

supported these withdrawals in the name of saving money, but the short-sighted decision to withdraw troops and capabilities from Europe ended up costing the taxpayers billions more, not less.

When Russia invaded Ukraine in 2014, America's military presence in Europe was inadequate to the scale and scope of Russia's threat to our interests and our allies. Addressing this problem has required billions of dollars in new investments to enhance our deterrent posture in Europe; in other words, American taxpayers, quite literally, paid the price for the strategic mistake of withdrawing from Europe, supported by Congressman MULVANEY.

In 2011, Congressman MULVANEY voted for the immediate withdrawal of all U.S. troops from Afghanistan. I repeat that. This is not a typographical error. In 2011, Congressman MULVANEY voted for the immediate withdrawal of all U.S. troops from Afghanistan. Congressman MULVANEY voting to abandon America's mission to prevent Afghanistan from becoming a safe haven for terrorists to attack our homeland as they did on September 11, is disturbing enough, but Congressman MULVANEY's testimony during his confirmation hearing that he did so at the urging of a single constituent, with no apparent regard for the national security consequences, leaves me with serious doubts about his judgment on matters of national security.

Beyond matters of defense and national security policy, I am also concerned about Congressman MULVANEY's support for reckless budget strategies that led to a government shutdown. He made frequent attempts to diminish the impact of the shutdown by referring to it as a "government slowdown," or the more Orwellian term, "temporary lapse in appropriations." There are few people whose views and record are more representative of the dysfunction that has gripped Washington for the last several years than that attitude.

Over my 30 years in the Senate, I have shown great deference to Presidents of both parties in selecting members of their Cabinet, but I cannot on this nominee. My decision to oppose this nomination is not about one person. It is not about one Cabinet position. This is not personal. This is not political. This is about principle. This is about my conviction as chairman of the Senate Armed Services Committee that providing for the common defense is our highest constitutional duty and that rebuilding our military must be the No. 1 priority of the Congress and the White House.

I will vote to oppose Congressman MULVANEY's nomination because it would be irresponsible to place the future of the defense budget in the hands of a person with such a record and judgment on national security.

This is the beginning, not the end, of the fight to rebuild our military. I will continue to stand on principle as this

body considers a budget resolution for the coming fiscal year and Defense authorization bill and a Defense appropriations bill, and I will continue to stand on principle in fighting to bring a full repeal of the Budget Control Act's discretionary spending caps to the floor of the Senate.

For 6 years now, Washington dysfunction has imposed very real consequences on the thousands of Americans serving in uniform and sacrificing on our behalf all around the Nation and the world.

From Afghanistan to Iraq and Syria, to the heart of Europe, to the seas of Asia, our troops are doing everything we ask of them. It is time for those of us in this body to do all we can for them. So long as I serve as chairman of the Armed Services Committee, it is my pledge to do just that.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

NOMINATION OF NEIL GORSUCH

Mr. HATCH. Mr. President, 2 weeks ago, President Trump nominated Tenth Circuit judge Neil Gorsuch of Colorado to fill the vacancy left by the death of Supreme Court Justice Antonin Scalia. Judge Gorsuch, in my opinion, is the ideal choice to fill this seat. He has impeccable credentials and a decade-long record on the bench demonstrating a keen understanding of the proper role of a judge.

Given the increasingly contentious nature of the confirmation process, it is not surprising that many of my colleagues on the other side of the aisle and their special interest group allies are stretching to find anything objectionable about Judge Gorsuch, no matter how ridiculous.

Today, I wish to address one of their latest, most outlandish claims: that Judge Gorsuch would not serve as an independent check on the executive branch. For example, last week in Politico, Senator SCHUMER, the distinguished Senator from New York, declared in an opinion piece: "The most important factor in assessing a Supreme Court nominee . . . is whether or not the potential justice will be an independent check on an executive who may act outside our nation's laws and the Constitution." Senator SCHUMER doubled down on these comments in the New York Times. There, he argued that it was impossible for him to discern Judge Gorsuch's judicial independence when they met in person. Why? Because Judge Gorsuch refused to say how he would rule on specific issues or how he would review particular government actions. These misleading narratives are an irrelevant, wasteful distraction from our consideration of Judge Gorsuch's sterling record and the merits of confirming him to the Supreme Court.

Last month, I warned that the left would use these diversion tactics in an attempt to discredit the President's nominee. Shortly before Judge Gorsuch's nomination was announced,

I predicted in an opinion piece in the Washington Post that advocates and interest groups would want to know how the nominee would decide particular cases before those cases ever reached the Court to make sure the nominee is on the right team. I was right.

Our Nation's Founders would have been embarrassed by such questions. Instead, the questions we ask should focus on whether the nominee will interpret and apply the law faithfully and neutrally no matter what the issue is. After all, that is what our Constitution demands.

Our Founders are not the only ones who would be embarrassed. I have been in the Senate for the last dozen Supreme Court confirmations. Every nominee we have considered has rightly refused to answer such questions. Consider, for example, Justice Ginsburg's response at her confirmation hearing. She said:

A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process.

Just last month in a speech in Arizona, Justice Sotomayor had an even stronger warning against asking and answering such questions. She said:

What you want is for us to tell you how as a judicial nominee we're going to rule on the important issues you find vexing. . . . Any self-respecting judge who comes in with an agenda that would permit that judge to tell you how they will vote is the kind of person you don't want as a judge.

So let's stop with this nonsense of trying to get Judge Gorsuch to pre-judge issues that could come before the Court. I hope my colleagues appreciate the irony in asking a judge to say how they would rule on particular issues in order to prove that the judge is judicially independent. I agree with Justice Sotomayor: A nominee who will tell you how she would vote is the kind of person you do not want as a judge.

But if judicial independence really is the most important factor, as Senator SCHUMER suggests, then this confirmation process should be the easiest one in the Senate's history. Over 11 years on the Tenth Circuit, Judge Gorsuch has consistently demonstrated in his judicial opinions and other writings that he deeply values the constitutional separation of powers between the three branches of the Federal Government. Judge Gorsuch understands that the Constitution gives each branch distinct roles: Congress makes the laws, the President enforces those laws, and the courts interpret those laws and the Constitution. The branches may act only according to the powers the Constitution grants them, with the remaining powers and rights reserved to the States and ultimately to the people.

With respect to the power of the executive branch, Judge Gorsuch has a strong record of reining in actions which violate the Constitution and the

law. Perhaps the best example is his opinion in the immigration case *Gutierrez-Brizuela v. Lynch*. There, the Attorney General attempted to apply a new agency rule retroactively prohibiting a noncitizen from receiving relief under Federal immigration law. Writing for the Tenth Circuit, Judge Gorsuch ruled that such action exceeded the executive's power to enforce the law.

In a separate opinion, he noted that there is an elephant in the room: the so-called *Chevron* deference doctrine, which requires courts to defer to Federal agency interpretations of the law we pass. He expressed constitutional concerns about *Chevron* deference. Judge Gorsuch wrote:

[T]he fact is *Chevron* . . . permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.

Judge Gorsuch then proceeded to provide a textbook explanation of the proper separation of powers under our Constitution. As he stated, the Founders included a strong separation of powers in the Constitution because "[a] government of diffused powers, they knew, is a government less capable of invading the liberties of the people."

As my colleagues know, I am no fan of *Chevron* deference. Last Congress, I introduced the Separation of Powers Restoration Act to get rid of it. As I noted when I introduced the legislation, regulators have taken advantage of the courts' deference under *Chevron* to shoehorn the law for their own political agenda, expanding their authority well beyond congressional intent. But the Constitution's separation of powers makes clear that it is the responsibility of the courts, not the bureaucracy, to interpret the law. So I am pleased Judge Gorsuch understands that the Constitution requires Federal judges to serve as an independent check on how Federal agencies interpret the laws we enact.

Separation of powers is not just about ensuring that the executive branch performs its proper role of executing the law; separation of powers is also about making sure Federal judges understand their proper role under the Constitution. As Chief Justice Marshall famously explained in *Marbury v. Madison*, judges have a constitutional duty to say what the law is. Simply put, judges must be faithful interpreters of our laws and the Constitution.

Under our constitutional separation of powers, it is not the role of Federal judges to make or change laws by imposing their own policy preferences. It is not their role to look beyond the law to consider their personal views and feelings. And it is not their role to choose winners and losers based on subjective beliefs that favor one group over another.

In my 40 years in the Senate, I have reviewed the record of hundreds of nominees for the Federal bench. I don't think I have ever reviewed the record of a nominee who better understands his proper role under the Constitution than Judge Gorsuch. Consider, for example, Judge Gorsuch's touching tribute to Justice Scalia that was published last year in the *Case Western Reserve Law Review*. In that speech, Judge Gorsuch eloquently explained how judges should not be in the business of ruling in ways that reflect their own political views or policy preferences. Judges, after all, are not elected legislators. Instead, judges should interpret the law as written. They must start with the text of the statute and then utilize the traditional tools of statutory interpretations to discern the meaning of any particular law.

Judge Gorsuch understands, to borrow from Alexander Hamilton, that the judiciary should be the least dangerous branch. These aren't just words; Judge Gorsuch's judicial record confirms that he lives this judicial philosophy of restraint and humility.

In an essay I published last week on SCOTUSblog, I reviewed a number of judicial opinions by Judge Gorsuch that demonstrate his commitment to the separation of powers and the proper role of a judge in our Federal system. I will not go through all of those cases here, but I ask unanimous consent that the essay be printed in the *RECORD*.

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

[From SCOTUSblog]

WORRIED ABOUT THE SEPARATION OF POWERS?
THEN CONFIRM JUDGE GORSUCH
(By Senator Orrin Hatch)

Last week, President Donald Trump nominated Judge Neil Gorsuch to replace Justice Antonin Scalia on the U.S. Supreme Court. Judge Gorsuch is an ideal choice to fill this seat: He has impeccable credentials and a decade-long record on the bench demonstrating a keen understanding of the proper role of a judge. Given the increasingly contentious nature of the confirmation process, it is no surprise that many Democrats are stretching to find anything objectionable about Judge Gorsuch, no matter how ridiculous. In the current political environment, they have focused much of their criticism on one particularly strained argument: their claim that Justice Gorsuch would not serve as an independent check on the executive branch.

Fortunately, we do not have to speculate about how Justice Gorsuch would decide these kinds of cases. Judge Gorsuch has consistently demonstrated in his judicial opinions and other writings that he deeply values the constitutional separation of powers between the three branches of the federal government. Judge Gorsuch understands that the Constitution gives each branch distinct roles: Congress makes the laws, the President enforces those laws, and the courts interpret those laws and the Constitution. The branches may act only according to the powers the Constitution grants them, with the remaining powers and rights reserved to the states and, ultimately, to the people.

With respect to the power of the executive branch, Judge Gorsuch has a strong record of reining in unlawful overreach. For instance,

in *Gutierrez-Brizuela v. Lynch*, the Attorney General had attempted to apply a new agency rule retroactively to prohibit a noncitizen from receiving relief under federal immigration law. Writing for the U.S. Court of Appeals for the 10th Circuit, Judge Gorsuch concluded that such action exceeded the executive's power to enforce the law. In a separate opinion, he went one step further and expressed concerns about how judge-made doctrines that require judicial deference to federal agency actions—namely, *Chevron* deference and its progeny—"permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." Judge Gorsuch then proceeded to provide a textbook explanation of the proper separation of powers between the three branches, concluding that "[i]t was to avoid dangers like these, dangers the founders had studied and seen realized in their own time, that they pursued the separation of powers. A government of diffused powers, they knew, is a government less capable of invading the liberties of the people."

Nor is Judge Gorsuch a supporter of federal judges who go beyond their constitutional role in interpreting the law. As Judge Gorsuch has eloquently explained, "judges should be in the business of declaring what the law is using the traditional tools of interpretation, rather than pronouncing the law as they might wish it to be in light of their own political views, always with an eye on the outcome, and engaged perhaps in some Benthamite calculation of pleasures and pains along the way." It is not judges' role to make or change laws by imposing their own policy preferences instead of what Congress actually passed. It is not their role to look beyond the text of the law to consider their personal views and feelings. And it is not their role to choose winners and losers based on subjective beliefs that favor one group over another. Judge Gorsuch's opinions reinforce his judicial philosophy of restraint and humility and his proper understanding—to borrow from Alexander Hamilton—that the judiciary should be the "least dangerous" branch.

Consider, for example, *United States v. Games-Perez*. There, the 10th Circuit upheld a conviction for possession of a firearm by a felon. The criminal defendant argued that he was unaware that he was a convicted felon, but the court rejected this argument as foreclosed by the court's prior precedent. Judge Gorsuch penned a separate opinion. He agreed that the court was bound by its own precedent, but he wrote separately to urge the court to reconsider its precedent in light of the plain text of the statute that requires the government to prove the defendant knew he was a convicted felon. As Judge Gorsuch explained, "we might be better off applying the law Congress wrote than the one [the court] hypothesized. It is a perfectly clear law as it is written, plain in its terms, straightforward in its application." He continued: "Of course, if Congress wishes to revise the plain terms of [the statute], it is free to do so anytime. But there is simply no right or reason for this court to be in that business."

Sometimes a judge is asked to consider the proper separation of powers between all three branches. For instance, in *Hobby Lobby Stores, Inc. v. Sebelius*, the 10th Circuit considered whether certain regulations issued by the U.S. Department of Health and Human Services under the Patient Protection and Affordable Care Act violated the plaintiffs' rights under the Religious Freedom Restoration Act. In particular, the plaintiffs argued that the regulations' health

insurance mandate for employers violated RFRA's statutory protections on religious freedom by forcing employers to provide health insurance coverage for abortion-inducing drugs and devices. Judge Gorsuch's opinion explained why the owners of one of the plaintiff companies were entitled to relief under RFRA. As an initial matter, he noted that the owners' "religious convictions are contestable" and that "[s]ome may even find [their] beliefs offensive," but that RFRA "does perhaps its most important work in protecting unpopular religious beliefs."

Judge Gorsuch then turned to the statutory interpretation question at issue and noted that the case was a "tale of two statutes." Wrote Judge Gorsuch: "The ACA compels the [plaintiffs] to act. RFRA says they need not. We are asked to decide which legislative direction controls." To decide which statute controlled, he did not defer to the executive branch's position on the matter. Nor did he seek to impose his own policy preferences. To the contrary, he noted that "[t]he tiebreaker is found not in our own opinions about good policy but in the laws Congress enacted." Because "Congress structured RFRA to override other legal mandates, including its own statutes, if and when they encroach on religious liberty," and "because the government identifies no explicit exclusion in the ACA to its dictates," Judge Gorsuch concluded, RFRA's directive prevailed.

Even a casual review of Judge Gorsuch's opinions should eliminate any concerns my Senate colleagues may have concerning his commitment to the Constitution's separation of powers. In his opinions, Judge Gorsuch has resisted executive branch efforts to make laws as opposed to merely enforcing those laws as written. Indeed, his opinions and other writings cogently make the case for this approach to separation of powers in a way that finds few rivals on the federal bench and reminds me much of the case Justice Scalia made during his time on the Court. Judge Gorsuch, moreover, has been a model of respect for the proper judicial role, a judicial philosophy under which "judges seek to interpret texts as reasonable affected parties might have done rather than rewrite texts to suit their own policy preferences."

To be sure, that Justice Gorsuch would be a fierce defender of the separation of powers and the rule of law does not mean his rulings will match his policy preferences, much less mine. In fact, in his tribute speech to Justice Scalia last year, Judge Gorsuch embraced Justice Scalia's philosophy of judicial restraint: "If you're going to be a good and faithful judge, you have to resign yourself to the fact that you're not always going to like the conclusions you reach." That is precisely why Judge Gorsuch is the right choice for the Supreme Court.

Mr. HATCH. To be sure, that Justice Gorsuch would be a fierce defender of the separation of powers does not mean his rulings will match his policy preferences. As Justice Scalia wisely remarked, good and faithful judges will not always like the conclusions they reach in interpreting the law. And it certainly does not mean that his rulings will match my policy preferences or those of my colleagues. As I have repeatedly stated on this floor over decades, that is not the proper inquiry when we assess the qualifications of a nominee to the Federal bench. Federal judges must be judges, not super-legislators.

The bottom line is, even a casual review of Judge Gorsuch's opinions should eliminate any concerns my colleagues may have concerning Judge Gorsuch's commitment to the Constitution's separation of powers. Any review would lead to that conclusion. In his opinions, Judge Gorsuch has resisted executive branch efforts to make laws as opposed to merely enforcing those laws. Judge Gorsuch's opinions and other writings make the compelling case for separation of powers in a way that finds few rivals on the current Federal bench.

If my colleagues are truly concerned about the proper separation of powers between the three branches of government, there is a simple solution: Confirm Judge Gorsuch as an Associate Justice on the United States Supreme Court.

REPEALING AND REPLACING OBAMACARE

Mr. President, I want to once again discuss the ongoing effort to repeal and replace the so-called Affordable Care Act. This is one of our most vexing issues of the day. Of course, this isn't the first time I have come to the floor to discuss ObamaCare, and I am fairly certain it won't be the last.

I was here just last week, in fact, talking about the general unanimity among Republicans on these issues, despite the seemingly eternal focus on the supposed divisions among our ranks. While some are still advancing that narrative, Republicans are, overall, still united in our desire to repeal and replace ObamaCare. As I said last week, I don't know if there is a single Republican in Congress who supports keeping the healthcare status quo in place. All of us want to right what went wrong with the poorly named Affordable Care Act and provide patients and consumers with more healthcare choices that address healthcare costs.

Most differences of opinion that do exist on these matters are more about timing than anything else. As I have said before, I support moving quickly to repeal ObamaCare and include as many replacement policies as possible under the rules of the reconciliation process. More specifically, I support repealing ObamaCare's harmful taxes, and I will explain why.

Put simply, the tax provisions in ObamaCare were poorly conceived and recklessly enacted, and they are harmful to our economy. Those taxes came in a number of forms, including the employer mandate and the individual mandate, both of which are enforced through the Tax Code.

In addition, there is the health insurance tax, the Cadillac tax, along with new taxes on healthcare savings and pharmaceuticals. ObamaCare also included a payroll tax hike for some high-income earners as well as additional taxes on investing. And, of course, we cannot forget the medical device tax, which, in just the first 3 years that ObamaCare was implemented, resulted in more than 30,000 lost jobs in that important industry.

All told, the tax provisions of the Affordable Care Act represented a trillion-dollar hit on the U.S. economy in the first 10 years, and the burdens of the vast majority of these taxes are ultimately borne by patients and consumers in the form of higher costs, larger tax bills, and reduced value in existing health plans and savings accounts.

I know some of my colleagues like to plead ignorance on the notion that taxes on a particular industry tend to be passed along to that industry's consumers, but it is a fact that can't be ignored. Taxes on health insurance plans increase premiums for patients. Taxes on drug companies make drugs more expensive. Taxes on medical device sales increase the costs of those devices.

It is not a complicated concept; it is the natural byproduct of tax provisions negotiated with stakeholders behind closed doors under threat of increased government intrusion and market regulation. These taxes weren't drafted solely to pay the cost of ObamaCare; they were also part of a strategy to get the law through Congress, dividing the business community and pitting industries against one another to prevent widespread opposition. As I said, at the end of the day, it is patients and consumers—individuals and families—who pay most of the freight on these types of tax policies.

Don't take my word for it. Let's look at one major example. Congress's non-partisan scorekeeper, the Joint Committee on Taxation, indicated that, by and large, the tax on health insurance premiums would be passed along to health insurance policyholders.

Mr. President, I ask unanimous consent to have printed in the RECORD a letter from the JCT to Senator GRASSLEY, dated October 28, 2009.

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

CONGRESS OF THE UNITED STATES,
JOINT COMMITTEE ON TAXATION,
Washington, DC, October 28, 2009.

Hon. CHARLES E. GRASSLEY,
Ranking Member, Committee on Finance, U.S.
Senate, Washington, DC.

DEAR RANKING MEMBER GRASSLEY: You requested that we provide you with an analysis of the incidence of the insurance industry fee provision of S. 1796, the "America's Healthy Future Act," our estimate of the effect on the after-tax price of purchased health insurance, and a distributional analysis of the provision.

INSURANCE INDUSTRY FEE

Sec. 6010 of S. 1796 would impose an annual fee on any covered entity engaged in the business of providing health insurance with respect to United States health risks. Under the provision, employers who self-insure their employees' health risks and governmental entities are not covered entities.

The fee applies for calendar years beginning after 2009. The aggregate annual fee for all covered entities is \$6.7 billion. Under the provision, the aggregate fee is apportioned among the covered entities based on a ratio designed to reflect their relative market share of U.S. health business.

For each covered entity, the fee for a calendar year is an amount that bears the same