at the political system.

In her Senate Judiciary Committee testimony on June 29, 2010, Ms. Kagan claimed in answer to a question from Senator Orrin Hatch that these were merely the Clinton Administration's, not her personal, views.

However, later, on October 31, 1996, Ms. Kagan was one of several White House staff members whose memorandum recommending how the White House should respond to questions about President Clinton's ''Campaign Finance Reform Announcement'' was transmitted to White House Chief of Staff Leon Panetta. That memo from Ms. Kagan and others incorporated Ms. Kagan's argument that the First Amendment does not protect the right to spend money for political activities. In short, in 1996 Ms. Kagan both suggested and endorsed that crabbed view of the. First Amendment.

Thus, Ms. Kagan's testimony this week before the Senate Judiciary Committee clearly is disingenuous. It is reasonable to conclude from her record that, if confirmed, Ms. Kagan would be willing to overrule Abood's well-established protection of the constitutional right of workers not to be forced to subsidize union politics.

This conclusion is supported by other documents the Clinton Presidential Library recently produced for the Senate Judiciary Committee in preparation for its hearings on Ms. Kagan's Supreme Court nomination.

On November 14, 1996, Ms. Kagan sent a memorandum on White House stationery to then White House Counsel Jack Quinn and then Deputy White House Counsel Kathleen Wallman about a draft ''memo to the President on campaign finance.'' In her memo, Ms. Kagan said:

The memo does not address what seems to me the key issue in developing a strategy on campaign finance legislation: how to deal with Republican efforts to restrict labor union spending. I think the Republicans will insist on including in any campaign finance legislation a provision making it difficult for unions to use money from compulsory union dues in political campaigns. . . . We should start thinking now how we're going to deal with this Republican poison pill.

In 1988, of course, in Communications Workers v. Beck, yet another case in which National Right to Work Legal Defense Foundation attorneys represented the plaintiff workers, the Supreme Court had already held that the National Labor Relations Act—like the First Amendment—prohibits unions from using compulsory union dues of objecting workers in political campaigns. Thus, any provision that would make ''it more difficult for unions to use money from compulsory union dues in political campaigns'' would simply protect a constitutional and statutory right of workers recognized by the Court in the Abood line of cases and in Beck.

Ms. Kagan nonetheless subsequently recommended that President Clinton oppose any legislation protecting the right of workers not to be forced to subsidize union politics, despite the First Amendment's guarantee of that basic worker freedom of speech and association.

On February 12, 1997, Kathleen Wallman, then Deputy Assistant to the President for Economic Policy, circulated an 11:30 a.m. draft memorandum for the President on possible policy announcements of labor issues that the Vice President could make at a meeting of the AFL–CIO's Executive Committee later that month. The draft indicates that Ms. Kagan, by then Deputy Assistant to the President for Domestic Policy, was writing two sections of the memo that were not included in the draft. One of those sections that Ms. Kagan ''agreed to draft'' concerned the Administration's ''[p]osition on Beck legislation aimed at limiting the use of union dues in political activity.''

Later that same day, Ms. Kagan e-mailed Ms. Wallman her recommendation about ''legislation aimed at limiting the use of union dues in political activity'' (italics added): John Hilley [Director of Legislative Affairs], Bruce Reed [Director of the Domestic Policy Council], and I all recommend that you state strong opposition to Beck legislation, no matter what it is attached to.''

In sum, as a high-level White House official Ms. Kagan both disagreed with the well-established legal principle that underlies the long line of Supreme Court decisions recognizing the constitutional right of workers not to be compelled to subsidize union political activities as a condition of employment and opposed any legislation designed to protect that fundamental right of free speech and free association. This puts her far outside the judicial mainstream and demonstrates a disdain for the rights of independent-minded American workers.

Consequently, on behalf of the National Right to Work Committee's over 2.6 million members, I strongly urge you to vote NO on confirmation of Ms. Kagan's nomination to the Supreme Court.

Respectfully,

MARK A. MIX.

DEAR SENATOR: On behalf of the American Conservative Union, I strongly urge you to vote ''NO'' on the confirmation of Elena Kagan to the U.S. Supreme Court.

Elena Kagan's entire career is more suited to that of a political activist than a legal scholar, as she has been described by President Obama and as she described herself in her testimony. Kagan began public life as a political operative for the U.S. Senate campaign of Elizabeth Holtzman of New York in 1980. The documents produced for the Judiciary Committee show that, as a member of the Clinton Administration's Justice Department, Kagan's primary role was to develop political strategy in dealing with the Congress on legal issues. A good example of this is when the issue of partial birth abortion came before the Senate during the Clinton administration. At this time Kagan proceeded to negotiate changes to a statement by the American Council of Obstetricians and Gynecologists (ACOG) that said there were no serious medical reasons for conducting a partial birth abortion. Kagan's involvement made it more difficult for the Senate to pass a ban on partial birth abortion. This example clearly displays that Kagan is more of a political operative than a legal scholar.

Another serious impediment to Kagan's nomination is her deep involvement as the Obama Administration's Solicitor General on issues that will continue to come before the Supreme Court. This may mean that Kagan will or should have to recuse herself from key decisions of the court. As outlined in a letter from Republican members of the Committee on July 13 to Kagan, there is even a question as to whether recusal will be an issue when the constitutionality of the recently passed health care bill comes before the court.

Kagan has also shown herself willing to ignore the law for political purposes. As Dean of the Harvard Law School, Kagan banned military recruiters on campus in violation of the Solomon Act to satisfy campus activists. Her actions were voided by a unanimous 8–0 decision of the very court on which she has been nominated to serve.

Although through the mid-twentieth century, court appointments of politicians were sometimes made to satisfy political deals, such as the appointment of Earl Warren in the 1950s, in recent years judicial experience and legal background have been at the forefront of nominations. The nomination of Elena Kagan is more akin to President Lyndon Johnson's nomination of political crony Abe Fortas as Chief Justice, which had to be withdrawn.

It was President Obama, as a U.S. Senator, who changed the criteria for judges from minimum qualifications to judicial philosophy and more subjective criteria. The nomination of Elena Kagan is a blatant attempt to place on the court a political operative who will work as an advocate of Administration policies rather than look at rulings from an objective view of constitutionality. Please vote ''NO'' in the confirmation of Elena Kagan.

Sincerely,

LARRY HART,
Director of Government Relations, The American Conservative Union.

AN OPEN LETTER TO THE AMERICAN PEOPLE:

For many years, before, during and after my service as surgeon general of the United States, I've been known for presenting my unvarnished opinion on medical matters, regardless of the views of political parties or outside influences. The time has come for me to do so again.

I was deeply disturbed to learn that Elena Kagan, the nominee for Supreme Court scheduled for a Senate committee vote next week, manipulated the medical policy statement on partial-birth abortion of a major medical organization, the American College of Obstetricians and Gynecologists (ACOG) in January 1997.

The problem for me, as a physician, is that she was willing to replace a medical statement with a political statement that was not supported by any existing medical data. During the partial-birth abortion debate in the 1990s, medical evidence was of paramount importance.

Ms. Kagan's amendment to the ACOG Policy Statement—that partial-birth abortion ''may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman''—had no basis in published medical studies or data. No published medical data supported her amendment in 1997, and none supports it today.

Indeed, there was, and is, no reliable medical data that partial-birth abortion is safe or safer than alternative medical procedures. There are other medical options.

In my many decades of service as a medical doctor, I have never known of a case where partial-birth abortion was necessary in place of a more humane and ethical alternative. Not only have I never seen such a case, but I have never known of any physician who had to do a partial-birth abortion—nor have I ever met a physician who knew of anyone who had to perform one out of medical necessity. In fact, partial-birth abortion has risks of its own, and could injure a woman.

Medical science should not have been twisted in 1997 for political or legislative gains.

Ms. Kagan's political language, a direct result of the amendment she made to ACOG's Policy Statement, made its way into American jurisprudence and misled federal courts for the next decade.

She misrepresented not only the science but also misrepresented her role in front of your elected representatives in the United States Senate.

This is unethical, and it is disgraceful, especially for one who would be tasked with being a measured and fair-minded judge.

Americans United for Life Action has released a thorough and comprehensive report on this matter, a report that provides substantive evidence of Ms. Kagan's actions in this matter. I ask that Senators and the American people give this report their most serious consideration. I urge the Senate to reject the politization of medical science and vote no on the Kagan nomination.

Sincerely,

C. EVERETT KOOP, M.D., SC.D.,
Surgeon General of the United States Public Health Service, 1981–89.

THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION,
Washington, DC, July 20, 2010.

Hon. PATRICK J. LEAHY,
Chairman, Senate Judiciary Committee, U.S. Senate, Washington, DC.

Hon. JEFF SESSIONS,
Ranking Member, Senate Judiciary Committee, U.S. Senate, Washington, DC.

DEAR CHAIRMAN LEAHY AND RANKING MEMBER SESSIONS: On June 25, we sent you a letter expressing serious concerns about Elena Kagan's nomination as the next associate justice to the U.S. Supreme Court. As we stated, we have been alarmed about Kagan's lack of respect for the First Amendment's right to free speech, her admiration for extreme judicial activists, and her role in advancing pro-abortion policies. We also expressed our distress about Kagan's attempts, while dean of Harvard Law School, to bar military recruiters from campus because of her own personal views in opposition to the military's ''Don't Ask, Don't Tell'' policy. Unfortunately, these concerns remain.

During the Judiciary Committee's confirmation hearings, Kagan failed to satisfactorily clarify her actions and opinions. Many of her answers were confusing and unclear. She refused to respond to several key questions in an open and honest manner. She also avoided many issues altogether. Since Kagan has had no judicial experience and possesses limited experience as a practicing attorney, we were interested in learning about her judicial philosophy. However, we learned little about her beliefs and judicial views during the confirmation hearings. Rather than providing answers to our concerns, Kagan's responses have only raised more serious questions.

After careful consideration, we believe Elena Kagan is not a suitable nominee for the Supreme Court. She has evaded too many questions and her record is too obscure to confirm her to this lifetime appointment. Consequently, we urge you to vote against Kagan's confirmation to the Supreme Court.

Sincerely,

RICHARD D. LAND.

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. MCCONNELL. Mr. President, let me begin by thanking the chairman and ranking member of the Judiciary Committee, Senator LEAHY and Senator SESSIONS, on conducting a dignified and respectful hearing on the Kagan nomination.

Let me just add that, in my view, the way Republicans on the Judiciary Committee have conducted themselves in the minority over the past few years underscores that the kind of hyperbole and hysteria that has too often accompanied the Supreme Court nominations of Republican Presidents is hardly an essential part of the process. The committee hearings gave Senators and the American people a valuable opportunity to focus our attention on a woman whom President Obama would like to see deciding cases on some of the most important and consequential issues we face as a country. Ms. Kagan will be ruling on some of the most important legal questions that arise during President Obama's administration and long after he leaves office. It was vitally important that we have an opportunity to question her on her views about the law. What we learned from the hearing and what we were unable to learn from it form an important part of the record on her nomination.

But this, of course, is just a part of Ms. Kagan's record. Senators have spent weeks examining Ms. Kagan's experience and background in light of the awesome responsibility that comes with a lifetime appointment on our Nation's highest Court. As I have said previously, my own judgment is that Ms. Kagan is not suited to assume a lifetime position on our Nation's highest Court. Now I would like to explain why in more detail.

As we know, Ms. Kagan does not have the judicial or private practice experience most modern-day Supreme Court Justices have had—far from it. This is relevant not because one has to have prior judicial experience in order to be a good Supreme Court Justice—that is not my view now, and it never has been—but the absence of judicial experience makes it all the more important that we look more closely at the kind of experience Ms. Kagan has, in fact, had. A review of Ms. Kagan's experience reveals a woman who has spent much or her adult life not steeped in the practice of law but in the art of politics.

When we look at her resume, we find a woman who has worked fervently to advance the goals of the Democratic Party and liberal causes, usually at the expense of those with whom she disagrees politically or ideologically. In college, she spent one summer working 14 hours a day for a liberal Democratic candidate for the U.S. Senate from New York. When her candidate lost, Ms.

Kagan wrote that it was her hope that one day a ''more leftist left will once again come to the fore.''

In fairness, few of us would want everything we said or wrote as college students put up on a billboard. But the trajectory of Ms. Kagan's career and the records from her time as a political advisor in the Clinton White House suggest someone, as one news story put it, who, long after college and even at the highest peaks of political influence, was ''driven and opinionated, with a flair for political tactics. . . .''

What else do we find in Ms. Kagan's resume?

Well, 8 years after that first Senate race, she volunteered for the Dukakis Presidential campaign, working as an opposition researcher to defend the then-Governor of Massachusetts from attacks and to look for ways to attack the Republican opposition. I note her job as an opposition researcher because it is part of a pattern of partisan political activity and because Democrats themselves have strongly questioned the impartiality of Republicans who have held this type of job.

As a Supreme Court law clerk, Ms. Kagan often inserted her own personal views into her legal advice. In one case, for example, she was dismissive of a man's second amendment claim because it was something that, in her words, she did not find to be ''sympathetic.''

Later, as an aide to President Clinton, she did not serve as an attorney but as a policy advocate, seeking legal advice rather than giving it. It was in this role that she helped lead a task force on changing the Nation's campaign finance laws and gleefully noted when one specific proposal would disadvantage Republicans. She also went out of her way to deter lawyers at the Justice Department from officially noting their serious constitutional concerns with a campaign finance proposal because it might complicate the pursuit of the Clinton administration's political goals.

It was also at the Clinton White House that she suggested turning a routine literacy event at a Maryland school into a chance to score political points against—you guessed it—Republicans. And it was there that she went to extraordinary lengths to prevent the enactment of a ban on partial-birth abortion, a procedure the vast majority of Americans strongly oppose.

From the Clinton administration, she went on to academia. She had strongly held views and acted upon them there as well. As dean of Harvard Law School, she refused to give our military, at all times, the full and good access to which they are entitled under Federal law. Indeed, she was so driven by her own personal views on this issue that she took a position in a case before the Supreme Court that was so legally dubious that not a single Justice agreed with it.

From Harvard, President Obama—her friend and former colleague at the University of Chicago Law School—selected her to be his Solicitor General. I, and the vast majority of my Republican colleagues, voted against her nomination to that position, given her lack of litigation experience. Indeed, Ms. Kagan made her first oral argument in any court, for any purpose, just last year in the Citizens United case. Having been in the courtroom myself that day, I heard her argue to an astonished Supreme Court that the power of the Federal Government is so vast it can ban political speech with which it disagrees, such as political pamphlets, despite the clear commands of the first amendment to the contrary.

So when we look at Elena Kagan's background, what we find again and again is someone who has worked tirelessly to advance a political agenda or ideology, often at the expense of the law.

Let's look for a moment at her relationship to the current administration.

We know the President and Ms. Kagan are former colleagues and friends. We know that the President views her as an important and loyal member of his team and that he was particularly pleased with her handling of the Citizens United case. And we know the President is confident that Ms. Kagan shares his view that judges should be judged especially on their ability to empathize with some over others—in other words, that she embraces the so-called empathy standard whereby judges act on, to quote the President, ''their broader vision of what America should be,'' which may or may not be what the law says is required. All of which brings us to the question of whether Ms. Kagan is suited to sit on the Supreme Court.

We do not have a judicial or private practice record to go to, but from the record we do have—that of a passionate policy advocate, a zealous political operative, and a loyal member of the Obama administration—the President picked precisely—precisely—the kind of judge he said he would. But is this the end of the inquiry? The President won the election. Ms. Kagan is bright. She has a good humor. Does the Constitution suggest that we therefore must assent to her nomination? Is that what the Founders envisioned?

Well, the Federalist Papers say two things that are particularly relevant here.

First, let's look at Federalist 76, which gives examples of specific disqualifiers for confirmation. The common theme for these disqualifiers is someone who is nominated not because of their objective qualifications but because of a personal connection to the Executive—be it friendship, family relationship, or a belief that they will exhibit a bias. It says the Senate's power to disapprove a nominee ''would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.'' That is Federalist 76.

Now let's look at Federalist 78, which talks about the role of the courts in our democracy and the proper philosophy for a judge. Here, Hamilton writes that courts may not ''substitute their own pleasure to the constitutional intentions of the legislature.'' He adds that their job must be to ''declare the sense of the law'' and that if, instead, they should exercise their ''WILL''—which he puts in all capital letters—''the consequence would be . . . the substitution of their pleasure to that of the legislative body.'' In other words, Hamilton was cautioning against judges so motivated by their own passions and sympathies that they would use their judicial power to implement, as President Obama puts it, ''their broader vision of'' what ought to be.

So while Hamilton, in Federalist 76, listed some of the reasons for disqualifying a nominee, this was clearly not an exhaustive list. Surely he did not lay out the critical qualification for a judge in Federalist 78 and then leave the Senate powerless to enforce it. Both papers must be read together, not in isolation, which brings us back to Ms. Kagan.

If you believe the role of a judge is to be an impartial arbiter, Ms. Kagan's background as a policy advocate and political lawyer—and oftentimes a very partisan one—cannot be ignored. Indeed, Members of both parties should appreciate the importance of confirming judges who are more interested in what the law says than in how the law can be used to advantage any one side.

As the chairman of the Judiciary Committee once put it:

> No one should vote for somebody that's going to be a political apparatchik for either the Democratic Party or the Republican Party.

If you believe the role of a judge is to be an impartial arbiter, Ms. Kagan's relationship to the President can't be ignored either. I think our friend, the senior Senator from Ohio, put his finger on what Federalist 76 was talking about in this regard. As he put it earlier this week:

> I would argue that General Kagan has been nominated based on her friendships and her personal attachments with President Obama and others at the White House, not based on objective qualities that would indicate she is qualified to be a Supreme Court Justice.

As for the empathy standard, well, empathy may be a very good quality in general, but in a court of law it is only good if you are lucky enough to be the guy the judge empathizes with. It is only good enough if you happen to share the judge's ''broader vision of what America ought to be,'' which is the exact opposite of what the author of Federalist 78 had in mind.

Let's say you are a pro-life group challenging a restriction on late-term abortion and you are appearing before a Justice Kagan. In light of the lengths

she went to in order to arrive at her preferred result on the subject of partial-birth abortion, do you think you are going to get a fair shake?

Let's say you think the government is infringing upon your second amendment rights. Given that she dismissively said she is not sympathetic to this sort of challenge, do you think she is going to apply the law or her own broader vision of how America should be?

Let's say you are a conservative nonprofit group that wants to publish a pamphlet or show a movie before an election. In other words, let's say you are a group such as Citizens United. Given her record of partisan advocacy, how do you think you are going to fare before her in that case?

Ms. Kagan has never made a secret of her professional aspirations. She has cultivated all the right friendships along the way, including the President of the United States. This is all well and good but, in my view, it strains credulity to think that Ms. Kagan's strong political views will be more constrained by the Constitution once she reaches her goal than they have been up until now.

Some of Ms. Kagan's supporters would like us to focus on her personality. They say she has a knack for making friends and getting along well with different kinds of people. Once again, these are all fine qualities. No one has any doubt that Ms. Kagan is bright and personable and easy to get along with. But the Supreme Court is not a social club. If getting along in polite society were enough reason to put someone on the Supreme Court, then we wouldn't need a confirmation process at all.

The goal was not to determine whether we think someone is smart and easy going; it is whether someone can be expected to be a neutral and independent arbiter of the law rather than a rubberstamp for this administration or for any other.

Whether it is small claims court or the Supreme Court, Americans expect politics to end at the courtroom door. Nothing in Elena Kagan's record suggests that her politics will stop there.

Ms. Kagan's background as a political operative, her lengthy resume of zealous advocacy for political and ideological causes, often at the expense of the law and those whose views differ from her own, her attachment to the President and his political and ideological goals, including his belief in the extraconstitutional notion that judges should favor some over others, make her precisely the kind of nominee, in my view, the Founders were concerned about and that Senators should have reason to oppose.

For these reasons, I will vote against the nominee, and I urge my colleagues to do the same.

I yield the floor.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. REID. Mr. President, the Republican leader and I recommend that Senators proceed to the Senate floor to cast their votes. We ask that Senators be seated when they cast their votes.

Decades before America's founding—when its direction was only roughly charted and its doctrines still in draft form—a lawyer from Massachusetts wrote that ours must be a nation of laws and not of men. That man, John Adams, knew that the rules and rights of a free land must withstand personal whims and political winds. It is a belief so basic Adams would later enshrine it in his State's constitution.

Today we will send to our highest Court another brilliant lawyer from Massachusetts, Elena Kagan, someone whose respect for the rule of law is matched only by her appreciation for those laws that concern the daily lives of the people they govern. The roots of General Kagan's respect for the rule of law are in her respect for our separation of powers. It is a reverence she developed during her service in all three branches of government, defending the first and second amendments, strengthening our national security, and protecting children's safety.

Wherever Elena Kagan has gone throughout her considerable career, she has succeeded. At Princeton and Oxford, at the law schools at Harvard and the University of Chicago and back to Harvard once again, in the private sector and in the highest levels of government, she has brought together people of every ideological stripe.

In recent weeks, we have again seen how effectively she impresses and unites those she meets. Look at the incredibly diverse array of people and organizations speaking in unison in favor of her nomination, including every Solicitor General, no matter the party, over the last quarter century. Now she is poised to join a Court whose power she respects as well as its limits. She understands that the laws are made only on this side of the street and only interpreted on the other side of the street.

Our Supreme Court promises equal justice for all who come before its bench. We must also fulfill the promise of greater equality among those who sit behind the bench.

Although the Founders did not want ours to be a government of men, for a long time men were the only ones running it. The most qualified women were turned away—turned away—one after another. Justice O'Connor graduated third in her law school class at Stanford, one of the premier law schools in this country, while others her age were just finishing college. The only job offer she got after graduating third in her class was a job as a legal secretary.

Justice Ginsburg graduated first in her law school class at Columbia, another premier law school, but not a single law firm would hire her either. She was denied a clerkship not by one but two Supreme Court Justices because, as they readily admitted, she was a woman.

It took nearly 200 years before the Court welcomed Sandra Day O'Connor as its first woman and more than a decade longer before Ruth Bader Ginsburg would join her as its second. A year ago today, Ginsburg was the only woman Justice, but when it opens this fall, three women—a full third of the bench—will preside together for the first time. That is progress. It is not yet completely equitable in a nation where women represent more than one-half the population, but it certainly is progress.

That Sotomayor and Kagan can join the Court in such relatively rapid succession is a tribute to the path their predecessors cleared.

Justice Ginsburg said last year that ''women belong in all places where decisions are being made.'' The Supreme Court is certainly one of those places. Elena Kagan is certainly one of those women.

As the Senate votes for this nominee on her merits, we are also voting for the most inclusive Court in its long history. It will be even more inclusive when we confirm more Justices who don't come from Ivy League schools.

In the oath General Kagan will soon take—the same oath sworn by 111 Justices before her—she will pledge to ''do equal right to the poor and to the rich.'' That is a commitment her predecessor, Justice John Paul Stevens, always fulfilled. We are grateful for Stevens' long record of service as a decorated war veteran, a successful lawyer, and an impartial judge and Justice who summoned common sense in his opinions. He was always passionate but always a gentleman.

Stevens once wrote: ''Corporations are not part of 'We, the People' by whom and for whom our Constitution was established.'' General Kagan believes that too. It is the principle she defended in her first case as the first female Solicitor General; that is, our country's chief lawyer, when she fought to stop foreign and domestic corporations from drowning out American voters' voices. She knew it would not be an easy case, but she stood for fairness, transparency, and citizens' rights because that is what a nation of laws demands.

General Kagan learned from another trailblazing Justice and her personal hero, Thurgood Marshall, that behind the law lived real people. She knows the Court's rulings can affect working families as intimately as they do wealthy interests.

The American people deserve a Justice who understands that one litigant's case is no more justified simply because he has more money than his opponent. Elena Kagan will be that Justice.

We need a voice on the Supreme Court who remembers and reveres the rights of individuals, not because people are always right and corporations are always wrong but because the argument of even the poorest citizen should be heard just as loudly, with the same patience and deliberation and impartiality as that of the richest firm.

Elena Kagan has demonstrated, time and time again, that she understands that.

In fact, listening is one of her strong suits. Justice Stevens often said that openly debated differences benefit democracy and he promoted what he called ''understanding before disagreeing.'' The lawyer and teacher the President has chosen to succeed Justice Stevens believes the same.

When General Kagan spoke last year to graduates of Harvard Law School, where she was beloved by the students and faculty alike, she reminded them: ''You only learn something when your ears are open, not when your mouth is open.'' That shows wisdom. It takes a smart person to recognize that we make progress and make the right decisions when we approach each person and each problem with an open mind. It takes a smarter one to say as much.

So I hope each Senator will approach this vote the way General Kagan will approach each question that comes before the Court: with deference to the facts, the evidence, and our shared national interests.

General Kagan is a public servant who has remained far above the political fray and will be the only Justice who comes from outside the judicial monastery. She is a student and teacher of the law who looks up from her books out into the real world. She knows that while we are a nation of laws and not of men, the former has a genuine and personal impact on the lives of the latter.

Because of her intellect and integrity; her reason, restraint, and respect for the rule of law; her unimpeachable character and unwavering fidelity to our Constitution, I am proud to cast my vote for Elena Kagan's confirmation to be a Justice of the U.S. Supreme Court.

We are going to wait until the hour of 3:30 arrives before we start to vote. Senator LEAHY, at that time, will have a request to make.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

Mr. LEAHY. Mr. President, I ask for the yeas and nays on the nomination of Elena Kagan to be an Associate Justice on the Supreme Court of the United States.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The question is, Will the Senate advise and consent to the nomination of Elena Kagan, of Massachusetts, to be an Associate Justice of the United States Supreme Court?

The clerk will call the roll.

The legislative clerk called the roll.

The result was announced—yeas 63, nays 37, as follows:

[Rollcall Vote No. 229 Ex.]

YEAS—63

Akaka	Bingaman	Cardin
Baucus	Boxer	Carper
Bayh	Brown (OH)	Casey
Begich	Burris	Collins
Bennet	Cantwell	Conrad
Dodd	Klobuchar	Reed
Dorgan	Kohl	Reid
Durbin	Landrieu	Rockefeller
Feingold	Lautenberg	Sanders
Feinstein	Leahy	Schumer
Franken	Levin	Shaheen
Gillibrand	Lieberman	Snowe
Goodwin	Lincoln	Specter
Graham	Lugar	Stabenow
Gregg	McCaskill	Tester
Hagan	Menendez	Udall (CO)
Harkin	Merkley	Udall (NM)
Inouye	Mikulski	Warner
Johnson	Murray	Webb
Kaufman	Nelson (FL)	Whitehouse
Kerry	Pryor	Wyden

NAYS—37

Alexander	Crapo	McConnell
Barrasso	DeMint	Murkowski
Bennett	Ensign	Nelson (NE)
Bond	Enzi	Risch
Brown (MA)	Grassley	Roberts
Brownback	Hatch	Sessions
Bunning	Hutchison	Shelby
Burr	Inhofe	Thune
Chambliss	Isakson	Vitter
Coburn	Johanns	Voinovich
Cochran	Kyl	Wicker
Corker	LeMieux	
Cornyn	McCain	

The nomination was confirmed.

The PRESIDING OFFICER. A motion to reconsider this vote is considered made and laid on the table. The President shall be notified of the Senate's action.

Mr. LEAHY. Mr. President, the Senate has concluded our consideration of the nomination of Elena Kagan and confirmed her as an Associate Justice on the U.S. Supreme Court. For the second time in 2 years, we have considered a nomination for a lifetime appointment to the Supreme Court, one of our most consequential responsibilities. I am proud that process we followed in considering this nomination in the Judiciary Committee and in the Senate has garnered praise from many Senators for its fairness and thoroughness.

We could not have given this nomination the attention it deserved without the help of dedicated staff. For months, the staff of the Judiciary Committee has worked long hours dutifully to obtain and review extensive amounts of documents and information and help Senators in our review. I wish to thank the following members of the majority staff in particular, Jeremy Paris, Erica Chabot, Kristine Lucius, Shanna Singh Hughey, Maggie Whitney, Hasan Ali, John Amaya, Sarah Hackett, Sarah Hasazi, Michael Gerhardt, Elise Burditt, Noah Bookbinder, Anya McMurray, Liz Aloi, Tara Magner, Kelsey Kobelt, Juan Valdivieso, Matt Virkstis, Curtis LeGeyt, Roslyne Turner, Erin O'Neill, Julia Gagne, Brian Hockin, Joseph Thomas, Elizabeth Saxe, Katharine McFarland, Miles Clark, Christine Paquin, David Zayas, Lydia Griggsby, Adrienne Wojciechowski, Dan Taylor, Patrick Sheahan, Matt Smith, Scott Wilson, Kiera Flynn, Rachel Pelham, Bree Bang-Jensen, Chuck Papirmeister, and Bruce Cohen. I also thank my staff for their hard work on this nomination, in particular, Edward Pagano, David Carle, Laura Trainor, and Kevin McDonald. I would also like to thank Stacy Rich from Senator MURRAY's staff who helped manage the floor.

I commend and thank the hard-working staffs of the other Democratic members of the Judiciary Committee for their tremendous contributions to this effort.

I also commend and thank Senator SESSIONS, the committee's ranking Republican, and his staff, in particular, Brian Benczkowski, Danielle Cutrona, Ted Lehman, and Lauren Pastarnack, for their hard work and professionalism.

LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will now return to legislative session.

The PRESIDING OFFICER. The Senator from Michigan.

UNANIMOUS CONSENT REQUEST—S. 3454

Mr. LEVIN. Mr. President, it is obvious we are not going to be able to get to the Defense authorization bill this week. However, it is important we get to it as soon as possible after we return. In order to facilitate that, I ask unanimous consent that at a time to be determined by the majority leader, following consultation with the Republican leader, the Senate proceed to the consideration of Calendar No. 414, S. 3454, national defense authorization.

The PRESIDING OFFICER. Is there objection?

Mr. MCCAIN. Reserving the right to object, and I do so with some reluctance, I remind my colleagues that last year we took up the consideration of the Defense authorization bill without warning. The distinguished chairman of the committee introduced a hate crimes bill which had no business on the Defense authorization bill, filled up the tree, and then, of course, we spent a great amount of time on hate crimes.

I have only been a member of this committee since 1987. I have never seen what the chairman of the committee did last year by bringing forth a totally irrelevant and very controversial issue and putting it on the Defense authorization bill. We spent weeks on that when we should have been spending time on defending this Nation. It was a betrayal of the men and women who are serving this country.

I am not going to allow us to move forward, and I will be discussing with my leaders and the 41 Members of this side of the aisle as to whether we are going to move forward with a bill that contains the don't ask, don't tell policy repeal before—before—a meaningful survey of the impact on battle effectiveness and morale of the men and women who are serving this Nation in uniform.

It is, again, the chairman of the committee and the majority leader and the other side moving forward with a social agenda on legislation that was intended to ensure this Nation's security.