The majority leader.

Mr. REID. Mr. President, the Committee on Rules and Administration will be providing its hearing room, SR–301, to the impeachment committee for an organizational meeting at a time to be determined.

The ACTING PRESIDENT pro tempore. The Senate will take further proper order and notify the House of Representatives and counsel for Judge Kent.

Mr. REID. Mr. President, I ask in an orderly fashion that Senators approach the desk for the signing of the resolution of impeachment before they leave the Chamber.

I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. 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 President, I ask unanimous consent that the order for the quorum call be rescinded.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 (Mr. BEGICH). Without objection, it is so ordered.

SCHEDULE

Mr. REID. Mr. President, at 11 o'clock today, there will be a vote on the nomination of Mr. Koh, to be Legal Adviser of the Department of State. I tell all Senators I had a conversation with the Republican leader today. We are doing our best to move to a couple appropriations bills. The first in line is the Legislative Branch appropriations bill, and the next is Homeland Security. We hope we can get on those. The Republican leader said he would do his best to help us do that. I hope that, in fact, is the case. We will keep Members advised as to what we will do the rest of the day.

RESERVATION OF LEADER TIME

The PRESIDING OFFICER. Under the previous order, the leadership time is reserved.

EXECUTIVE SESSION

NOMINATION OF HAROLD HONGJU KOH TO BE LEGAL ADVISER OF THE DEPARTMENT OF STATE

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to executive session to consider the following nomination, which the clerk will report.

The legislative clerk read the nomination of Harold Hongju Koh, of Connecticut, to be Legal Adviser of the Department of State.

The PRESIDING OFFICER. Under the previous order, the time until 11 a.m. will be equally divided and controlled between the two leaders or their designees.

The Senator from Massachusetts.

Mr. KERRY. Mr. President, I yield myself such time as I will consume. I intend to yield time to Senator LIEBERMAN and Senator FEINGOLD.

Mr. President, I rise in very strong support of the nomination of Dean Harold Koh to be the Legal Adviser to the Secretary of State. This nomination is, in fact, overdue.

Dean Koh is one of the foremost legal scholars in the country and a man of the highest intellect, integrity, and character. He received a law degree from Harvard, where he was an editor of the Law Review, with two master's degrees from Oxford University where he was a Marshall Scholar.

He clerked on both the DC Circuit Court of Appeals and the U.S. Supreme Court. He has served with distinction in both Democratic and Republican administrations, beginning his career in government in the Office of Legal Counsel in the Reagan era.

I think everybody who has dealt with him and has worked with him on a personal level understands the skill Dean Koh would bring to this job. He has worked with the State Department on a firsthand basis. He served as Assistant Secretary of State for Democracy, Human Rights, and Labor in the Clinton administration—a post for which he was unanimously confirmed by the Senate in 1998.

He left government to teach at Yale Law School, and he went on to serve as dean until his nomination to serve in the current administration. As a renowned scholar and a leading expert on international law, he has published or coauthored eight books and over 150 articles.

Throughout his career, Dean Koh has been a fierce defender of the rule of law and human rights. He understands that the United States benefits as much if not more than any other country from an international system of law where we are governed by the rule of law.

At the same time, his personal commitment to America's security and to the defense of our Constitution are indisputable. Accusations that his views on international or foreign law would somehow undermine the Constitution are simply unjustified and unfounded—completely and totally. As Dean Koh explained in response to a question from Senator LUGAR, who supports his nomination, he said:

> My family settled here in part to escape from oppressive foreign law, and it was America's law and commitment to human rights that drew us here and have given me every privilege in my life that I enjoy. My life's work represents the lessons learned from that experience. Throughout my career, both in and out of government, I have argued that the U.S. Constitution is the ultimate controlling law in the United States and that the Constitution directs whether and to what extent international law should guide courts and policymakers.

So while disagreements on legal theory are obviously legitimate, I regret that some of the accusations and insinuations against Dean Koh have simply gone over any line of reasonableness or decency. Some people have actually alleged that Dean Koh supports the imposition of Islamic Shariah law in America, which it just begs any notion of relevance to what is rational.

Some have questioned Dean Koh for allegedly supporting suits against Bush administration officials involved in abusive interrogation techniques. Well, this is a matter for the Justice Department that he will have no role in as Legal Adviser of the State Department.

Others have actually gone so far as to claim—believe it or not—that he is against Mother's Day. I am happy his mother was at the hearing. He pointed to her and had to go so far as to actually deny that, which is rather extraordinary.

Dean Koh deserves a better debate than he has been given thus far, and all of us are done a disservice when the debate gets diverted to some of the accusations we have heard in this case.

Regardless of any policy differences, everyone in the Senate ought to be able to agree on Dean Koh's obvious competence. We have received an outpouring of support for this nomination from all corners, including from over 600 law professors, over 100 law school deans, over 40 members of the clergy, 7 former State Department Legal Advisers—including the past two Legal Advisers from the Bush administration—and many others.

Perhaps most remarkable has been the enthusiastic support for Dean Koh from those who do not agree with him on some issues who have spoken out on his behalf, including former Solicitor General Ted Olson and former White House Chief of Staff Joshua Bolten. No less a conservative legal authority than Ken Starr wrote:

> The President's nomination of Harold Koh deserves to be honored and respected. For our part as Americans who love our country, we should be grateful that such an extraordinarily talented lawyer and scholar is willing to leave the deanship at his beloved Yale Law School and take on this important but sacrificial form of service to our Nation.

So I think that says it all. That is the kind of Legal Adviser we need at the State Department. I urge my colleagues to support this nomination and to vote for cloture on this nomination.

Mr. President, how much time do we have remaining on our side? At least another 15 minutes.

The PRESIDING OFFICER. There is 3 minutes 40 seconds remaining.

Mr. KERRY. That is the total time we have available?

The PRESIDING OFFICER. That is the total time remaining controlled by the majority.

Mr. KERRY. I divide it evenly between Senator LIEBERMAN and Senator FEINGOLD.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. LIEBERMAN. Mr. President, I rise to speak on behalf of the nomination of Harold Koh to be Legal Adviser at the Department of State.

I have known Harold Koh for many years, as a friend and as a neighbor in New Haven, and there is no doubt in my mind that he is a profoundly qualified choice for this important position, and deserving of confirmation.

To state the obvious, Harold is a brilliant scholar and one of America's foremost experts on international law. He also has a distinguished record of service in our government, having worked in both Democratic and Republican administrations and consistently won the highest regard from people across the political spectrum.

However, Harold Koh will bring to this position a deep devotion to our country and an appreciation of the fundamental values for which we stand, drawn from his own personal experience and the experience of his family.

Harold's parents came to this country, like so many before and since, fleeing the evils of dictatorship and seeking freedom. It was this experience that helped forge in Harold his lifelong commitment to democracy and the rule of law.

Harold has of course been a prolific scholar, having authored or coauthored 8 books and more than 150 articles. And in the course of his long academic career, he has quite often exercised his right of free speech.

To tell the truth, there have been occasions when Harold has said or written things that I personally don't agree with. And although he is too gracious to say so, I am sure there have been occasions when I have said or done things that Harold has not agreed with.

But this has never interrupted my respect for Harold—for his intelligence and his integrity, nor I have any doubt about Harold's love for our great nation and its values, and his commitment to uphold our Constitution. To use a word we do not use enough anymore, Harold Koh is a true American patriot who will put our country and our Constitution first.

It is also worth noting that no one who has ever worked with Harold has offered anything but praise for him personally and support for his nomination. In fact, his nomination has attracted a remarkable bipartisan coalition of supporters, including Ted Olson, Ken Starr, and Josh Bolten.

These endorsements reflect the fact that, even those who might not always agree with Harold on every issue, nonetheless respect him enormously and feel he is profoundly qualified to serve in this position.

There is a great deal that we debate in this chamber, but there is really no debate about the importance of the rule of law to our country. That is what Harold Koh's life and career have been all about, and it is that surpassing priority that he will bring to the position of Legal Adviser at the State Department.

For these reasons, I urge my colleagues to support Harold Koh's nomination and to vote for his confirmation.

The cloture vote will occur at 11 o'clock, minutes from now. I speak from a real depth and personal experience with Harold Koh. I know him and have known him for years as a friend and a neighbor in Connecticut. Based on that and all of his professional work, there is no doubt in my mind that he is profoundly qualified to occupy this important position as Legal Adviser at the Department of State. He is a brilliant scholar. He is one of America's foremost experts on international law. He actually is qualified to be the Legal Adviser to the Secretary of State. He has a distinguished record of service in our government, having worked in both Democratic and Republican administrations. He has consistently won the highest regard from people across the political spectrum.

Harold Koh will bring to this position a deep devotion to our country and the appreciation of the fundamental values for which we stand, based on his personal status as the child of immigrants who came to this country, escaping dictatorship, seeking freedom, and contributing mightily to America.

Harold has been a prolific scholar in the course of his long academic career. He has fully exercised his right of free speech. To tell the truth, there have been occasions when Harold has said or written things that I personally don't agree with. Although he is too gracious to say so, I am sure there have been occasions on which I have centered on some things that Harold has not agreed with, but that has never interfered with my respect and admiration for him——

The PRESIDING OFFICER. The time of the Senator from Connecticut has expired.

Mr. LIEBERMAN.—because I have always known, regardless of whether we agree or disagree, Harold Koh is committed to the United States of America, to the Constitution, and the rule of law. What more could we ask for a Legal Adviser to the Department of State.

I thank the Chair and yield the floor.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, I am so pleased to rise today in strong support of the nomination of Harold Koh to be Legal Adviser at the State Department. I have known Dean Koh for more than 30 years, and I can say without any doubt he is an excellent choice for this position. I say that not just because he is one of my oldest friends but because he is one of the leading legal scholars in the country. He is extraordinarily qualified for this position.

Dean Koh is one of the most intelligent, ethical, and hard-working individuals I have ever encountered. He has spent his career of some 30 years working on public and private international law, national security law, and on human rights. Throughout that time, he has been committed to America's security and to defending our Constitution. He has dedicated his life to upholding the rule of law and strengthening American values.

During his confirmation hearing in the Senate Foreign Relations Committee, Dean Koh effectively responded to all of the charges against him. He made clear that he understands that his role as legal counsel for the State Department would be different from that of an academic, that he would adhere to the constitutional laws of our land, and that of course he does not believe that foreign law can trump the Constitution.

There is no doubt in my mind that Dean Koh will candidly and objectively advise the Secretary of State on existing law, while also ensuring that she receives competent, objective, and honest advice on the legal consequences of her actions and decisions in an effort to support and advance the President's foreign policy agenda.

At the same time, Dean Koh will ensure respect for our national interests and our legal obligations. If confirmed, Dean Koh will serve our President, and this Nation, and defend the Constitution fully and faithfully.

We are long overdue in confirming Dean Koh. I urge my colleagues to vote in favor of cloture so we can move expeditiously to an up or down vote and Dean Koh can begin his service as the State Department's Legal Adviser.

Mr. President, I thank the Chair and yield the floor.

The PRESIDING OFFICER. The Senator's time has expired.

The Senator from Texas is recognized.

Mr. CORNYN. Mr. President, I rise reluctantly to speak against the nomination of Harold Koh to be the Legal Adviser to the State Department. I had a chance to explain some of the reasons yesterday, and for the benefit of our colleagues I wish to cover those and some additional concerns as well with a little more detail.

There is no question that Dean Koh is a brilliant lawyer and he has been a charming advocate for his promotion to this important position. However, I have concluded that he is not the right person for this job, because he has stated what I would consider to be radical views with regard to the role of the United States sovereignty relative to the rest of the world.

For example, he has advocated judges using treaties in customary international law, including treaties that the Senate has not ratified, to bind the United States. If that is not an erosion of U.S. sovereignty, I don't know what it is. Advocating that judges who take an oath to uphold and defend the Constitution and laws of the United States should instead look to international treaties as the source of that law, to me, is a radical and very fundamental shift in what I think most people would expect from our judges.

He said that Federal judges should use their power to ''vertically enforce'' or ''domesticate'' American law with international norms and foreign law. Do we want the top adviser at the State Department supporting the idea that international bodies and unelected Federal officials, not the Congress,

should be the ultimate lawmaking authority for the American people? I don't think so.

This has manifested itself in a number of ways. For example, in an interview that Dean Koh gave on May 10 for the ''News Hour,'' he was asked about, for example, some of the interrogations that took place in places such as Guantanamo. He basically said that the U.S. forces, including our commanders and presumably the intelligence officials who actually conducted interrogations and detentions, violated the Geneva Conventions and should be held accountable for that. Does he believe that U.S. officials should be prosecuted and perhaps convicted of war crimes because they did what the American people asked them to do, consistent with the legal opinions from the Office of Legal Counsel at the Justice Department?

As the Wall Street Journal points out today in an article called ''The Pursuit of John Yoo''—I will read a couple of sentences from it:

Here's a political thought experiment: Imagine that terrorists stage an attack on U.S. soil in the next 4 years. In the recriminations afterward, Administration officials are sued by families of victims for having advised in legal memos that Guantanamo be closed and that interrogations of al-Qaida detainees be limited. Should these officials be personally liable for the advice they gave to President Obama?

The article goes on to say:

We'd say no, but that's exactly the kind of lawsuit that the political left, including State Department nominee Harold Koh, has encouraged against Bush administration officials.

Of course, it goes on to talk about the lawsuit brought by Jose Padilla, a convicted terrorist, against lawyers at the Office of Legal Counsel at the Justice Department that is being encouraged, if not facilitated, by Harold Koh, the outgoing dean at the Yale Law School, the person who is being proposed for promotion as a Legal Adviser at the Justice Department.

I think his views, if they were confined to academia and to Yale Law School, would be one thing, but the thought that he would bring and put these what I would consider to be out-of-the-mainstream legal theories and approaches into action as a Legal Adviser at the State Department, to me is a frightening prospect.

He has also, in the course of his writings, taken very extreme views with regard to the second amendment to the Constitution of the United States, part of our Bill of Rights, the right to keep and bear arms. In 2002, and later in Fordham Law Review in May of 2003, he wrote an article called ''The World Drowning In Guns'' in which he argued for a global gun control regime. Do we want the top adviser at the State Department working through diplomatic circles to take away Americans' second amendment rights to the Constitution? I think not.

Third, Professor Koh in 2007 argued that foreign fighters, detainees held by the U.S. Armed Forces anywhere in the world—not just at Guantanamo Bay—are entitled to habeas corpus review in U.S. Federal courts—in civilian courts—just as an American citizen would be, no matter where they were held. Do we want the top adviser at the State Department working to grant terrorists and enemy combatants more rights than they have ever had before under any court interpretation? I think not.

Perhaps most timely, Professor Koh appears to draw moral equivalence between the Iranian regime's political suppression and human rights abuses on the one hand, which we have been watching play out on television, and America's counterterrorism policies on the other hand. In 2007, he wrote:

The United States cannot stand on strong footing attacking Iran for ''illegal detentions'' when similar charges can be and have been lodged against our own government.

Do we want a Legal Adviser to the State Department who can't see the difference between America defending itself against terrorism and the brutal repression practiced by a theocratic dictatorship? I think not.

I am afraid that Dean Koh is just another in a line of radical nominees by this administration that the Senate should not confirm.

I think back to Don Johnson who was also nominated to the Office of Legal Counsel who said America is not at war post 9/11, and that instead of embracing the provisions of the Constitution that recognize the President's powers as Commander in Chief to protect the American people, we ought to instead resort to a paradigm that says, Well, this is a law enforcement matter. If it is a law enforcement matter, then you are not going to do anything to stop terrorist attacks before they occur; you are merely going to prosecute the terrorists after they kill innocent life.

Just like Don Johnson, who said we are not at war, Harold Koh has encouraged and facilitated the investigation and perhaps prosecution of American military personnel, and who knows who else, including lawyers who have provided legal advice, as well as perhaps the intelligence officials who relied on that advice to get actual intelligence that we have used to deter and indeed to defeat terrorist attacks on our own soil.

I hope my colleagues will join me in voting against cloture on this nomination. Professor Koh may be an appropriate individual for some other job, but when our national security is at stake, and our role relative to the international community, whether we are going to subject ourselves not just to the U.S. Constitution and laws made by the elected representatives of the people here in the Congress but instead to international treaties and international common law that we have not agreed to and that the American people have not consented to, I think this is the wrong job for this nominee. I ask my colleagues to join me in voting against cloture.

I yield the floor and reserve the remainder of our time.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I ask unanimous consent to speak for 2 minutes.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. SPECTER. Mr. President, I have sought recognition to strongly support the nomination of Dean Koh for this position. I have known Dean Koh from his outstanding work at the Yale Law School and from his outstanding contribution as the dean of the Yale Law School. He comes to this position with an extraordinary educational background: summa cum laude of Harvard College, Oxford; Harvard Law School, cum laude. He has had a distinguished career with the Federal Government having served as Assistant Secretary of State from 1998 to 2001. He has done exemplary work at Yale. His father was the first Korean lawyer to study in the United States.

Yesterday, I spoke at some length about Dean Koh and inserted his extraordinary resume in the RECORD. It took many pages to list all of his honorary degrees, all of his publications, and all of his awards. When we search for the best and the brightest to come to Washington, Dean Koh is a perfect match for that description. If his nomination is to be rejected, it certainly will be a signal to people who have an interest in public service that they are better off not treading in these waters because the politics is so thick that even individuals of such extraordinary credentials can be rejected by the Senate.

I strongly urge my colleagues to support this nomination. I have been in this body a while. I have never spoken with such enthusiasm or such determination for the confirmation of a nominee as I have for Dean Koh. I think he will do an outstanding job.

Certainly, the points that have been raised by the distinguished Senator from Texas are worthy of consideration, but there is no showing that any of those ideas will be followed to the extreme to the detriment of the United States, and his qualifications suggest he would be a great asset to the United States of America and the State Department.

The PRESIDING OFFICER. The Senator's time has expired.

CLOTURE MOTION

Under the previous order, pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will report.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We, the undesigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, hereby move to bring to a close debate on the nomination of Harold Hongju Koh, of Connecticut, to be Legal Adviser of the Department of State.

Harry Reid, Mark L. Pryor, Sheldon Whitehouse, Daniel K. Inouye, Russell D. Feingold, Christopher J. Dodd, Roland W. Burris, Richard Durbin, Patty Murray, Jon Tester, Mark Udall, Amy Klobuchar, Jack Reed, Max Baucus, Jeff Merkley, Blanche L. Lincoln, Maria Cantwell, Byron L. Dorgan.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on the nomination of Harold Koh, of Connecticut, to be Legal Adviser of the State Department shall be brought to a close?

The yeas and nays are mandatory under the rule. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from West Virginia (Mr. BYRD) and the Senator from Massachusetts (Mr. KENNEDY) are necessarily absent.

Mr. KYL. The following Senator is necessarily absent: the Senator from Mississippi (Mr. COCHRAN).

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 65, nays 31, as follows:

[Rollcall Vote No. 212 Ex.]

YEAS—65

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

NAYS—31

Barrasso	DeMint	McConnell
Bennett	Ensign	Murkowski
Bond	Enzi	Risch
Brownback	Graham	Roberts
Bunning	Grassley	Sessions
Burr	Hutchison	Shelby
Chambliss	Inhofe	Thune
Coburn	Isakson	Vitter
Corker	Johanns	Wicker
Cornyn	Kyl	
Crapo	McCain	

NOT VOTING—3

Byrd	Cochran	Kennedy

The PRESIDING OFFICER. On this vote, the yeas are 65, the nays are 31. Three-fifths of the Senators duly chosen and sworn having voted in the affirmative, the motion is agreed to.

(Disturbance in the Visitors' Galleries.)

The PRESIDING OFFICER. No applause from the gallery is allowed.

The Senator from Georgia.

Mr. CHAMBLISS. Mr. President, I ask unanimous consent to speak as in morning business and that I be followed by my colleague, Senator ISAKSON.

The PRESIDING OFFICER. Is there objection? Hearing no objection, it is so ordered.

TRIBUTE TO DR. BRUCE GRUBE

Mr. CHAMBLISS. Mr. President, I rise to pay tribute to an academic leader and a true public servant—Dr. Bruce Grube. A decade ago, Dr. Grube took the helm of Georgia Southern University in Statesboro, GA. At the end of this month, after 10 years on this job, he will leave Georgia Southern a bigger, better, and considerably richer university, both in terms of its endowment and in its academic achievements, than when he started.

His leadership has been robust. During Dr. Grube's tenure as President of Georgia Southern the school's enrollment has risen almost 23 percent. Nearly 18,000 students are proud to call Georgia Southern their academic home. And while freshman SAT scores were rising some 13 percent on his watch, the university was being catapulted into national prominence. During Dr. Grube's time as president, Georgia Southern was designated a Carnegie doctoral/research university, was featured in the U.S. News and World Report's ''Best Colleges'' guide, and was named one of the Nation's ''Top 100 Best Values'' in education by Kiplinger.

He also oversaw the creation of two new colleges specializing in information technology and public health, presided over a veritable building boom on campus, and brought Georgia Southern into the Internet age with distance learning courses.

Of all his remarkable achievements, perhaps the most significant is that in the decade of Dr. Grube's presidency, the amount of scholarships funded through the Georgia Southern Foundation has doubled. In 1999, the foundation's scholarships totaled $644,000. In 2007, the foundation was able to award $1.3 million to deserving scholars, many of whom may not have been able to start school or complete their degrees without that assistance. And Dr. Grube has led the way in doubling the university's endowment in 9 years' time.

In addition, he has overseen Georgia Southern's rise in the world of collegiate athletics. In the past decade, the Eagles' volleyball, softball, baseball, and golf teams have reached their respective NCAA tournaments. Its football team went to the FCS national championships, and its cheerleading squad captured the national title.

Georgia Southern and the entire university system will miss Dr. Grube's visionary leadership. Fortunately, this political scientist who got his start in the classroom won't be going far. After a little time off, he will return to Georgia Southern to teach in 2010.

Dr. Grube, we certainly wish you and your family the best. Your professional dedication to better education has made Georgia Southern and Georgia a better place in which to live. I am proud to call you my good friend.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. ISAKSON. Mr. President, I am delighted to rise with my colleague from Georgia, Senator CHAMBLISS, and pay tribute to my friend, Dr. Bruce Grube. A lot of times we stand on the floor and say ''my friend,'' when it is a passing statement. Well, it is not for me. I met Dr. Grube in 1989, when he was named the 11th president of Georgia Southern University, and I was with him as recently as commencement last year.

He is a great leader in education in our State, and he will be missed. But he is both remembered and revered and there are three reasons I would like to talk about his distinguished career. No. 1, he did what is most important for college presidents to do—he raised the endowment of the university. In fact, he doubled the endowment of the university. And because of that, as Senator CHAMBLISS said, he doubled the number of scholarships going out to deserving Georgians to come to Georgia Southern University. That is No. 1.

No. 2, as a former chairman of a State board of education and one whose passion is education, I love what Dr. Grube did when he put in the First-Year Experience program at Georgia Southern University, a program designed to make the first-year experience a lasting experience so student retention improved at Georgia Southern and more kids who entered graduated. Since the inception of that program, retention at Georgia Southern University has gone from 66 percent of the freshman class to 81 percent of the freshman class—four out of five returning and getting their degree at Georgia Southern University.

No. 3, among everything else that a president of a university does in terms of responsibility, it is so important that they outreach to the community. When you go to Bulloch County in Statesboro, GA, if you are at Snooky's Restaurant for breakfast, Dr. Grube is there. If you are on campus in the middle of the day, interacting with students under the shade of a Georgia pine tree, Dr. Grube is there. If there is a charitable or benefit program in Bulloch County, Dr. Grube is there. He is the face of Georgia Southern University, and he will be missed—but only for a year because after a brief sabbatical he comes back to teach political science at Georgia Southern University. He returns to his roots, established in his doctorate degree at the University of Texas in political science and carried on for years to come as a distinguished professor of political science at Georgia Southern University.

I am proud to rise with my colleague, Senator CHAMBLISS, to pay tribute to a great Georgian, a great educator, and my personal friend, Dr. Bruce Grube.

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

The PRESIDING OFFICER (Mr. KAUFMAN). The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. MCCONNELL. 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. MCCONNELL. Mr. President, I am going to proceed on my leader time which I did not use earlier this morning.

HEALTH CARE WEEK IV, DAY III

Mr. President, when it comes to reforming health care, Republicans believe that both political parties should work together to make it less expensive and easier to obtain, while preserving what people like about our current system.

That is why Republicans have put forward ideas that should be easy for everyone to support, such as reforming medical malpractice laws to get rid of junk lawsuits; encouraging wellness and prevention programs that have already been shown to cut costs; and addressing the needs of small businesses without imposing taxes that will kill jobs.

Unfortunately, Democrats on Capitol Hill have opted against many of these commonsense proposals, moving instead in the direction of a government-run system that denies, delays, and rations care.

So it is my hope that the President uses his prime time question and answer session at the White House tonight to clearly express where he himself comes down on a number of crucial questions.

One question relates to whether Americans would be able to keep the care they have if the Democrat plan is enacted. The President and Democrats in Congress have repeatedly promised Americans they could keep their health insurance. Yet the independent Congressional Budget Office says that just one section of the Democrat bill being rushed through Congress at the moment would cause 10 million people with employer-based insurance to lose the coverage they have.

Another independent study of a full proposal that includes a government-run plan estimates that 119 million Americans, or approximately 70 percent of those covered under private health insurance, could lose the health insurance they have as a consequence of a government plan. America's doctors have also warned that a government plan threatens to drive private insurers out of business. And yesterday, the President himself acknowledged that under a government plan, some people might be shifted off of their current insurance.

So the first question is this: Will the President veto any legislation that causes Americans to lose their private insurance?

The President also said that health care reform cannot add to the already staggering national debt. Yet once again, the Congressional Budget Office has said that just one section of the Democrats' HELP bill would spend $1.3 trillion, while others estimate the whole thing could end up spending more than $2 trillion. And here is how the CBO put it: ''the substantial costs of many current proposals to expand Federal subsidies for health insurance would be much more likely to worsen the long-run budget outlook than to improve it.''

Let me repeat that, Mr. President. The Congressional Budget Office says that some of the proposals in the Democrats' bill would be much more likely to worsen the long-run budget outlook than to improve it.

So the second question is this: Will the President veto a bill that adds to the Nation's already staggering deficit?

The President has said that no middle-class Americans would see their taxes raised a penny. Yet Democrats on Capitol Hill are considering proposals, such as a plan to limit tax deductions for medical costs, that would not only raise taxes on middle class families, but that would hit these families the hardest.

So the third question is this: Will the President veto any legislation that raises taxes on the middle class?

The President has said he supports wellness and prevention programs that have proven to cut costs and improve care by encouraging people to make healthy choices, like quitting smoking and fighting obesity. One such program is the so-called Safeway plan, which has dramatically cut that company's costs and employee premiums. Yet the bill Democrats are rushing through the Senate would actually ban the key provisions of the Safeway program from being implemented by other companies.

So the fourth question is this: Does the President support the HELP Committee bill, which bans providing incentives for healthy behavior, and will he veto legislation that bans these kinds of programs?

Finally, the President has said that government should not dictate the kind of care Americans receive. On this issue, the President has no stronger supporters than Republicans. But Democrats on the HELP Committee rejected a Republican amendment that would have prohibited a Democrat-proposed government board from rationing care or denying lifesaving treatments because they are too expensive.

So the fifth question is this: Does the President support the Republican amendment to prohibit the rationing of care, and will he veto legislation that allows the government to deny, delay, and ration care?

Five questions: Will the President use his veto pen to make sure Americans are not kicked off their current health plans? Will he oppose any legislation that increases the nation's deficit? Will he oppose any bill that raises taxes on middle-class families? Will he reject any bill that excludes commonsense wellness and prevention programs that have been proven to cut costs and improve care? And will he disavow legislation that denies, delays, and rations care?

The American people want Republicans and Democrats to work together to enact health care reform, but they want the right kind of reform not a massive government takeover that forces them off of their current insurance and denies, delays, and rations care. Americans are right to be concerned about what they are hearing from Democrats. It's my hope that the President addresses those concerns tonight once and for all.

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. KYL. 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. KYL. Mr. President, the nomination of Harold Koh concerns me for a number of reasons. Primarily, his view that international law should guide U.S. law and his criticism of our first amendment right to freedom of speech and his opposition to the Solomon amendment, which conditions Federal funding to educational institutions on allowing military recruiting on campus.

The State Department Legal Adviser helps formulate and implement U.S. foreign policy, advises the Justice Department on cases with international implications, influences U.S. positions on issues considered by international bodies, and represents the United States at treaty negotiations and international conferences.

In short, this position requires the utmost deference to the Constitution of the United States. Mr. Koh is a proponent of transnationalism, the belief that Americans should use foreign law and the views of international organizations to interpret our Constitution and to determine our policies.

Mr. Koh has gone so far as to refer to the United States as part of an ''axis of disobedience'' in reference to America's alleged violations of international law.

During his 2003 speech at the University of California at Berkeley, Mr. Koh said:

> When I came to government, the first conclusion I reached was that the rule of law should be on the U.S. side.
>
> That's a system of law—

He is speaking now of international law—

> that we helped to create. So that's why we support various systems of international adjudication. That's why we support the UN system. We need these institutions, even if they cut our own sovereignty a little bit.

Mr. Koh's views on the first amendment again portray a desire to make

American law subservient to international law. In his Stanford Law Review article—the title of which was ''On American Exceptionalism''—Koh stated that our first amendment gives ''protections for speech and religion . . . far greater emphasis and judicial protection in America than in Europe or Asia,'' and he opined that America's ''exceptional free speech tradition can cause problems abroad.'' Furthermore, he stated that the way for the ''Supreme Court [to] moderate these conflicts'' is ''by applying more consistently the transnationalist approach to judicial interpretation.''

This is breathtaking. Is it even consistent with an oath to protect and defend the Constitution? Should we now begin to dismantle a founding principle of our democracy in order to appease the so-called international community, as Mr. Koh advocates? If the Founding Fathers had followed this advice, this country would not be the leading example of freedom in the world it is today and a leader in getting others to protect free speech and assembly and other freedoms—such as are being asserted in Iran today. Conforming our views to the norm, which Mr. Koh acknowledges provides less protection than our Constitution would, therefore, would adversely affect the very international community which Mr. Koh seeks to emulate.

Let me put it another way. People in Iran today are taking to the streets to try to exercise some degree of free speech and assembly and petition their government. Mr. Koh acknowledges that in our Constitution we provide much more protection for those rights than anywhere else, or, I think as he put it, than the mainstream of international law provides. That is true.

I think that is something we should not only adhere to for our own benefit but for the benefit that it provides to others around the world as an example of what they should seek to achieve and because of the moral status it gives the United States to be able to say to the leaders of a country such as Iran: You need to provide free speech and assembly and the right to petition their government, and the fact that you are not doing it is wrong because if we believe we are all created equal, by our Creator, that means we have moral equality as individuals. Everybody in Iran, we believe, would have the same right as anyone else to exercise these God-given rights. And if that is true, it makes no sense to diminish those rights as they have been interpreted by our courts in the United States, interpreting our U.S. Constitution, in order for us to conform to an international norm.

Rather, it makes sense for us to continue to adhere to those high standards and to try to bring other countries along with us. In fact, I would postulate that because of our high standard of rights and the example that our Constitution provides, many countries of the world have actually advanced the cause of free speech and assembly and petitioning their government more than they otherwise would have because they have the example of the United States to look at.

If I think of countries, the revolutions, the Orange Revolution, and the changes in governments in places such as Poland, back when it broke from the Soviet Union, and Ukraine and Georgia and all of the other places in the world where people finally broke free from the shackles of a government that would not permit free speech, what were they seeking to do? To exercise free speech in order to petition their government for individual freedom.

So the United States should jealously guard those rights in our Constitution rather than, as Mr. Koh says, have the United States interpret its Constitution more in line with the mainstream of thinking in the rest of the world.

If you sort of try to apply a mathematical formula, and you average what the rest of the world thinks about free speech, the right of religion, the right to assemble, the right to petition the government, the average is far below what we provide. We are pretty much at the top of the pile in terms of what we protect.

But if we were to follow Mr. Koh's advice, in order to be more accepted in the world, we would draw our standards of protection of individual rights down to the leveled area of the mainstream around the world. If you look around the world today, there are so many dictatorships, totalitarian systems, autocracies—even a country such as China—which provide very little in the way of freedom for their people. If you just took the average based on the population of the world, I know what the mainstream would be. It would not be very much in the way of individual rights.

So we should jealously protect what we have in the United States, which is a constitution that at least thus far has been interpreted to protect those rights jealously, not just for our benefit—though that should be, I submit, the sole purpose of a Supreme Court Judge, for example, deciding Supreme Court cases; what does the Constitution say for the people of America?—but if one is going to consider the international implications, I think it would be exactly the opposite of what Mr. Koh is saying; namely, that we should be concerned that any diminishment of the interpretation of our rights would negatively affect other people around the world.

I do not care if the average is a lower standard. I wish those countries would bring their standards up to ours. But I certainly do not want to conform to some idea of international acceptance or international popularity by bringing ourselves down to their level. This is not what ''American Exceptionalism'' is all about—the title of the piece Mr. Koh wrote.

He has argued in other contexts as well that unique American constitutional provisions should conform to the international view of things. I have been speaking of free speech and assembly, the right to petition your government, to practice religion. We think those are absolutely basic. But there are some other rights in our Constitution. One of them is the second amendment. It is controversial.

Other countries do not have a protection such as the second amendment to the U.S. Constitution. If we want to amend the Constitution, we can do that. But as it stands right now, the second amendment has been upheld by the Supreme Court to apply to every individual in the United States, free from Federal undue interference with respect to the ownership of guns.

But if we adopt Mr. Koh's argument about conforming to international norms, including stricter gun control, it may bring us more in line with some other countries, but it certainly would not be in keeping with the interpretation of the U.S. Supreme Court with respect to that second amendment.

In an April 2002 speech at the Fordham University School of Law, Mr. Koh advocated a U.N.-governed regime to force the United States ''to submit information about their small arms production.'' He believes the United States should ''establish a national firearms control system and a register of manufacturers, traders, importers and exporters'' of guns to comply with international obligations. This would allow U.N. members such as Cuba and Venezuela and North Korea and Iran to have a say in what type of gun regulations are imposed on American citizens.

As the dean of Yale Law School, Mr. Koh was a leader in another effort I think is troublesome. It was an effort to deprive students of the freedom to listen to military recruiters who wanted to explain on campus the benefits of a career in our military services. We all—every one of us in this body—frequently express our gratitude to the people in the U.S. military services who protect us, who put themselves in danger in order to protect the very freedoms we are talking about. Yet as dean of the law school, he would not allow the recruiters for these military institutions to come on campus. Yet he would protect students' freedom to listen to antiwar speakers on campus. But Yale closed its doors to military recruiters primarily because it disagreed with the military's policies on gays, which, by the way, is a policy of the President and the Congress, not just the military.

In court, Mr. Koh and others in Yale's administration challenged the constitutionality of the Solomon amendment. The Solomon amendment is a statute that denies Federal funds to educational institutions that block military recruiters. The Supreme Court unanimously ruled against Mr. Koh's position.

Mr. Koh also led a lawsuit against Department of Justice lawyer John

Yoo for doing what any government lawyer is expected to do: provide his legal opinions to the people he worked for, the policymakers of the U.S. Government.

The Supreme Court has said, in no uncertain terms, that government lawyers need immunity from suit in order to avoid ''the deterrence of able citizens from acceptance of public office'' and the ''danger that fear of being sued will dampen the ardor of . . . public officials in the unflinching discharge of their duties.''

In other words, by encouraging this lawsuit, Mr. Koh was effectively deterring his students from doing precisely what Yale otherwise recommends that they do: enter public service.

Elections have consequences. I understand and generally support the prerogative of the President to nominate individuals for his administration he deems appropriate as long as they are within the spectrum of responsible views. However, because of the importance of his position in representing the United States in the international community with respect to treaties and other agreements, his own words and actions demonstrate to me he is far outside the mainstream in such a way that his appointment as State Department Legal Adviser could damage U.S. sovereignty.

So I oppose his nomination. I urge my colleagues—all of us who take an oath to support and defend the Constitution and who appreciate there are always challenges to America's sovereignty—to closely examine Mr. Koh's record and determine whether he would be a representative not only whom they could be proud of but whom they could rely upon in representing the American public interest.

At the end of the day, our sovereignty depends upon the American people. We govern with the consent of the governed. Our government does not start with rights. We had a group of people in America who gave their government certain limited rights in order for their common good. So the American people are our bosses. They pay our salary. We need to listen to them.

When I talk to my constituents—at least in recent months—I notice a theme that is recurring, and it is troublesome to me first of all because it is the kind of thing that sometimes is influenced by people who have less character than those of us in this body and others who may disagree with each other but seriously approach these issues. It is the idea that little by little the people are losing sovereignty, and that the country of America is giving up its sovereignty to others. Who are the others?

I am not a conspiratorial person. That is why I say some of the people who promote this idea do not do so for the right reasons, and I do not like to see them paid attention to by our constituents. But every time we adhere to a U.N. resolution or sign a treaty with another country or agree to abide by the terms of a trade agreement, or something of that sort, to some extent we are giving up a little bit of our sovereignty. As long as we do all of those things with the consent of the governed and as long as we do it through the representative process where we pass a law or we confirm a treaty, ratify a treaty, it is done in the right way. We may make a mistake, we may go too far sometimes, but that is the decision we make. We have the right to make mistakes too. But when we go outside the legal framework of the country to cede a little bit of our sovereignty, as Mr. Koh says is OK, then we have abused the confidence the American people have placed in us and we have gone beyond our legal ability as representatives of the people to give up this little degree of sovereignty.

What I am concerned about, because of his position, which is the direct link between the United States and all of these international organizations and countries which our country necessarily deals with, is that he cares less about the protection of American sovereignty than the vast majority of the American citizens. In fact, he has a point of view which regards that as less important than conforming to international norms and even being in line with popular opinion internationally. As I said before, it is nice to be liked, but at the end of the day, the United States should not be about popular opinion.

We could probably be more popular with 100 countries in the United Nations if we stopped harping on things such as clean elections and free speech and the right to assembly and so on because my guess is there are probably 50 to 100 countries in the United Nations that don't respect their citizens' rights nearly as much as we do. In fact, the number is probably larger than that. They are uncomfortable with the example of a country such as the United States which sets on such a high pedestal our American citizens' rights, that we not only protect those rights for our citizens, but we hold them out to the rest of the world as something that would be beneficial for their citizens as well. This makes them uncomfortable, and rightly so, because sometimes, as we are seeing in Iran today, people decide that it is a good thing to decide to exercise those rights and they feel the denial of that ability by their governments is wrong. They are even willing to risk their lives, as our forefathers did, to assert those rights. That is how important they are.

How odd it is, therefore, to come across such an intelligent—and he certainly is intelligent—man such as Mr. Koh who has a very different point of view about these important American rights, who believes it is more important for us to be in the mainstream of international thinking even though that mainstream represents a view of rights far less than the United States views our rights; it is far more important for us to be well viewed in the international community than it is to strictly adhere to those rights that are embodied in our Constitution. That is extraordinarily troubling to me. Some of his views are breathtaking as they have been asserted.

I know he has met with some of our colleagues, that he is apparently, in addition to being very intelligent, very charming, and that his essential position is: Well, that is what I said in a speech, but I will recognize my obligations as a member of the administration.

I think we are all informed by our views, and if we care enough about them to speak out in a way that he has, as frequently and as forcefully as Mr. Koh has, it is difficult to believe that all of a sudden, in a moment of his confirmation, he will forget about everything he said and what he believes and conform his representation of the American people to what is a far more mainstream point of view; namely, that we should defend our Constitution to the absolute maximum extent we can, irrespective of the views of other countries around the world. That is why, at the end of the day, as I said, I hope my colleagues will review his record very carefully and will judge and eventually base their vote on his confirmation on what he has said—because he is an intelligent man who knows very well what he has said—and what, therefore, could flow from his words as actions as our representative in the State Department as its Legal Adviser.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

The PRESIDING OFFICER (Mr. BEGICH). Without objection, it is so ordered.

Mr. CARDIN. Mr. President, I ask unanimous consent to speak as in morning business for up to 20 minutes, with the time counting toward the postcloture debate time.

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

METRO COLLISION

Mr. CARDIN. Mr. President, I rise today to offer my condolences to the families and loved ones of those who lost their lives in the tragic collision of two Metro trains this past Monday evening. This accident is the most devastating, by any measure, in Metro's history, and it has affected our entire region. My prayers are with those who lost their lives and my deepest sympathies are with their families, friends, and all those they touched.

I want to take a moment to praise the first responders, who worked tirelessly through the night to rescue the injured and save lives. It is during tragedies such as this that we can fully appreciate the heroism and bravery of our first responders.

At this time, we don't know the cause of the crash, and it may take considerable time for the National Transportation Safety Board to complete its investigation and make a determination. We certainly will do everything we can in this body to assist the National Transportation Safety Board in their investigation, make sure it is thorough and complete, and that we fully understand how this tragedy occurred.

News reports found that the train car that caused the fatal accident was an older model that the Federal safety officials had recommended for replacement. It didn't have the data recorder or modern improvements to stand up to a collision, and it may have been 2 months behind in its scheduled maintenance. Metro officials are replacing these aging cars that date back to the 1970s. These costly replacements are being made but at a pace that is too slow.

Funding shortfalls have caused Metro to make repairs instead of replacing aging equipment or structures throughout the system. Last year, I visited the Shady Grove Station and witnessed firsthand how they literally are using wood planks and iron rods to prop up station platforms. They have been forced to make accommodations to keep the system running in the safest possible manner.

The Washington Metro rail system is the second busiest commuter rail system in America, carrying as many as a million passengers a day. It carries the equivalent of the combined subway ridership of BART in San Francisco, MARTA in Atlanta, and SEPTA in Philadelphia each day. But more than three decades after the first train started running, the system is showing severe signs of age. Sixty percent of the Metro rail system is more than 20 years old. The costs of operations maintenance and rehabilitation are tremendous.

This is not only the responsibility of the local jurisdictions that serve Metro—the State of Maryland, Virginia, and Washington, DC—but there is also a Federal responsibility in regard to these cars. Federal facilities are located within footsteps of 35 of Metrorail's 86 stations. Nearly half of Metrorail's rush hour riders are Federal employees. This is our Metro system. We have a responsibility. Approximately 10 percent of Metro's riders use the Metrorail stations at the Pentagon, Capital South, and Union Station, serving the military and the Congress.

In addition, Metro's ability to move people quickly and safely in the event of a terrorist attack or natural disaster is crucial. The Metro system was invaluable on September 11, 2001, proving its importance to the Federal Government and the Nation during the terrorist attacks of that tragic day.

There is a clear Federal responsibility to this system.

Metro is unique from any other major public transportation system across the country because it has no dedicated source of funding to pay for its operation and capital funding requirements. But we are close to resolving that issue.

I was proud to work alongside Senator MIKULSKI, Senator WEBB, and former Senator John Warner last year to pass the Federal Rail Safety Improvement Act, which was signed into law in October 2008. This law authorizes $1.5 billion over 10 years in Federal funds for Metro's governing Washington Metropolitan Area Transit Authority, matched dollar for dollar by local jurisdictions, for capital improvement. The technical details of this arrangement are nearly complete, and when done, Metro finally will have its dedicated funding sources. I compliment the States of Virginia and Maryland and the District for passing the necessary legislation.

Earlier this year, as a regional delegation, along with our new colleague, Senator MARK WARNER, we requested that the Appropriations Committee provide the first $150 million. While this is a substantial downpayment, it is not nearly enough to fulfill all of Metrorail's obligations. At the time of the bill's passage, Metro had a list of ready-to-go projects totaling about $530 million and $11 billion in capital funding needs over the next decade. Yesterday, I joined with my colleagues from Maryland and Virginia in sending another letter to the chairman and ranking member of the Appropriations Committee reiterating our urgent request for a first-year installment of $150 million in funding for WMATA. Earlier today, I was pleased to announce $34.3 million in additional funding for the purchase of new Metro cars. This was the last installment of a 3-year, $104 million commitment. However, only a steady, major stream of funding will help WMATA make the investments needed to reassure the commuters, locals, tourists, families, and all Americans who ride Metro that the system is as safe and reliable as it can possibly be. I find it unacceptable that the transit system in our Nation's Capital does not have enough resources to improve safety and upgrade its aging infrastructure. While we may not know the cause of Monday's tragic collision for some time, it shined a spotlight on the dire need for improvements and upgrades to the Metrorail's infrastructure.

Again, on behalf of all our colleagues, I extend our deepest sympathies to all those affected by this horrific accident, in particular the families and loved ones of those who were killed. I hope my colleagues will join together, working with the Virginia Senators and Maryland Senators, to ensure that this body does everything it can to make sure a similar tragedy is never repeated.

HATE CRIMES LEGISLATION

Madam President, I next wish to talk about the urgent need to pass the Matthew Shepard Hate Crimes Prevention Act of 2009. We passed this 2 years ago, and unfortunately we were unable to reconcile it with the other body.

In the last 2 years, we have had constant reminders of the need to pass this legislation. Just this past June 15, Steven Johns, a security guard at the U.S. Holocaust Museum, lost his life to a person who was deranged but who also was acting under hate. On February 12, 2008, Lawrence King, a 15-year-old student, lost his life because he was gay. On election night, we saw two men go on a killing spree against African Americans because America elected its first African-American President. In July of last year, four teenagers killed a Mexican immigrant and used racial slurs, making it clear it was a hate crime. In 2007, there were 7,600 reported hate crimes in America—150 in my own State of Maryland. So we need to do something about this. The trends have not been positive. They have been negative. Crimes against Latinos, based upon hate, have increased steadily since 2003. In 2007, we saw the highest number of hate crimes against lesbians, gays, bisexual and transgendered, up 6 percent from the year before. The number of supremacist groups in America has increased dramatically. There has been an increase in anti-Semitism between 2006 and 2007. The list goes on and on.

My point is this: We are seeing a troubling trend in America, with increased violence caused by hate-type activities. We need to act. The Federal Government needs to act. The Matthew Shepard Hate Crimes Prevention Act of 2009 will do just that. It expands the current hate crimes legislation we have on the Federal books so that it covers not just protected Federal activities but all activities in which a hate crime is perpetrated, and it extends the protections against hate crimes generated by gender, disability, gender identity, and sexual orientation. It will supplement what the States are doing. Many States are aggressively pursuing these matters. In fact, 45 States and the District of Columbia have passed their own hate crimes statute, and 31 include sexual orientation as a protected right.

The reason we need the Federal law is that the Federal Government has the resources and the capacity to respond when many times the States cannot. And I want to make it clear that this bill fully protects first amendment rights. This protection is against violent acts, not against speech. Hate crimes not only affect the victim, but they affect the entire community. It is time for us to act, and I hope we will soon pass the Matthew Shepard Hate Crimes Prevention Act of 2009.

HEALTH CARE REFORM

Lastly, I wish to talk about health care reform. There has been a lot of debate in this body, a lot of conversation about health care reform and what we need to do. I hope the only option that is not on the table is the status quo. We cannot allow the current system to continue.

I say that for several reasons. First is the matter of cost. The Nation cannot afford the health care system we have now. Last year, the Nation's health care costs totaled $7,400 for every man, woman, and child in this country, for a total of $2.4 trillion. We spent 15 percent of our gross domestic product on health care in 2006—the highest country by far. Switzerland, which is No. 2, spends 11 percent, and the average of the OECD nations is 8½ percent. We spend approximately twice as much as the industrial nations of the world spend on health care. And we don't have the results to warrant this type of expenditure. Of the 191 countries ranked by the World Health Organization, we are ranked 37th on overall health systems performance—behind France, Canada, and Chile, just to mention a few. We rank 24th on health life expectancies, and we ranked No. 1, by far, on health care expenditures. Between 2000 and 2007, the median earnings of Maryland workers increased 21 percent. Yet health insurance premiums for Maryland families rose three times faster than the median earnings in that same time period.

So we can't afford the cost of health care in America. It is crippling our economy, and our budgets are not sustainable. We are having a hard time figuring out how we are going to bring down the Federal deficit. When we look at the projected numbers, if we don't get health care costs under control, it is going to be extremely difficult to figure out how to balance budgets in the future. We need to bring down the cost of health care if America is going to be competitive in this international competitive environment.

For all those reasons, we need to do it. Yet we know we have 46 million Americans—despite how much money we spend—who don't have health insurance, and that is 20 percent higher than 8 years ago. We are running in the wrong direction. In my State of Maryland, 760,000 people do not have health insurance. Every day, people in Maryland and around the Nation are filing personal bankruptcy because they can't afford the health care bills they have. We have to do something about this.

I wish to thank and congratulate President Obama for bringing forward a reform that I hope will be embraced by this body. It certainly has been embraced by the American people. They understand it. We build on our current system. We want to maintain high quality. And I say that coming from a State that is proud to be the home of Johns Hopkins University and its great medical institution; the University of Maryland Medical Center, with its discoveries; and certainly NIH. This is a State—a nation—that is proud of its medical traditions of quality. We want to maintain choice. I want the constituents in Maryland and around the country to not only choose their doctor and their hospital but to choose the health care plans they can participate in, and we certainly want to make sure this is affordable. So for all those reasons, we want to build on the current system.

Let me talk about one point that has gotten a lot of attention, and that is whether we should have a public option. I certainly hope we have a robust public insurance option, and I say that for many reasons. Public insurance has worked in our system. Just look at Medicare. If the Federal Government did not move for Medicare, our seniors would not have had affordable health care coverage, our disabled population would not have had affordable health care coverage. I don't know of a single Member of this body who is suggesting that we repeal Medicare, and that is a public insurance option.

A public insurance option does not have the government interfering with your selection of a doctor. The doctors and hospitals are private. We are talking about how we collect pay for these bills. And Medicare has worked very well, as has TRICARE for our military community. So we want to build on that experience.

The main reason we want a public insurance option is to keep down cost. That is our main reason. We know Medicare Advantage is a private insurance option within Medicare. I am for a private insurance option in Medicare, but I oppose costing the taxpayers more money because of that. We know Medicare Advantage costs between 12 to 17 percent more for every senior who enrolls in the private insurance option. The CBO—Congressional Budget Office—tells us that cost is $150 billion over 10 years. So this is a cost issue.

I remember taking the floor in the other body when we were talking about Medicare Part D, the prescription drug part of the Medicare system. I urged a public insurance option at that time, on the same level playing field as private insurance so that we could try to keep the private insurance companies honest and have fair competition. We didn't do that. As a result, the Medicare Part D Program is costing the taxpayers more than it should.

So my main reason for saying we need to have a public insurance option is to keep costs down, but it also provides a guaranteed reliable product for that individual who is trying to find an affordable insurance option, for that small business owner who today finds it extremely difficult to find an affordable, reliable product available in the private insurance marketplace. Maybe the private insurance marketplace will be up to the challenge with 46, 47 million more people applying for insurance in America. I want to make sure they are. And having a public insurance option puts us on a level playing field and allows the freedom of choice for the consumer as to what insurance product they want to buy and the freedom of choice to choose an insurance product that allows them to choose their own private doctor and hospital.

There are plenty of positive proposals, and I congratulate the leadership on the Finance Committee and on the HELP Committee for the manner in which they are working to bring down health care costs—first by universal coverage. Universal coverage will bring down health care costs. We know that someone who has no health care insurance uses the emergency room. It costs us a lot of money to use the emergency room. We want to get care out to the community, and with universal coverage it will bring down costs.

Preventive health care saves money. It saves money and it saves lives. It provides better, healthier lives for individuals, but it also saves money. We know that providing a test for a person for early detection of a disease costs literally a couple hundred dollars compared to the surgery that might be avoided which costs tens of thousands of dollars. So this is about cost, about saving lives, and about a better quality of life with preventive health care. I congratulate the committees for really coming together on this issue.

Also, the better use of health information technology will not only save us money in the administrative aspect of health care but actually in the delivery of care. If we know about a person and we can coordinate that person's care, we can bring down the cost of care and prevent medical errors.

For all those reasons, I strongly concur in what our committees are doing currently to reform our health care system to bring down costs.

One last point is the need for us to work together. I do reach out to every Member of this body to say: Look, I don't know of anyone who says our system is what it should be. Everyone agrees we are spending too much money. I haven't talked to a single Senator who believes we can't cut the cost of health care. We have to bring down the cost of health care. I think all of us agree we have to do a better job in preventive care and we have to do a better job of having an affordable product for those who don't have health insurance today. We all agree on that.

Let's listen to each other and work together. This is not a Democratic problem or a Republican problem. It cries out for Democrats and Republicans to work together to solve one of the most difficult problems facing our Nation. I congratulate President Obama for being willing to tackle this problem, and I urge all colleagues to join in this debate so, at the end of the day, we can pass reform that will truly bring down the cost of health care to America, be able to say America still leads the world in medical technology, and allows that care to be available to all the people of our country.

That is our goal. We can achieve it working together, and I look forward to working with my colleagues in achieving that goal.

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

The PRESIDING OFFICER (Mrs. HAGAN). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

SOTOMAYOR NOMINATION

Mr. SESSIONS. Madam President, the individual right to keep and bear arms—I think a fundamental right guaranteed by the explicit text of the second amendment of the U.S. Constitution—is at risk today in ways a lot of people have not thought about.

Although the Supreme Court recently held that the second amendment is an individual right, which is a very important rule, many significant issues remain unresolved, which most people have not thought about.

The Supreme Court, including whoever will be confirmed to replace Justice Souter, will have to decide whether the second amendment has any real force or whether, as a practical matter, to allow it to eviscerate its guarantees.

The second amendment says that ''the right of the people to keep and bear Arms, shall not be infringed.'' ''[T]he right of the people to keep and bear Arms, shall not be infringed.'' I know there is a preamble about a well-regulated militia being important to the security of the State, but the Supreme Court has ruled on that in Heller and said that does not obviate the plain language that the right to keep and bear arms is a right that individual Americans have, at least vis-a-vis the U.S. Government.

Not all the amendments, I would say, are so clearly a personal right. The first amendment, if you will recall, protects freedom of religion and freedom of speech. It talks about restricting Congress: Congress shall make no law with respect to the establishment of a religion or prohibiting the free exercise thereof.

So some could argue that does not apply to the States. It would apply only to the Federal Government because it explicitly referred to it. However, the Supreme Court has held it does apply to the States, and the right of speech and press and religion are applicable to the States and bind the States as well.

In the case of District of Columbia v. Heller, the Supreme Court recently held that the second amendment ''confer[s] an individual right to keep and bear arms.'' This is consistent with the Constitution and was a welcome and long-overdue holding.

Despite this holding, however, many important questions remain. For example, it is still unsettled whether the second amendment applies only to the Federal Government or to the State and local governments as well—a pretty big question. This question will determine whether individual Americans will truly have the right to keep and bear arms because if that is not held in that way, it would allow State and local governments—not bound by the second amendment—to pass all sorts of restrictions on firearms use and ownership. They may even ban the ownership of guns altogether.

So we are talking about a very important issue. Remember, the District of Columbia basically banned firearms. It is a Federal enclave, in effect, with Federal law. And the Supreme Court held that the Federal Government could not violate the second amendment, was bound by the second amendment, and that legislation went too far. But they, in a footnote, noted they did not decide whether it applies to the States, cities, and counties that could also pass restrictions similar to the District of Columbia.

President Obama, who nominated Judge Sotomayor, has a rather limited view of what the second amendment guarantees.

In 2008, he said that just because you have an individual right does not mean the State or local government cannot constrain the exercise of that right—exactly the issues the Supreme Court has not resolved yet. Can States and localities constrain the exercise of that right in any way they would like?

In 2000, as a State legislator, the President cosponsored a bill that would limit the purchase of handguns to one a month.

In 2001, he voted against allowing the people who are protected by domestic violence protective orders—because they felt threatened—he voted against legislation that would allow them to carry handguns for their protection.

So there is some uncertainty about his personal views.

Let's look at Judge Sotomayor, whom the President nominated, and her record on the second amendment. That record is fairly scant, but we do know that Judge Sotomayor has twice said the second amendment does not give you and me and the American people a fundamental right to keep and bear arms.

The opinions she has joined have provided a breathtakingly, I have to say, short amount of analysis on such an important question to the U.S. Constitution. And the opinions she has written lack any real discussion of the importance of these issues, in an odd way.

Judge Sotomayor has gone from sort of A to Z without going through B, C, D, and so forth. For example, in her most recent opinion in January of this year—Maloney v. Cuomo—which asked whether the Supreme Court's protection of the right to bear arms in DC—the Heller case—would apply to the States, she spent only two pages to explain how she reached her conclusion. Her conclusion was that it did not.

The Seventh Circuit dealt with this same question and reached the same conclusion, but they gave the issue the respect it deserved and had eight pages discussing this issue, at a time when Judge Sotomayor only spent about two pages on it and not very much discussion at all.

The Ninth Circuit reached a different opinion. They say the second amendment does apply to individual Americans and does bar the cities of Los Angeles or New York or Philadelphia from barring all hand guns because you have an individual constitutional right to keep and bear arms. So the Ninth Circuit disagreed, and they had 33 pages in discussing this important issue.

Further, in deciding that the second amendment applies to the people, the majority in the Supreme Court dedicated, in Heller, 64 pages to this important issue. Including dissents and concurrences on that decision, the entire Court generated 157 pages of opinion. Judge Sotomayor wrote only two pages in a very important case as important as Heller. Judge Sotomayor's lack of attention and analysis is troubling.

These truncated opinions also suggest a tendency to avoid or casually dismiss constitutional issues of exceptional importance. Other examples might include the New Haven firefighters case, Ricci v. DeStefano, which is currently pending before the Supreme Court on review, and the fifth amendment case of Didden v. Village of Port Chester, which was recently discussed in the New York Times. It dealt with condemnation of a private individual's property. All those were serious constitutional cases. They had the most brief analysis by the court, which is odd.

I do not think it is right for us to demand that we know how a judge will rule on a case in the Supreme Court. I am not going to ask her to make any assurances about how she might rule. But I do think it will be fair and reasonable to ask her how she reached the conclusions she reached and perhaps why she spent so little time discussing cases of fundamental constitutional importance.

I am not the only one who has been troubled by the second amendment jurisprudence of Judge Sotomayor. As I mentioned previously, the Ninth Circuit disagreed with her opinion and held that the second amendment is a fundamental right applicable to the States and localities.

Additionally, in a June 10 editorial, the Los Angeles Times—a liberal newspaper—disagreed with her view in Maloney as to whether the second amendment applies against States and localities.

Moreover, in a June 10 op-ed in the Washington Times, a leading academic argued that the decision in Maloney was flawed.

So these are critical questions that will determine whether the people of the United States have a fundamental right guaranteed by the Constitution to keep and bear arms. So I think it is important and it is more than reasonable for the Senators to analyze the opinions on this question and to inquire as to how the judge reached her decisions and what principles she used in doing so.

I would say we are moving forward with this confirmation process. It is a

difficult time for us in terms of time. There are now only eight legislative days before the hearings start. There is a lot of work to be done, a lot of records that have not yet been received. So our team and Senators are working very hard, and we will do our best to make sure we have the best hearings we have ever had for a Supreme Court nominee.

I see my colleague, Senator HATCH, in the Chamber, who is a fabulous constitutional lawyer and former chairman of this Judiciary Committee. I was honored to work for him, serve under him, when he was our leader. I know whatever he says on these subjects is something the American people need to listen to because he loves this country, he loves our Constitution, and he understands it.

I thank the Chair and yield the floor.

The PRESIDING OFFICER (Mr. UDALL of New Mexico). The Senator from Utah is recognized.

Mr. HATCH. Mr. President, I thank my colleague for his comments. He knows how deeply I respect him and how proud I am that he is the Republican leader on the Judiciary Committee. He will do a terrific job, and has been doing a terrific job, ever since he took over.

Considering a Supreme Court nominee is one of this body's most important responsibilities. I come at this wanting to support whomever the President nominates. The President has the right to nominate and appoint, and we have a right, it seems to me, to vote up or down one way or the other and determine whether we will consent to the nomination. We can also give advice during this time.

Only 110 men and women have so far served on our Nation's highest Court, and President Obama has now nominated Judge Sonia Sotomayor to replace Justice David Souter. Our constitutional rule of advise and consent requires us to determine whether she is qualified for this position by looking at her experience and, more importantly, her judicial philosophy.

President Obama has already described his understanding of the power and role of judges in our system of government. He has said he will appoint judges who have empathy for certain groups and that personal empathy is an essential ingredient for making judicial decisions. Right off the bat, President Obama's vision of judges deciding cases based on their personal feelings and priorities is at odds with what most Americans believe. A recent national poll found that by more than three to one, Americans reject the notion that judges may go beyond the law as written and take their personal views and feelings into account.

Judge Sotomayor appears to have endorsed this subjective view of judging. In one speech she gave several times over nearly a decade, she endorsed the view that there is actually no objectivity or neutrality in judging, but merely a series of perspectives. She questioned whether judges should even try to set aside their personal sympathies and prejudices in deciding cases, a view that seems in conflict with the oath of judicial office which instead requires impartiality.

We must examine Judge Sotomayor's entire record for clues about her judicial philosophy. She was, after all, a Federal district court judge for 6 years and has been a Federal appeals court judge for nearly 11 more. While we were told that this is the largest Federal judicial record of any Supreme Court nominee in a century, we are being allowed the shortest time in recent memory to consider it. The 48 days from the announcement to the hearing for Judge Sotomayor is more than 3 weeks—more than 30 percent—shorter than the time for considering Justice Samuel Alito's comparable judicial record. There was no legitimate reason for this stunted and rushed timetable, but that is what the majority has imposed on us and that is where we are today.

I wish to take a few minutes this afternoon to look at Judge Sotomayor's judicial record on a very important issue to me and, I think, many others in this body: the right to keep and bear arms protected by the second amendment to the Constitution.

Some can be quite selective about constitutional rights—prizing some, while ignoring others. Some even trumpet rights that are not in the Constitution at all as more important than those that are right there on the page. It appears that Judge Sotomayor has taken a somewhat dim view of the second amendment. Two issues related to the scope and vitality of the right to keep and bear arms are whether it is a fundamental right and whether the amendment applies to the States as well as to the Federal Government. On each of these issues, Judge Sotomayor has chosen the side that served to limit, confine, and minimize the second amendment. She has done so without analysis, when it was unnecessary to decide the case before her, and even when it conflicted with Supreme Court precedent or her own arguments.

In a 2004 case, for example, a Second Circuit panel including Judge Sotomayor issued a short summary order affirming an illegal alien's conviction for drug distribution and possession of a firearm. The case summary and headnotes supplied by Lexis take up more space than the three short paragraphs proffered by the court. Judge Sotomayor's court rejected a second amendment challenge to New York's ban on gun possession in a single sentence relegated to a footnote with no discussion, let alone any analysis of the issue whatsoever. In fact, the court neither described the appellant's argument nor indicated how the district court had addressed this constitutional issue, but merely cited a Second Circuit precedent for the proposition that the right to possess a gun is ''clearly not a fundamental right.''

That is pretty short shrift for a constitutional claim. Last year, in the District of Columbia v. Heller, the Supreme Court held that the second amendment right to keep and bear arms is an individual rather than a collective right. But the Court also noted that by the time of America's founding, the right to have arms was indeed fundamental, and that the second amendment codified this preexisting fundamental right. Several months later, a Second Circuit panel including Judge Sotomayor affirmed a conviction under State law for possessing a weapon. Citing a 1886 Supreme Court precedent, the Second Circuit held that under the Constitution's privileges and immunities clause, the second amendment applies only to the Federal Government, not to the States. Whether correct or not, that holding was obviously enough to decide the issue in that particular case. Judge Sotomayor's court, however, went beyond what was necessary to further minimize the second amendment by once again characterizing it as something less than a fundamental right. The court said that there need be only a so-called rational basis to justify a law banning such weapons, a legal standard it said applies where there is no fundamental right involved. The court simply ignored and actually contradicted the Supreme Court's decision in Heller by treating the second amendment as protecting less than a fundamental right. In fact, the very 1886 precedent Judge Sotomayor's court cited to hold that the second amendment limits only the Federal Government recognized the preconstitutional nature of the right to bear arms. Her court never addressed these contradictions.

The Seventh Circuit has since also held that under the privileges and immunities clause, the second amendment limits only the Federal Government. But the Ninth Circuit last month held that under the Constitution's due process clause, the second amendment does indeed apply to the States. These courts gave this issue much more analysis than did Judge Sotomayor's court and neither found it necessary to address whether the right to keep and bear arms is fundamental. I wish Judge Sotomayor's court had shown similar restraint.

It appears that Judge Sotomayor has consistently and even gratuitously opted for the most limiting, the most minimizing view of the second amendment. No matter how distasteful, this result would be legitimate if it followed adequate analysis, if it properly applied precedent, and if it was necessary to decide the cases before her. In that event, it would not like it but probably could not quarrel with it. But as I have indicated here, this is not the case. There was virtually no analysis, her conclusion conflicted with precedent, and was unnecessary to decide the cases before her. This is not the picture of a restrained judge who has set aside personal views and is focusing on applying the law rather than on

reaching politically correct results. These are serious and troubling issues which go to the very heart of the role judges play in our system of government. These are elements not from her speeches but from her cases that give shape to her judicial philosophy. We have a written Constitution which is supposed to limit government, including the judiciary. We have the separation of government power under which the legislative branch may employ empathy to make the law, but the judicial branch must impartially interpret and apply the law. We have a system of self-government in which the people and their elected representatives make the law and define the culture. It is no wonder that most Americans believe that judges must take the law as it is, not as judges would like it to be, and decide cases impartially. That is exactly what judges are supposed to do if our system of ordered liberty based on the rule of law is to survive.

President George Washington said that the right to keep and bear arms is ''the most effectual means of preserving peace.''

Justice Joseph Story, in his legendary commentaries on the Constitution, called this right the ''palladium of the liberties of a republic.''

I, for one, am glad that our Founders did not give short shrift to this fundamental individual right.

Let me close my remarks this afternoon by saying that these are some of the questions that need answers, issues that need clarification, and concerns that need to be satisfied as the Senate examines Judge Sotomayor's record. Perhaps such answers, clarification, and satisfaction exist. My mind is open, and I look forward to the hearing in which these and many other matters no doubt will be raised. These are important issues that can't be shunted aside as though they are unimportant, and Judge Sotomayor needs to answer some of these issues and questions that we are raising as we go along.

I told her that we will ask some very tough questions and that she is going to have to answer them. She understands that, and I appreciate that.

With that, I yield the floor.

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

Mr. THUNE. Mr. President, I rise today to follow up on some of the comments made by my colleagues who had come to the floor to talk about the nomination of Judge Sotomayor to the Supreme Court of the United States.

Any confirmation the Senate considers is important but none more so than a lifetime appointment to the most distinguished judicial office in our Nation.

Now that the President has nominated Judge Sotomayor, it is the Senate's job to give advice and consent. As Alexander Hamilton told the Constitutional Convention:

> Senators cannot themselves choose—they can only ratify or reject the choice of the President.

I take this role very seriously, as do all of my Senate colleagues. In fact, just 3½ years ago, on this very floor, one of our colleagues in the Senate at the time rose and gave the following views on a then-pending Supreme Court nomination. I will quote for you what he said:

> There are some who believe that the President, having won the election, should have complete authority to appoint his nominee and the Senate should only examine whether the Justice is intellectually capable and an all-around good person; that once you get beyond intellect and personal character, there should be no further question as to whether the judge should be confirmed. I disagree with this view. I believe firmly that the Constitution calls for the Senate to advise and consent. I believe it calls for meaningful advice and consent and that includes an examination of the judge's philosophy, ideology, and record.

The Senator who made those remarks was then-Senator Obama. He spoke those words in January 2006 on this floor when the Senate was debating the confirmation of now-Supreme Court Justice Samuel Alito.

I, like the President, believe it is the Senate's constitutional duty to thoroughly review all nominees to the Federal bench, especially those who will have a lifetime appointment to the highest Court in our Nation. This review should be thorough and fair and cover a nominee's background, judicial record, and adherence to the Constitution. This is especially true with the voluminous judicial record Judge Sotomayor has compiled, with over 3,600 Federal district and appellate level decisions. The Senate must also work to ensure that the nominee will decide cases based upon the bedrock rule of law as opposed to their own personal feelings and political views.

As part of this confirmation process, I had the opportunity this morning to meet with Judge Sotomayor. Like many in this body, I agree that she has an impressive background, as well as a compelling personal story. But what we have to do is examine and look at her record when it comes to her understanding of the Constitution, especially as it relates to the second amendment right to bear arms, and that is an area where I have significant concerns.

While sitting on the Second Circuit Court of Appeals, Judge Sotomayor consistently advanced a narrow view of the second amendment and did so with little explanation or reasoning. For example, twice, Judge Sotomayor has ruled that the second amendment is not a ''fundamental right.'' The first time she did so with a one-sentence footnote, and most recently it was simply stated as fact without any explanation or reasoning being provided. Judge Sotomayor's views on whether the second amendment right to bear arms is a fundamental right are so important because the Supreme Court has made this determination a key element in deciding whether to apply parts of the Bill of Rights, such as the second amendment, to State and local governments.

This question, also known as incorporation, is likely to be the next second amendment issue the Supreme Court will consider because the circuit courts of appeal are split, and the Supreme Court specifically noted that they were not deciding this issue in the landmark District of Columbia v. Heller decision, which was decided last year.

What is most troubling to me, though, is that these second amendment cases point out a disturbing trend that legal experts have expressed about Judge Sotomayor: That she has a record of avoiding or casually dismissing difficult and important constitutional issues. It doesn't take an attorney to notice that Judge Sotomayor's discussion of incorporation, a challenging and constitutionally significant issue, consists of just a few paragraphs. In contrast, the opinions for both the Ninth Circuit and the Seventh Circuit discuss the issue at length and, in doing so, give this important issue the attention and analysis it deserves. While I understand that writing styles can and do vary, even in the writing of judicial opinions, I am still concerned about the apparent lack of thoughtfulness and thorough reasoning in her decisions.

Another example of a Judge Sotomayor opinion that appears to be unnecessarily short and inadequately reasoned is the Ricci v. DeStefano case, or more popularly known as the New Haven firefighter promotion case. In this case, a three-judge panel, which included Judge Sotomayor, published an unusually short and unsigned opinion that simply adopted the lower district court's ruling without adding any original analysis. Even one of Judge Sotomayor's own mentors, Judge Jose Cabranes, commented that the Ricci opinion ''contains no reference whatsoever to the constitutional claims at the core of this case'' and that the ''perfunctory disposition [of the case] rests uneasily with the weighty issues presented by this appeal.'' Without careful reasoning being provided, critics and supporters alike have been left to wonder on what basis these decisions have been made. I am left with concerns about these rulings and whether they are based upon personal views and feelings rather than the rule of law.

My short meeting with Judge Sotomayor this morning did not provide either of us with enough time to address these issues and these concerns at length, and that is why, like many colleagues, I will be monitoring closely the confirmation hearings that are set to occur next month. During those hearings, it is my hope that the members of the Judiciary Committee will take the necessary time to explore and thoroughly examine her positions and legal reasoning, especially on the second amendment, in greater detail.

I, like many of my colleagues, am anxious to see this process move forward. We also understand the weight that is attached to the constitutional role of the Senate when it comes to advice and consent. When you consider a

lifetime appointment to the highest Court in the land, you better make sure that you do your homework and that you thoroughly and completely and fairly examine the record.

I hope the Judiciary Committee—and I know they will—will conduct this in a way which is consistent with the tone that ought to be a part of this. It ought to be a civil discussion. It also needs to be thorough because we are talking about a lifetime appointment to the Supreme Court. Whoever ends up on that Court will be faced with a great many issues, all of which have lasting consequences for this great Republic.

In my view, it is important that we have judges who are put on the Supreme Court who understand that the role of the judiciary in our democracy is not to play or take sides; it is to be the referee, the umpire, to be someone who applies the Constitution, the laws of the land, fairly to the facts in front of them in the cases they will hear. I certainly hope that, as we have an opportunity to more thoroughly review the record of this nominee, the members of the Judiciary Committee and all of the Members of the Senate will take that responsibility very seriously. That will be the criteria and the filter by which I look at this nominee—whether or not, in my view, she exercises an appropriate level of judicial restraint and doesn't view the role of a judge in our judiciary system in this country to be that of an activist, someone who expresses personal feelings or tries to advance a particular political agenda, but someone who, in terms of philosophy and temperament, is committed to that fundamental principle of judicial restraint, which is a hallmark of our democracy and has been for well over 200 years.

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. THUNE. 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. THUNE. Mr. President, I didn't have an opportunity to address the Koh nomination this morning. We had a cloture vote on the nomination of Harold Koh to be the next State Department Legal Adviser. I wish to express some of the views and concerns I have. Obviously, cloture was invoked this morning, and my guess is that he will ultimately be confirmed. We have an opportunity in a postcloture period to talk a little bit about this nominee.

I have to say this is an important position. If confirmed, Mr. Koh would be the top lawyer at the State Department and would be involved in the negotiation, the drafting, and the interpretation of treaties and U.N. Security Council resolutions. He would also represent the United States in other international negotiations, at international organizations, and before the International Court of Justice. To put it simply, he would be viewed as the top legal authority for the United States by the international community.

Similar to Judge Sotomayor, Mr. Koh highlights an alarming trend which I think we see in some of President Obama's nominees. They have impressive backgrounds, but when their records are examined in detail, there are substantive questions about their understanding of the Constitution. For example, Mr. Koh has said repeatedly, including at his confirmation hearing, that he believes the congressionally authorized 2003 U.S. invasion of Iraq ''violated international law'' because the United States had not received ''explicit United Nations authorization'' beforehand. He also said that the U.S. Supreme Court should ''tip more decisively toward a transnationalist jurisprudence'' as opposed to basing decisions on the U.S. Constitution and laws made pursuant to it.

His views on the second amendment are also extremely worrisome. In a speech called ''A World Drowning in Guns,'' which was given at Fordham University Law School in 2002 and later published in the Law Review, he explains why he believed there should be a global gun control regime and admits that ''we are a long way from persuading government to accept a flat ban on the trade of legal arms.''

He concludes his speech with this statement:

> When I left the government several years ago, my major feeling was of too much work left undone. I wrote for myself a list of issues on which I needed to do more. One of those issues was the global regulation of small arms.

Given, again, that Mr. Koh will be the top legal adviser at the State Department on both domestic and international issues, I have concerns, because of statements such as these, that he could place his own personal agenda ahead of the needs of our country and the Constitution.

So we will have an opportunity probably—we have had the cloture vote on the nomination, but I wanted to express for the record my concerns about this nominee and the types of statements he has made in the past, the type of agenda he has expressed support for, and how, in my view, it contradicts many of the basic constitutional freedoms and rights—the second amendment being one—that I would raise as a major concern but also this notion that transnational jurisprudence—that the Supreme Court ought to tip more decisively in that direction. That is a cause for great concern.

I hope that on final disposition of this nominee, the Senate will vote to reject this nomination. It is, in my view, dangerous to the national security interests of the United States and some of our basic constitutional freedoms when he rules in the way he has in the past and continues to issue statements that, in my view, are very troublesome. I will be opposing this nomination, and I hope my colleagues will as well.

I yield the floor.

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

The PRESIDING OFFICER (Mr. MERKLEY). Without objection, it is so ordered.

Mr. DURBIN. It is my understanding we are postcloture, speaking on the nomination of Harold Koh to be Legal Adviser for the Department of State; is that correct?

The PRESIDING OFFICER. That is correct.

Mr. DURBIN. Mr. President, earlier today the Senate voted to invoke cloture and move forward with this nomination. Sixty-five Senators recognized the extraordinary qualifications that Mr. Koh will bring to the State Department. Yet in the last few weeks, some Senators on the other side of the aisle have done everything they can to slow down the work of the Senate, even going so far as to delay the consideration of a bill to promote tourism in America. That is a noncontroversial bill with 11 Republican cosponsors but a bill that could only get two Republican Senators to support it when we asked to move it forward.

Unfortunately, the same thing is happening with the nomination of Mr. Koh. This is a nomination which is not controversial for most Members of the Senate—65 supported going forward. Yet the Republicans are insisting, as they have the right to do under Senate rules, that we delay for maybe up to 30 hours before we actually get to the vote. If we are going to waste that much time on a noncontroversial nomination for a person to become Legal Adviser to the State Department, the people of this country have a right to ask what is the goal of the Republicans in doing this?

There is a lot we need to do in the Senate. There is a lot the American people are counting on us to do, measures we should be considering. I have a bipartisan measure on food safety. I have been working on this for over 10 years. There is not a week that goes by that there is not some new press report about something dangerous: pet food, cookie dough—you name it. All of these things have been in the headlines over the last several years, and we can do a better job making sure the items we purchase at our local stores for our families, for our pets, are safe; making sure the things we import from other countries are safe. But we cannot even get to that measure because there is a strategy on the Republican side of the aisle to stop us, to delay as much as possible to try to make sure the Senate does as little as possible.

In the last election, the people of this country said: We think it is time for change in this town of Washington. We are sick and tired of this partisan bickering and this waste of time and Democrats banging heads with Republicans. Why don't you all just roll up your sleeves and be Americans for a change and try to solve the problems? You may not get it completely right, but do your best and work at it. Spend some time on it.

Look at what we have, an empty Chamber. This Senate Chamber should be filled with debate on critical issues, but it is not because, unfortunately, this is a procedural strategy on the other side of the aisle which is slowing us down.

This man whose nomination is before us should have just skated through here. This is an extraordinarily talented man. Mr. Harold Koh has a long and distinguished history of serving his country and the legal profession. During the Reagan administration, a Republican President's administration, he was a career lawyer in the Office of Legal Counsel at the Department of Justice; in 1998, unanimously confirmed as the U.S. Assistant Secretary of State for Democracy, Human Rights and Labor, a bureau in the State Department that champions many of our country's most cherished values around the world.

Mr. Koh's academic credentials are amazing—a Marshall Scholar at Oxford, graduate of Harvard Law School, editor of the Harvard Law Review, and he went on to be a clerk at the Supreme Court across the street, which is about as good as it gets coming out of law school.

Since the year 2004, Harold Koh has served as dean of the Yale Law School. Mr. Koh was a Marshall Scholar at Oxford. He has been awarded 11 honorary degrees and 30 human rights awards.

I don't know that you could present a stronger resume for a man who wants to serve our country, to be involved in public service and step out of his professional life as a lawyer in the private sector, with law schools. He has been endorsed by leaders, legal scholars from both political parties, including the former Solicitor General, Ted Olson, former Independent Counsel Ken Starr, former Bush Chief of Staff Josh Bolton, seven former Department of State Legal Advisers, including three Republicans, more than 100 law school deans, and 600 law school professors from around the country. What more do we ask for someone who wants to serve this country?

Several retired high-ranking military lawyers have written: If the U.S. follows Koh's advice, as State Department Legal Adviser:

[It] will once again be the shining example of a Nation committed to advancing human rights that we want other countries to emulate.

Here is an excerpt from a recent letter for support Ken Starr sent to Senators KERRY and LUGAR. I have had my differences with Ken Starr. Politically we are kind of on opposite sides. Here is what he said of Dean Koh, who is being considered by this empty Senate Chamber as we burn off 30 hours. He wrote:

My recommendation for Harold comes from a deep, and long-standing, first-hand knowledge. We have been vigorous adversaries in litigation. We embrace different perspectives about a variety of different substantive issues. As citizens, we no doubt vote quite differently. But based on my two decades of interaction with Harold, I am firmly convinced that Harold is extraordinarily well qualified, to serve with great distinction in the post of legal adviser. . . . Harold's background is, of course, the very essence of the American dream. . . . Harold embraces, deeply, a vision of the goodness of America, and the ideals of a nation, ruled, abidingly, by law.

There is overwhelmingly bipartisan support for Harold Koh. Usually these nominations are done routinely late at night when there are few people on the floor, and when we are going through a long series of things to do. Someone with this kind of background does not even slow down as they move through the Senate on to public service.

But, unfortunately, the strategy on the other side of the aisle is to slow things down, do as little as possible this week. I sincerely hope that when the time comes, when the 30 hours have run, when the Republicans have finally decided they do not want to delay the Senate any longer, they will bring Mr. Koh's nomination to a vote.

I enthusiastically support his nomination and encourage my colleagues to join me in voting him out of the Senate quickly so he can continue his record of public service.

HEALTH CARE REFORM

Mr. President, you are well aware from your State of Oregon and from my State of Illinois how much this health care reform debate means to everybody we represent. When you ask the American people what we can do about health insurance, 94 percent of people across America overwhelmingly support change in our current health care system. Some 85 percent of the people across this country, Democrats, Republicans, and Independents, say that the health care system needs to be fundamentally changed.

This is the time to do it. This is the President to lead us in doing it. We had better seize this moment. If we do not, if we miss it, we may never have another chance for years and years to come. That is unfortunate.

Democrats want to build on what is good about the current system. It is interesting that so many people would say we should change the health care system, but about three out of four people say: I kind of like my health insurance.

So what we have to do first is to say we are going to keep the things in the current system that work, and only fix those things that are broken. If you have a health insurance plan that you like and you trust it is good for you and your family, you need to be able to keep it. We should not be able to take it away from you. We do not want to. That is the starting point. And then when we start to fix what is broken in the system, we address some issues that I think are really critical.

Health insurance companies today can deny you coverage because of an illness you might have had years ago, exclude coverage for what they call preexisting conditions, which sadly we all know about, or charge you vastly more because of your health status or your age.

We want to make sure that the end of the day, after health care reform, we keep the costs under control, make sure you have a choice of your doctor, make certain you have privacy in dealing with your doctors so that the doctor-patient relationship is protected and confidential.

We want to protect quality in the system, to make certain we bring out the very best in medical care, and not reward those who are doing things poorly. We believe we can do this on a bipartisan basis, with both parties working together.

Some of the critics of this effort basically are in denial that we need to change our health care system. I do not think they are taking the time to look at it closely. Whether you talk to people, average families, or small businesses, large corporations, you understand that the cost of health care now is spinning out of control, and if we do not do something dramatic and significant about it, it will become unaffordable.

I had a group of people in my office who were in the communications industry. They are union workers. They are worried because every year when they get more money per hour for working, it always goes to health insurance. They learn each year there is less coverage: pay more, get less.

We have got to do something about containing the cost of a system that is the most expensive health care system in the world. We spend, on average, more than twice as much as the next country on Earth for health care for Americans. We have great hospitals and doctors. We have amazing technology and pharmacies. But the bottom line is, other countries get better results for fewer dollars.

So the first item we must address is bringing down the cost of health care, stop it from going through the roof, so that families and businesses can afford it, and government can afford it as well.

The second thing we have to make sure we do is protect the choice of individuals for their doctor and their hospital, their providers. There are limitations now. In my home town of Springfield, IL, my health insurance plan tells me there is one preferred hospital of the two I can choose, and I know if I do not go to that hospital, I can end up with a bill I have to pay personally. So there are limitations under the current system, and that is to be expected.

But we want to limit those to as few as possible so people are able to come forward and have the basic choice they want in physicians.

Then there is a question about how to keep the costs under control. If we are going to build this new health care reform on private health insurance, the obvious question is: Will there be a government health insurance plan such as Medicare available as an option so you can look at all of the private health insurance plans you might buy, and also consider the government health insurance plan, the public health insurance plan, as an option?

This is controversial. Health insurance companies say, if we have to compete with a government plan, they will always charge less and we will not be able to compete. Others argue that if you do not have at least one nonprofit entity offering health insurance, then basically the private health insurance plans will continue to be too expensive; they will not have the kind of competition they need to bring about real savings.

Many people on the other side of the aisle have come to the floor and criticized the idea of a public interest health insurance plan. They argue it is government insurance, government health care. But most Americans know that government health care is not a scary thing in and of itself. There are 40 million Americans under Medicare. That is a government health care program. Millions of Americans are protected by Medicaid for lower income people in our country. That has a government component too.

Our veterans come back from war and go to the Veterans' Administration, a government health program. I have not heard a single Republican come to the floor and say: We need to eliminate Medicare, eliminate Medicaid, close the VA hospitals, because it is all government health care. No. For most people being served by these programs, they believe they are godsends and they do not want to lose them.

Yesterday, the minority leader, the Republican Senator from Kentucky, came to the floor and talked about a future which is fictitious. He said: A government plan where care is denied, delayed, and rationed.

Those are fighting words, because no one wants their coverage denied, they do not want to wait in a long line for surgery, and they do not want to believe they are victims of rationing. It is important for them to have medical care given to them.

The language we hear from the other side of the aisle is language we are all too familiar with. The miracle of the Internet is that people can come up with a written document now, and by pressing a button or clicking a mouse, they can send that document to lots of different people.

A couple of months ago, a Republican strategist named Frank Luntz wrote a 28-page memo to give to Republican Senators on how to defeat health care. Dr. Luntz—he calls himself ''doctor''—Dr. Luntz said: Whatever they come up with, here is the way to beat it.

He had not seen the health care reform plan that President Obama might support or the Democrats might produce. But he says: This is how we stop them from passing anything, how we delay things, deny things. And he used those words. He said: We have got to use words that Americans will identify with, buzzwords like ''deny,'' ''delay,'' ''ration.'' And those are the words we hear every week now from the other side of the aisle.

The reason I mentioned the Internet is it turns out somebody punched the wrong button on their computer, clicked the wrong mouse button, and the next thing you know that memo spread across Washington. Everybody has it.

So we have seen the play book. We kind of know the plays they are running. We know their speeches before they give them. But they still come down and give these speeches over and over again.

I guess the starting point is this: Some of my colleagues and friends on the other side of the aisle want to keep the current health care system. They think it is fine. They do not want to change it. Well, I do not join them, and most American people do not join them either.

There are winners in the current system. There are people making a lot of money under the current health care system. Health insurance companies were one of the few sectors in the economy last year, 2008, that showed profitability when most American companies that were not health insurance companies were not profitable. So were oil companies, incidentally. But the health insurance companies that are making a lot of money do not want to see this system changed. It is a good, profitable system for them. By and large, they want to keep it the way it is. There are some providers who are doing quite well under the system, some specialists are making a lot of money, some hospitals are making a lot of money. They want to keep it as it is.

But we know we cannot. It is unsustainable. It is too expensive for individuals, families, and for businesses and for government, for us not to get the cost under control.

The Republican resistance to change in health care reform is not surprising. Last week we had a cloture vote and 30 hours of debate to proceed to the consideration of a bipartisan noncontroversial bill. We have been through cloture votes and delays all of this week. We are in the middle of one right now. That is why those who are visiting the Capitol are wondering where all of the Senators are. This is a situation where the Republicans have decided they are going to force us to wait 30 hours before we do something, a waste of time that we cannot afford, and we have faced it before.

We have to understand that we need to have health care reform. The President is right that this opportunity comes around so rarely.

We have pretty good health insurance as Members of Congress. But I want to make it clear for the record, we do not have ''special'' health insurance. I have heard that argument being made. If you can get the same health insurance the Senator has, you would be set for life. We have great health insurance. But it is the same health insurance available to all Federal employees, 2 million Federal employees; 8 million employees and their families. We have a Federal health benefits program. We have an open enrollment each year to pick, in my case, from nine different health insurance plans available to me in my home State of Illinois for my wife and myself. That is a luxury most people can only dream of. All Federal employees have it, and so do Members of Congress, because we are considered Federal employees. But it is something most Americans do not have and we can make available to small and large businesses alike. It is important that we do this.

I hope we can get some support, some support from the other side of the aisle. Today in America, while we are going about our business, 14,000 Americans will wake up and realize something: Yesterday they had health insurance and today they do not. Every day in America, 14,000 Americans lose their health insurance.

I cannot imagine what life is like without health insurance. There was a time in my life when I did not have it. It was scary. I was a brandnew married father, baby on the way, and no health insurance. It happened. We made it through with a lot of bills that we took years to pay off. That goes back a long time.

Currently, if you are without health insurance, you are one diagnosis or one accident away from being wiped out. So going after bringing the cost of health insurance down is our first priority, but the second is to make sure everybody has some basic form of health insurance.

We have to understand that those of us who have health insurance pay more for our health insurance because some 47 million Americans do not have it. They present themselves to the doctors and hospitals, and in this caring Nation, we treat them and their bills are then absorbed by a system that spreads them around for all of the rest of us to pay. It is about $1,000 a year. It is a hidden tax for families, $1,000 more each year on health insurance premiums to take care of the uninsured in our country.

So now we have a chance to bring the uninsured into coverage. By bringing them into coverage, we will not only give them peace of mind, make them part of the system, we will reduce that $1,000 hidden tax every family pays who has health insurance. So we have an opportunity to do something positive about health insurance.

For those who are following this debate closely, they probably heard this mentioned by others, but I want to make a point of it. There is an important article for people to read, and they can go online to find it. It is from the June 1st New Yorker magazine.

A man who is a surgeon in Boston, an Indian American, whose name is Dr. Atul Gawande, wrote an article about health care in America today. I will not go into detail about what he found, but it is an eye opener because he went to one of the most expensive cities in America when it comes to treating Medicare patients. It is McAllen, TX. He could not figure out why in McAllen, TX, they were spending about $15,000 a year for Medicare patients—dramatically more than other towns in Texas and around the country.

What he found, unfortunately, is that many of the doctors in that city were treating elderly patients by running up their charges, by ordering unnecessary tests, by ordering hospitalizations and things that were not being ordered in other cities. The reason is, there was a financial incentive. The more tests, the more procedures, the more hospitalizations they can charge to Medicare, the more the doctor was paid.

Well, Dr. Gawande went down and met with the doctors and confronted them with it. There was no other explanation. That was it.

Then he went to Mayo Clinic in Rochester, MN—a place I respect very much, a place that has treated my family and treated them well. He found out the cost for treating Medicare patients in Rochester, MN, is a fraction of what it is in McAllen, TX.

At the Mayo Clinic it is cheaper to treat a Medicare patient than it is in McAllen, TX. Why? Well, it turns out it is pretty basic. The doctors who are on the staff of the Mayo Clinic are paid a salary. They are not paid by the patient or by the procedure. So their interest is not in running up a big medical chart of tests. Their interest is getting that patient well, and doing it effectively. They do it with fewer procedures and less money spent and better results at the end of the day.

So now we have a choice in this health care debate: Do we want to continue the example of McAllen, TX, which is abusing the system, charging too much, and not giving good health care results, or do we want to move to a Mayo Clinic model, one that basically is much more efficient and effective, keeps people healthier, at lower cost? I hope the answer is obvious. It is to me. I would like to see us move toward incentives such as the Mayo Clinic system.

The President spoke to the American Medical Association in Chicago last week. It was a mixed review. They were very courteous to him. There were a few people dissatisfied with his remarks, but it is a free country. We can expect that. Some of those doctors in that room understand it is time for change and some of them do not. Some of them think change is going to be bad for them and bad for our country. But most of us understand if we work together in good faith, conscientiously, we can change this health care system for the better, reduce its costs, preserve our choice of doctors and hospitals, make certain quality is rewarded, and also make certain we cover those 46 or 47 million uninsured Americans and come up with a health care system that does not break the bank—not for families, not for businesses, and not for governments in the future.

Mr. President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

SOTOMAYOR NOMINATION

Ms. KLOBUCHAR. Mr. President, I will be joined on the floor today by some of my fellow women Senators to talk about the President's nominee for the Supreme Court. I will note that some of my colleagues on the other side of the aisle came to the floor yesterday to, as one news report described it, ''kick off their campaign against her.'' So we wanted to take this opportunity to get the facts out to correct any misconceptions and to set the record straight.

The Supreme Court confirmation hearing for Judge Sotomayor will begin on July 13, but my consideration of her will not begin then. I began considering her the day she was announced because, as a member of the Judiciary Committee, I wish to learn as much as I can about President Obama's choice to fill one of the most important jobs in our country.

Even though there are many questions that will be asked and many areas we will want to focus on, I wish to speak today about how Judge Sotomayor appears to me based on my initial review. After meeting with her and learning about her, I am very positive about her nomination. Judge Sotomayor knows the Constitution, she knows the law, but she also knows America.

I know Americans have heard a lot about her background and long career as a judge. But it is very important for us to talk about what a solid nominee she is because we have to keep in mind that there have been accusations and misstatements, many made by people outside of this Chamber on TV and 24/7 cable. There have been misstatements.

It came to me a few weeks ago when I was in the airport in the Twin Cities in Minnesota. A guy came up to me on a tram in the airport and said: Hey, do you know how you are voting on that woman?

I said that I want to listen to her and see how she answers some of the questions.

He said: I am worried.

I said: Why? She is actually pretty moderate.

He said: She is always putting her emotions in front of the law.

I said: Do you know that when she is on a panel with three judges—which they often do on the circuit court where she sits now, and they have her and two other judges—95 percent of the time she comes to an agreement with the Republican-appointed judge on the panel? You must be thinking the same thing about those guys because you cannot just say that about her.

That incident made me think we really need to set the record straight here about the facts, that we should be ambassadors of truth and get out the truth about her record and the kind of judge we are looking for on the U.S. Supreme Court. We need to make sure she gets the same civil, fair treatment other nominees have been given.

Judge Sotomayor's story is a classic American story about what is possible in our country through hard work. She grew up, in her own words, in modest and challenging circumstances and worked hard for every single thing she got. Many of you know her story. Her dad died when she was 9 years old, and her mom supported her and her brother. Her mom was devoted to her children's education. In fact, her mom was so devoted to her and her brother's education that she actually saved every penny she could so that she could buy Encyclopedia Britannica for her kids. I remember when I was growing up that the Encyclopedia Britannica had a hallowed place in the hallway. I now show my daughter, who is 14, these encyclopedias from the 1960s, and she doesn't seem very interested in them. They meant a lot to our family and also to Judge Sotomayor.

Judge Sotomayor graduated from Princeton summa cum laude and Phi Beta Kappa, and she was one of two people to win the highest award Princeton gives to undergraduates. She went on to Yale Law School, which launched her three-decades-long career in the law. So when commentators have questions about whether she is smart enough—you cannot make up Phi Beta Kappa. You cannot make up that you have these high awards. These are facts.

Since graduating, the judge has had a varied and interesting legal career. She has worked as a private sector civil litigator, she has been a district court and an appellate court judge, and she taught law school.

The one experience of hers that particularly resonates for me is that, immediately graduating from law school, she spent 5 years as a prosecutor at the Manhattan district attorney's office, which was one of the busiest and most well thought of prosecutor's offices in our country. At the time, it paid about half as much as a job in the private

sector, but she wanted the challenge and trial experience, she told me when we met, and she took the job as a prosecutor. Before I entered the Senate, I was a prosecutor. I managed an office of about 400 people in Minnesota, which was the biggest prosecutor's office in our State. So I was very interested in this experience we had in common.

One of the things that I learned and that I quickly learned that she understood based on our discussions is that, as a prosecutor, the law is not just some dusty book in your basement. After you have interacted with victims of crime, after you have seen the damage crime can do to a community, the havoc it can wreak, after you have interacted with defendants who are going to prison and you have seen their families sitting in the courtroom, you know the law is not just an abstract subject; you see that the law has a real impact on real people.

As a prosecutor, you don't just have to know the law, you have to know people, you have to know human nature. Sonia Sotomayor's former supervisor said that she was an imposing and commanding figure in the courtroom who would weave together a complex set of facts, enforce the law, and never lose sight of whom she was fighting for. Of course, she was fighting for the people in those neighborhoods, the victims of crime. Judge Sotomayor's experience as a prosecutor tells me she meets one of my criteria for a Supreme Court nominee: She is someone who deeply appreciates the power and impact that laws have and that the criminal justice system has on real people's lives. From her first day at that Manhattan district attorney's office, Judge Sotomayor learned that the law is not just an abstraction.

In addition to her work as a prosecutor, I have also learned a lot about Judge Sotomayor from her long record as a judge. She has been a judge for 17 years—11 years as an appellate judge and 6 years as a trial judge. President George H.W. Bush—the first President Bush—gave her the first job she had as a Federal judge. She was nominated by a Republican President. The job was to be a district judge in the Southern District of New York. Her nomination to the Southern District was enthusiastically supported by both New York Senators, Democratic Senator Daniel Patrick Moynihan and Republican Senator Alfonse D'Amato.

If you watch TV or read newspapers or blogs, you know that Judge Sotomayor has been called some names. It always happens in these Supreme Court nominations—the nominees are called names by talking heads on TV and on the radio. In most cases, these commentators may have read a case or two of hers or, even worse, a speech and took a sentence or so out of context, and they have decided they are entitled to make a sweeping judgment about her judicial fitness based on a few words taken out of context.

I think just about everything in a nominee's professional record is fair game to consider. After all, we are obligated to determine whether to confirm someone to an incredibly important position with lifetime tenure. That is a constitutional duty I take very seriously. But that said, when people get upset about a few items and a few speeches a judge has given, I have to wonder, do a few statements someone made in public, for which they said they could have used different words, do those trump 17 years of modest, reasoned, careful judicial decisionmaking? I don't think so.

If we want to know what kind of a Justice she will be, isn't our best evidence to look at the type of judge she has already been? Here are the facts. As a trial judge, Sonia Sotomayor presided over roughly 450 cases on the Second Circuit and participated in more than 3,000 panel decisions. She has authored more than 200 appellate opinions. In cases where she and at least one Republican-appointed judge sat on a three-judge panel, she and the Republican-appointed judge agreed 95 percent of the time, as I mentioned. The Supreme Court has only reviewed five cases where she authored the decision and affirmed the decision below in two of them. The vast majority of her cases have not been in any way overturned or reversed by a higher court.

It is worth noting that this nominee, if confirmed, would bring more Federal judicial experience to the Supreme Court than any Justice in 100 years.

With that, I see one of my colleagues, the Senator from New Hampshire. We will have a number of women Senators here today. I will come back and finish my remarks sometime in the next half hour. I think it is very important that Senator SHAHEEN, the Senator from New Hampshire, be able to say a few words about the nominee.

I yield the floor.

The PRESIDING OFFICER (Mr. BURRIS). The Senator from New Hampshire is recognized.

Mrs. SHAHEEN. Mr. President, I am delighted to be here this afternoon to join my friend and colleague from the State of Minnesota, Senator KLOBUCHAR, in supporting the nomination of Judge Sonia Sotomayor to be a Justice of the Supreme Court.

Everyone in New Hampshire was very proud 19 years ago when former President George Bush nominated New Hampshire's own David Souter as an Associate Justice of the Supreme Court. Every action Justice Souter has taken since he began service to our Nation's highest Court has only reinforced that pride. So when Justice Souter announced in early May that he intended to retire at the end of his term and return home to New Hampshire, I took particular interest in whom President Obama would select to fill David Souter's seat.

I believe the President has made a thoughtful and outstanding choice in nominating Judge Sonia Sotomayor.

Judge Sotomayor has had a distinguished career as a Federal judge. As has been widely noted, if confirmed, she would bring more Federal judicial experience to the Supreme Court than any Justice in 100 years. Today, David Souter is the only member of the Supreme Court with prior experience as a trial court judge. Sonia Sotomayor, too, would be the only Justice with experience as a trial court judge. I happen to agree with Senator KLOBUCHAR. I think it is important that at least one of the nine Supreme Court Justices have that experience. It is trial judges, after all, who day-in and day-out must apply the legal principles enunciated in Supreme Court opinions.

Judge Sotomayor also served 5 years as a local prosecutor and practiced law for 7 years as a trial attorney with a law firm. Judge Sotomayor, because of her experience, will be ever mindful of the need to provide those in the courtroom with clear and practical decisions. More important, she will understand how Supreme Court opinions affect real human beings.

As a trial judge, every day Judge Sotomayor directly faced innocent victims of crime, vicious perpetrators of crime, and occasionally the wrongfully accused. She directly faced injured parties seeking civil redress and civil defendants who may have made honest mistakes. She had to answer: What is the right verdict? What is the right length of incarceration? What is the right level of damages? These are not easy decisions. I know that because my husband was a State trial court judge for 16 years. Trial court judges must be able to live with the justice they mete out. To do it well, it takes more than an understanding of the law, it takes an understanding of people. Judge Sotomayor has a great understanding of both.

I had the pleasure of meeting with Sonia Sotomayor the day she fractured her ankle. I said to her as she came into my office: Boy, you are tough. She said: I grew up in the Bronx; we had to be tough. She handled that painful injury with grace and humor. She has a first-rate temperament and also a first-rate intellect. After growing up in a public housing project in the South Bronx, she excelled at both Princeton and Yale Law School.

I believe Judge Sonia Sotomayor is an excellent choice to replace David Souter as a Supreme Court Justice. She deserves a fair and a thorough hearing without delay. I look forward to that hearing.

I yield the floor.

The PRESIDING OFFICER. The Senator from Minnesota.

Ms. KLOBUCHAR. Mr. President, I thank my colleague, Senator SHAHEEN, for her remarks and for her reminiscence of meeting with the judge and once again the judge showing how she perseveres in the face of adversity.

I wish to talk a little bit more—I was ending my last comments talking about how, in fact, this nominee would bring more Federal judicial experience to the Supreme Court than any Justice

in 100 years. I had earlier noted my exchange with someone in an airport, where he wondered if she was worthy of this, if she was able to apply the facts, apply the law.

Clearly, when you look at this experience she brings and you compare it to any of these other nominees on the Supreme Court, she stands out. She stands out not only because of her unique background, as she overcame obstacles to get here, but she stands out as to her experience, all those years as a prosecutor, all those years as a Federal judge. That makes a difference.

I wish to address one other point that has been made about Judge Sonia Sotomayor in her capacity as a judge. It is something Senator SHAHEEN mentioned, this temperament issue. There have been some stories and comments, mostly anonymous, I note, that question Judge Sotomayor's judicial temperament. According to one news story about this topic, Judge Sotomayor developed a reputation for asking tough questions at oral arguments and for being sometimes brusque and curt with lawyers who were not prepared to answer them. So she was a little curt, one anonymous source said. Where I come from, asking tough questions and having very little patience for unprepared lawyers is the very definition of being a judge. I cannot tell you how many times I have seen judges get very impatient with lawyers who were not prepared and who did not know the answer to a question. As a lawyer, you owe it to the bench and to your clients to be as well prepared as you possibly can be.

As Nina Totenberg said on National Public Radio, if Sonia Sotomayor sometimes dominates oral arguments at her court, if she is feisty, even pushy, then she would fit right in on the U.S. Supreme Court.

I would add this to that comment. Surely, we have come to a time in this country where we can confirm as many gruff, to-the-point female judges as we have confirmed gruff, to-the-point male judges. Think how far we have come with this nominee.

When Sandra Day O'Connor graduated from law school 50-plus years ago, the only offer she received from a law firm was for a position as a legal secretary. She had this great background, a very impressive background, and yet the only offer she received was as a legal secretary.

Judge Ginsburg, who now sits on the Court, faced similar obstacles. When she entered Harvard in the 1950s, she was only 1 of 9 women in a class of more than 500. One professor actually asked her to justify taking a place that would have gone to a man in that class in Harvard. Mr. President, 9 women, 500 spots, and someone actually asked her to justify the fact that she was there. I suppose she could justify it now, saying she is now on the U.S. Supreme Court. Later Justice Ginsburg was passed over for a prestigious clerkship despite her impressive credentials.

Looking at Judge Sotomayor's long record as a lawyer, a prosecutor, and a judge, you can see we have come a long way.

She was confirmed by this Senate for the district court. She was nominated at that point by the first President Bush.

She was confirmed by this Senate for the Second Circuit, and she now faces a confirmation hearing before our Judiciary Committee and confirmation, again, for a position with the U.S. Supreme Court.

I will tell you this, after learning about Judge Sotomayor, her background, her legal career, her judicial record, similar to so many of my colleagues, I am very impressed. To use President Obama's words, I hope Judge Sotomayor will bring to her nomination hearing and to the Supreme Court, if she is confirmed, not only the knowledge and the experience acquired over the course of a brilliant legal career but the wisdom accumulated from an inspiring life's journey.

Actually today, Justice O'Connor was on the ''Today Show.'' She was asked about her work on the Court and what it was like. She was actually asked about Judge Sotomayor. She was asked: When you retired, you let it be known you would like a woman to replace you and you were sort of disappointed when a woman didn't replace you. So what is your reaction to Judge Sotomayor's nomination?

Justice O'Connor said: Of course, I am pleased that we will have another woman on the Court. I do think it is important not to just have one. Our nearest neighbor, Canada, also has a court of nine members and in Canada there is a woman chief justice and there are four women all told on the Canadian court.

Then she was asked: Do you think there is a right number of women who should be on the Court?

Justice O'Connor, this morning, said: No, of course not.

But then she pointed out: But about half of law graduates today are women, and we have a tremendous number of qualified women in the country who are serving as lawyers and they ought to be represented on the Court.

She was also asked later in the interview about opponents of Judge Sotomayor who have brought up this term ''activist judge.''

She was asked: I know that is a term you have railed against in the past. What is it about the term that you object to?

She answered: I don't think the public understands what is meant by it. It is thrown around by many in the political field, and I think that probably for most users of the term, they are distinguishing between the role of a legislator and a judge, and they say a judge should not legislate. The problem, of course, Justice O'Connor says, is at the appellate level, the Supreme Court is at the top of the appellate level. Rulings of the Court do become binding law. So it is a little hard to talk in terms of who is an activist.

I, again, ask people to look at Judge Sotomayor's opinions. When I talked with her about this, she talked about how she uses a set formula, laying out the facts, laying out the law, showing how the law applies to the facts, and then reaching a decision.

We can also look at her record where, in fact, when she was on a three-judge panel with two other judges, when you look at her record of what she agreed with judges who had been appointed by a Republican President, 95 percent of the time they reached the same decision. So unless you believe those Republican-appointed judges are somehow activist judges, then I guess you would say she is an activist judge. But I think when you look at her whole record, you see someone who is moderate, sometimes coming down on one side and sometimes coming down on another.

I can tell you, as a former prosecutor, I did not always just look at whether I agreed with the judge if I was trying to figure out if someone would be a good judge. I would look at whether they applied the laws to the facts, whether they were fair. Sometimes our prosecutor's office would not agree with a judge's decision. We would argue vehemently for a different decision. In the end, when we evaluated these judges, when we decided whether we thought they were a fair person to have on a case, we looked at that whole experience, we looked at that whole experience to make a decision about whether this was a judge who could be fair.

That is what I think when you look at her record—and I am looking very much to her hearing, where we are going to explore a number of these cases—again, colleagues on one side of the aisle will agree with one case or disagree with another, and the other side of the aisle would have made a decision one way or the other.

You have to look at her record as a whole. When you look at her record, you will see someone of experience, someone thoughtful, someone who makes a decision based on the facts and based on the law.

I am very much looking forward to these hearings. I know that some of my colleagues are coming to the Chamber as we speak. I am looking forward to their arrival as we become, as I said, ambassadors of truth to get these facts out as so many things have been bandied about in names and other things that get into people's heads. I think it important for all those watching C–SPAN right now and for all of those who are in the galleries today, that people take these facts away with them—the facts of her experience, that in over 100 years of judicial experience, when you look back 100 years, she has more experience on the bench than any of the Justices who were nominated. You have to go back 100 years to find someone with that much experience. You look at that work she has done as

a prosecutor, you look at the work she has done throughout her whole life, where she basically came from nothing, worked her way up, got into a good college, got into a good law school, did it on her own, with maybe a little help from her mom who bought the ''Encyclopedia Britannica.''

As I said at the beginning, this is a nominee who not only understands the law, understands the Constitution but also understands America.

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

Ms. KLOBUCHAR. Mr. President, I am pleased that my colleague from Louisiana, Senator LANDRIEU, who has spoken many times in the past about the importance of fair judges and strong judges, is here today to discuss this nominee.

The PRESIDING OFFICER. The Senator from Louisiana.

Ms. LANDRIEU. Mr. President, I thank my colleague for her passionate remarks about this particular nominee. I am happy to join many of my colleagues in supporting a woman I consider to be an extraordinarily accomplished woman, and I commend President Obama for his selection.

As the Senate Judiciary Committee prepares for its confirmation hearing, I wished to come to the floor to express my strong support for this nominee. As we all know, the Supreme Court serves as the highest tribunal in the Nation. As the final arbitrator of our laws, the Supreme Court Justices are charged with ensuring the American people achieve the promise of equal justice under our law and serving as interpreters of our Constitution. It is a very important charge.

It is our duty as Senators to ensure that the members of this High Court, which we are asked to confirm, serve as impartial, fairminded Justices who apply our laws, not merely their ideology. The American people deserve no less.

A number of my colleagues have expressed concerns regarding this nominee. Those are not concerns I share. Having reviewed her resume, her academic credentials, having reviewed her time on the bench on the Second Circuit, as well as in a trial capacity, she has an expansive judicial record, and I think that provides evidence of the kind of Justice she will be on the Supreme Court.

She has been described as a ''fearless and effective prosecutor.'' She has served for 6 years as a trial judge in New York, as I said, on the Federal district court, and 11 years on the circuit court of appeals. So she has been in the courtroom on both sides of the bench representing a variety of clients, and she has written extensively. I think that record reflects the kind of balance, fairminded, intellectual rigor we are looking for.

Talking about Democratic and Republican Parties, she has been appointed by both a Democratic administration and a Republican administration. So clearly there were some things that were seen in her and her service by President George Bush as well as President Bill Clinton.

She has participated in over 3,000 decisions. She has written over 400 signed opinions on the Second Circuit. If confirmed, Judge Sotomayor would bring more Federal judicial experience to the Supreme Court than any Justice in 100 years. That is a very strong and powerful statement, and I think a compelling statement, to the Members of this body.

I had, as many of us have, the opportunity to meet with Judge Sotomayor in my office earlier this month. In addition to having an impressive professional resume, her personal journey as a young woman from a struggling, very middle-class background from the Bronx also captured my attention. She came up the hard way, with a lot of hard knocks but with a loving and supportive family around her to lead her and guide her. Tutors and teachers saw in this young girl a tremendous amount of promise and potential, and she has most certainly lived up to the promise her mother and grandmother and others saw in her at a young age.

I believe she is the kind of person who will bring not only extraordinary intellect and character and credibility but a tremendous breadth of experience that will be very helpful in dealing with the issues the Court has before it today and will in the near future. She has not only been a champion in many ways, but her life has been an inspiration to all Americans, proving that with determination and hard work anything is possible.

Finally, it goes without saying that she is a historic choice that will bring a wealth of experience and added diversity to the Nation's highest Court. When confirmed, she will become only the third woman to serve on the Nation's highest court and the first Hispanic Justice in the history of the United States. This is truly a remarkable turning point. I wish she could receive, because of her outstanding resume—not just because of her gender and background and culture. I believe her resume should garner the support of a broad range of Members of this body. Hopefully, that is the way it will come out in the final vote. She most certainly, from my review, deserves our support, and I look forward to doing what I can to process her nomination as it is debated by the full Senate.

I thank my colleague from Minnesota, and I yield the floor.

The PRESIDING OFFICER. The Senator from Minnesota.

Ms. KLOBUCHAR. I thank my colleague Senator LANDRIEU for her very kind and thoughtful remarks about the nominee.

We are now joined by the Senator from Missouri, Senator MCCASKILL, who as a former prosecutor I am sure will shed some light on the subject.

I also thank the Senator from Kansas for allowing us to take an additional 5 minutes.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Missouri.

Mrs. MCCASKILL. Mr. President, I thank my friend, the Senator from Minnesota, for helping to get us organized this afternoon to spend a little time talking about an outstanding Federal judge.

I also thank my colleague from Kansas for giving us a few minutes to make these remarks.

I will confess that I wasn't familiar with Judge Sotomayor before she was nominated. I started looking at her resume, and there are so many things in her resume that are, frankly, amazing that you can get distracted by—where she went to school, where she got her law degree, and the fact that she has been at several levels of the Federal bench; and also, of course, that she had a very big job with complex litigation in a law firm. But the part of her resume that spoke to me was her time as an assistant district attorney in New York.

I don't know that most Americans truly understand the difference between a State prosecuting attorney and a Federal prosecuting attorney. Those of us who have spent time in the State courtrooms like to explain that we are the ones who answer the 911 calls. When you are a State prosecutor, you don't get to pick which cases you try. You try all of the cases. When you are a State prosecutor, you don't have the luxury of a large investigative staff or maybe a very light caseload. It would be unheard of for a Federal prosecutor to have a caseload of 100 felonies at any given time, but that is the caseload Judge Sotomayor handled as an assistant district attorney during her time in the District Attorney's Office in New York.

When she came to the prosecutor's office, ironically it was almost exactly the same year I came to the prosecutor's office as a young woman out of law school. I was in Kansas City; she was in New York. I know what the environment is in these prosecutors' offices. There are a lot of aggressive type A personalities, and it is very difficult to begin to handle serious felony cases because everybody wants to handle the serious felony cases. In only 6 months, Judge Sotomayor was promoted to handle serious felony cases in the courtroom. She prosecuted every type of crime imaginable, including the most serious crimes that are committed in our country.

She had many famous cases. One was the Tarzan murderer, where she joined

law enforcement officers in scouring dangerous drug houses for evidence and witnesses. After a month of trial, she convicted Richard Maddicks on three different murders and he was sentenced to 67 years to life in prison.

A New York detective had a hard time finding a New York prosecutor willing to take his child pornography case. Judge Sotomayor stepped up, winning convictions against two men for distributing films depicting children engaged in pornographic activities. These were the first child pornography convictions after the Supreme Court had upheld New York's law that barred the sale of sexually explicit films using children.

After her time as a prosecutor, she eventually became a trial judge. A trial judge is an unusual kind of experience for a Supreme Court Justice. But keep in mind what the Supreme Court Justices do: They look at the record of the trial. They are trying to pass on matters of law that emanate from the courtroom. What a wonderful nominee we have, one who has not only stood at the bar as a prosecutor but also sat on the bench ruling on matters of evidence, ruling on matters of law. I am proud of the fact that she has this experience. If she is confirmed, or when she is confirmed, she will be the only Supreme Court Justice with that trial judge experience, because she is replacing the only Supreme Court Justice with that experience—Judge Souter.

This is a meat-and-potatoes moderate judge. This is a judge who has agreed with Republicans on her panels 95 percent of the time. This is a judge who has the kind of experience that will allow her to make knowing and wise decisions on the most important matters that come in front of our courts in this country.

We have a ''gotcha'' mentality around here. We all engage in it at one time or another. It is gotcha, gotcha, gotcha. It is an outgrowth of the political system of this grand and glorious democracy we all participate in. It is not my favorite part, but it is real. Justice Sotomayor will become a Supreme Court Justice, after having gone through a gotcha process. We are going to hear a lot of gotchas over the coming weeks. But at the end of the day, this is a smart, proud woman who has fought her way through a system against tremendous odds to show that she has integrity, grit, intellect, and the ability to pass judgment in the most difficult intellectual challenges that face a Supreme Court Justice.

I am proud to support her nomination, and I look forward to the day—and I am confident that the day will come—she will take her place on the highest Court in the land.

Mr. President, I again thank the Senator from Kansas for his indulgence, and I yield the floor.

The PRESIDING OFFICER. The Senator from Minnesota.

Ms. KLOBUCHAR. Mr. President, again I thank the Senator from Kansas, and also Senator MCCASKILL, Senator SHAHEEN, and Senator LANDRIEU, who spoke today. I also know that Senators GILLIBRAND, FEINSTEIN, MIKULSKI, BOXER, and MURRAY will be speaking, or may have already and will be in the next few weeks on this nominee, as will many of my colleagues.

I appreciate this time, Mr. President. We are very excited about this upcoming hearing, and we are glad to be here as ambassadors for the truth.

I yield the floor.

The PRESIDING OFFICER. The Senator from Kansas.

Mr. BROWNBACK. Mr. President, I believe under a previous agreement I have time allotted at the present time; is that correct, if I could inquire of the Chair.

The PRESIDING OFFICER. The Senator may be recognized under cloture.

Mr. BROWNBACK. Mr. President, I rise today to discuss the nomination of Judge Sonia Sotomayor to the U.S. Supreme Court. I had the opportunity to meet with Judge Sotomayor 2 weeks ago. I was in the Senate when she was previously before this body on the Second Circuit Court nomination, and I appreciated the chance to meet with her recently.

I have also appreciated the chance to review her record in depth and also to hear my colleagues speak about Judge Sotomayor, because it represents the distinction that I think is very important to note here. My colleague from Missouri just spoke, and she was talking about the wonderful qualifications of Judge Sotomayor and the candidate's background and experiences that she brings. She has a very interesting, a very American story to tell of her background. It is a compelling story. She is the daughter of immigrants who overcame diversity to go to two of the Nation's best universities. I admire that, and I admire the things they pointed out in their presentation of her background and what she has done. I think those are all admirable characteristics.

But what we are doing here is picking somebody to be on the U.S. Supreme Court, and what their judicial philosophy is that they will take with them. It isn't all just about the background or the experience. It is about the judicial philosophy that comes forward, and that is what my colleagues didn't discuss. So that is what I want to discuss here this afternoon.

I have had the chance to review Judge Sotomayor's records. In 1998, the Senate voted to promote Judge Sotomayor to the appellate court. I voted against her at that time because I was concerned not about her background, not about her qualifications, but I was concerned that she embraced an activist judicial philosophy. That is what I want to talk about today, because that is what we are deciding when we put somebody on the Supreme Court—what is the judicial philosophy this person carries with them.

It is not necessarily about their own background or their qualifications. Those are important to review, but at the heart is what is the judicial philosophy. Is this a person who supports an activist judiciary getting into many areas in which the American public doesn't think they should go into or is it a person who believes in more of a strict constructionist view, that the Court is there to be an umpire and not an active player in policy development? Are they an umpire who calls the balls and strikes, and not how do we do law; how do we rewrite what is here?

I think the Court loses its lustre when it gets into becoming an active player in policy development instead of being a strict umpire of policy development. Unfortunately, what I saw in Judge Sotomayor in 1998 was somebody who embraced an activist judicial philosophy. During a 1996 speech at Suffolk University Law School 2 years before the Senate voted on her nomination to the Second Circuit, Judge Sotomayor said:

> The law that lawyers practice and judges declare is not a definitive capital ''L'' law that many would like to think exists.

Translated, that is to say the law is not set. It is mobile, as moved by judges, not by legislatures. This is not the rule of law. This is the rule from the bench. This is the rule of man, and it makes our law unpredictable. That is not good for a society like ours which is based on the rule of law, not the rule by a person.

Any nominee to the Federal bench, and especially to the U.S. Supreme Court, must have a proper understanding and respect for the role of the Court—for the role they would assume. The Court must faithfully hold to the text of the Constitution and the intent of the Founders, not try to rewrite it based on ever changing cultural views. This is at the heart of what a judge does.

Democracy, I believe, is wounded when Justices on the high Court, who are unelected, invent constitutional rights and alter the balance of governmental powers in ways that find no support in the text, the structure, or the history of the Constitution. Unfortunately, in recent years, the courts have assumed a more aggressive political role. In many cases, the courts have allowed the left in this country to achieve through court mandates what it cannot persuade the people to enact through the legislative process. The Constitution contemplates that the Federal courts will exercise limited jurisdiction. They should neither write nor execute the law.

This is very basic in our law and goes back to the very Founders. As Chief Justice John Marshall said in his famous 1803 case, Marbury v. Madison, that every law student has studied at length, the role of the court is simple. It is to ''say what the law is.'' It is not to write the law. It is not to rewrite the law. It is to ''say what the law is,'' what did the legislature pass, when it needs interpretation. It is not about

writing it. It is not about the mobility, that the law isn't with a capital ''l,'' and we can move it here based on these factors that we think are different with the cultural environment and we may have to move it over here in 10 years because the environment has changed and the law changes with it.

If the law changes, it is by legislatures. It is not by the court. That is why Marbury v. Madison said the law is to ''say what the law is,'' not to rewrite it.

In Federalist 78, Alexander Hamilton wrote this—law students study this as well:

> Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatsoever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

The court is to have judgment. A judge is to have judgment, not write the law.

In Hamilton's view, judges could be trusted with power because they would not resolve divisive social issues—that is for the legislature to do—short-circuit the political process, or invent rights which have no basis in the text of the Constitution.

I have long believed the judicial branch preserves its legitimacy with the public and has its strength with the public through refraining from action on political questions. This concept was perhaps best expressed by Justice Felix Frankfurter, a steadfast Democrat appointed by President Franklin Delano Roosevelt. Justice Frankfurter said this:

> Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures. Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress.

That is to quote Justice Frankfurter.

I recall a private meeting I had with then-Judge Roberts, before assuming the position of Chief Justice, when he had been nominated to be Chief Justice—a wonderful Justice on the Supreme Court who then-Senator Obama voted against. Senator Obama voted against the confirmation of John Roberts, voted against the confirmation of Samuel Alito to the Supreme Court based, I believe, primarily on judicial philosophy because they believed in strict constructionism; that a court was to be a court and not a legislative body. Then-Senator Obama voted against both John Roberts and against Samuel Alito.

In my meeting with Judge Roberts, he talked about baseball and about the courts and his analogy to baseball. He gave a great analogy, I thought, when he said:

> It is a bad thing when the umpire is the most watched person on the field.

Imagine that, watching a baseball game and the thing you are watching the most is the umpire because the umpire is both umpire and a player. How confusing, how difficult, and what a wrong way to have a game. He, of course, Judge Roberts, was alluding to the current situation in American governance where the legislature can pass a law, the executive sign it, but everybody waits, holding their breath to see what the courts will do with it.

Unfortunately, Judge Sotomayor seems to me far too interested in being both an umpire and active player. Prior to becoming a Federal judge, Sonia Sotomayor spent more than a decade on the board of directors of the Puerto Rican Legal Defense and Education Fund. A September 25, 1992, article in the New York Times referred to Judge Sotomayor as ''a top policy maker'' on the group's board.

In 1998, the group brought suit against the New York City Police Department, claiming that a promotion exam was discriminatory because the results gave a disproportionate number of promotions to White police officers. As a judge on the appellate court, Judge Sotomayor was involved in a nearly identical case, Ricci v. Destefano, involving a group of White firefighters seeking promotion in New Haven, CT. City officials in New Haven decided to void the results of the exam because it had a disparate impact on minorities. Judge Sotomayor agreed with the city's decision, and we are now waiting on a ruling from the Supreme Court.

> Sotomayor's work as an activist challenging the New York Police Department's test results in 1998 is evidence that she may have allowed personal biases to guide her decision to rule against New Haven firefighters. I hope we can find out more in her confirmation interviews and in her hearings. But I am also troubled by the number of amicus briefs filed by the fund in support of what are radical positions on pro-abortion issues during the time Sotomayor was on this same board.

Six briefs were filed taking positions outside of the mainstream in support of abortion rights in prominent cases such as in Webster v. Reproductive Health Services or in Ohio v. Akron Center for Reproductive Health. In that Ohio v. Akron case, the Court upheld Ohio's parental consent laws. These are laws that say, before a minor can have an abortion, they must have parental consent.

Joining the majority opinion were moderate Justice Sandra Day O'Connor and liberal Justice John Paul Stevens. Yet the group that Judge Sotomayor was associated with filed a brief opposing this parental notification law, saying ''any efforts to overturn or in any way to restrict the rights in Roe v. Wade,'' they opposed any restriction, even allowing parents of a minor child to have parental notification that their child was going to go through this major medical procedure. She took a stand opposed to that parental right that most of the American public, 75 percent of the American public supports; that parental right of that notification. She opposed it.

According to the New York Times:

> The board monitored all litigation undertaken by the fund's lawyers, and a number of those lawyers said Ms. Sotomayor was an involved and ardent supporter of their various legal efforts during her time with the group.

I am also deeply concerned that Judge Sotomayor will bring this radical agenda to the Court.

Judge Sotomayor has given speeches and written articles promoting judicial activism. The President who appointed her said judges should have ''the empathy to recognize what it's like to be a young teenage mom; the empathy to understand what it is like to be poor or African-American or gay or disabled or old,'' and that difficult cases should be decided by ''what is in the Justice's heart.''

While I think it is admirable to have empathy, a Justice and a person who sits on the bench is to decide this based on the law. That is what they are to decide it upon, not an interpretation or rewriting of the law.

The President's view of the role of a Judge on the Court is not shared by Justices Marshall or Frankfurter, nor is it the view of Hamilton and the drafters of the Constitution.

The oath that all Supreme Court Justices take says:

> I will administer justice without respect to persons, and do equal right to the poor and to the rich.

That is the oath they take. The Justice is to be blind and just to hear the case and decide it based on the facts and what the law is and say what the law says, not what they wish it to be nor what is in their heart. It is to be blind and it is to hold these and to weigh these equally and fairly to determine the truth and to determine the outcome in the case.

The President is asking his nominees to ignore, in essence, their oath. I fear Justice Sotomayor is all too eager to comply.

In her writings, Judge Sotomayor has rejected the principle of impartiality and embraces a rather novel idea that a Judge's personal life story should come into play in the courtroom. In a 2001 speech at the UC Berkeley Law School, which was later published, Judge Sotomayor dismissed the

idea that ''judges may transcend their personal sympathies and prejudices and aspire to achieve a greater degree of fairness and integrity based on the reason of law,'' by saying that ''ignoring our differences as women or men of color we do a disservice both to the law and society.''

I am not sure why Judge Sotomayor believes the law is somehow different when interpreted by people of a different gender, but I think Judge Sotomayor is absolutely wrong and we do a disservice to law and society when we don't transcend our personal sympathies and prejudices and base our decisions upon the facts and the law.

Judge Sotomayor's view is contrary to the words engraved upon the Supreme Court's entrance which state ''equal justice under law.''

In the same 2001 speech, Judge Sotomayor made the following astonishing statement:

> Personal experiences affect the facts judges choose to see. . . . I simply do not know what the difference will be in my judging. But I accept there will be some.

When Judge Sotomayor says that ''personal experiences affect the facts judges choose to see,'' does that mean she is willing to ignore other facts? Is justice blind or is it actually interpreting and seeing which facts to pick and which facts not to pick?

The role of judges is to examine all the facts of a particular case, not solely the facts that deliver a desired outcome or solely the facts that the judge can relate to based on his or her personal biography. It is dangerous for this body to consent to elevating a judge who believes that justice equates with picking winners and losers based upon his or her own personal biases. That is not judging.

I hope my colleagues understand this 2001 speech at Berkeley was not an isolated incident. In a 1994 speech, Judge Sotomayor used language nearly identical to that of the 2001 speech, saying judges should not ignore their differences as women and people of color and to do so would be a disservice to the law and society. In 1994, Judge Sotomayor discussed the impact that more women on the bench will have on the ''development of the law.''

''Development,'' like this is about the writing of the law. If that is the case, that is done by the Congress not by the courts. Judges do not make law, and under no circumstances should they be under the impression they do.

Judge Sotomayor sees judges as lawmakers, as both umpire and player. In the 2005 appearance at Duke Law School, she said: ''The court of appeals is where policy is made.''

I wonder how Alexander Hamilton would respond. I think he would wholly disagree with that interpretation. Unfortunately, Judge Sotomayor's writings and statements lead me to believe that she is a proponent, a clear proponent, of an activist judiciary. I cannot support her nomination. I will vote no when it comes before the full Senate.

I ask unanimous consent that her speech in the Berkeley La Raza Law Journal be printed in the RECORD.

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

[From the Berkeley La Raza Law Journal, 2002]

RAISING THE BAR: LATINO AND LATINA PRESENCE IN THE JUDICIARY AND THE STRUGGLE FOR REPRESENTATION

Judge Reynoso, thank you for that lovely introduction. I am humbled to be speaking behind a man who has contributed so much to the Hispanic community. I am also grateful to have such kind words said about me.

I am delighted to be here. It is nice to escape my hometown for just a little bit. It is also nice to say hello to old friends who are in the audience, to rekindle contact with old acquaintances and to make new friends among those of you in the audience. It is particularly heart warming to me to be attending a conference to which I was invited by a Latina law school friend, Rachel Moran, who is now an accomplished and widely respected legal scholar. I warn Latinos in this room: Latinas are making a lot of progress in the old-boy network.

I am also deeply honored to have been asked to deliver the annual Judge Mario G. Olmos lecture. I am joining a remarkable group of prior speakers who have given this lecture. I hope what I speak about today continues to promote the legacy of that man whose commitment to public service and abiding dedication to promoting equality and justice for all people inspired this memorial lecture and the conference that will follow. I thank Judge Olmos' widow Mary Louise's family, her son and the judge's many friends for hosting me. And for the privilege you have bestowed on me in honoring the memory of a very special person. If I and the many people of this conference can accomplish a fraction of what Judge Olmos did in his short but extraordinary life we and our respective communities will be infinitely better.

I intend tonight to touch upon the themes that this conference will be discussing this weekend and to talk to you about my Latina identity, where it came from, and the influence I perceive it has on my presence on the bench.

Who am I. I am a ''Newyorkrican.'' For those of you on the West Coast who do not know what that term means: I am a born and bred New Yorker of Puerto Rican-born parents who came to the states during World War II.

Like many other immigrants to this great land, my parents came because of poverty and to attempt to find and secure a better life for themselves and the family that they hoped to have. They largely succeeded. For that, my brother and I are very grateful. The story of that success is what made me and what makes me the Latina that I am. The Latina side of my identity was forged and closely nurtured by my family through our shared experiences and traditions.

For me, a very special part of my being Latina is the mucho platos de arroz, gandoles y pernir—rice, beans and pork—that I have eaten at countless family holidays and special events. My Latina identity also includes, because of my particularly adventurous taste buds, morcilla,—pig intestines, patitas de cerdo con garbanzo—pigs' feet with beans, and la lengua y orejas de cuchifrito, pigs' tongue and ears. I bet the Mexican-Americans in this room are thinking that Puerto Ricans have unusual food tastes. Some of us, like me, do. Part of my Latina identity is the sound of merengue at all our family parties and the heart wrenching Spanish love songs that we enjoy. It is the memory of Saturday afternoon at the movies with my aunt and cousins watching Cantinflas, who is not Puerto Rican, but who was an icon Spanish comedian on par with Abbot and Costello of my generation. My Latina soul was nourished as I visited and played at my grandmother's house with my cousins and extended family. They were my friends as I grew up. Being a Latina child was watching the adults playing dominos on Saturday night and us kids playing lotería, bingo, with my grandmother calling out the numbers which we marked on our cards with chick peas.

Now, does any one of these things make me a Latina? Obviously not because each of our Carribean and Latin American communities has their own unique food and different traditions at the holidays. I only learned about tacos in college from my Mexican-American roommate. Being a Latina in America also does not mean speaking Spanish. I happen to speak it fairly well. But my brother, only three years younger, like too many of us educated here, barely speaks it. Most of us born and bred here, speak it very poorly.

If I had pursued my career in my undergraduate history major, I would likely. provide you with a very academic description of what being a Latino or Latina means. For example, I could define Latinos as those peoples and cultures populated or colonized by Spain who maintained or adopted Spanish or Spanish Creole as their language of communication. You can tell that I have been very well educated. That antiseptic description however, does not really explain the appeal of morcilla—pig's intestine—to an American born child. It does not provide an adequate explanation of why individuals like us, many of whom are born in this completely different American culture, still identify so strongly with those communities in which our parents were born and raised.

America has a deeply confused image of itself that is in perpetual tension. We are a nation that takes pride in our ethnic diversity, recognizing its importance in shaping our society and in adding richness to its existence. Yet, we simultaneously insist that we can and must function and live in a race and color-blind way that ignore these very differences that in other contexts we laud. That tension between ''the melting pot and the salad bowl''—a recently popular metaphor used to described New York's diversity—is being hotly debated today in national discussions about affirmative action. Many of us struggle with this tension and attempt to maintain and promote our cultural and ethnic identities in a society that is often ambivalent about how to deal with its differences. In this time of great debate we must remember that it is not political struggles that create a Latino or Latina identity. I became a Latina by the way I love and the way I live my life. My family showed me by their example how wonderful and vibrant life is and how wonderful and magical it is to have a Latina soul. They taught me to love being a Puerto Riqueña and to love America and value its lesson that great things could be achieved if one works hard for it. But achieving success here is no easy accomplishment for Latinos or Latinas, and although that struggle did not and does not create a Latina identity, it does inspire how I live my life.

I was born in the year 1954. That year was the fateful year in which Brown v. Board of Education was decided. When I was eight, in 1961, the first Latino, the wonderful Judge Reynaldo Garza, was appointed to the federal bench, an event we are celebrating at this conference. When I finished law school in 1979, there were no women judges on the Supreme Court or on the highest court of my

home state, New York. There was then only one Afro-American Supreme Court Justice and then and now no Latino or Latina justices on our highest court. Now in the last twenty plus years of my professional life, I have seen a quantum leap in the representation of women and Latinos in the legal profession and particularly in the judiciary. In addition to the appointment of the first female United States Attorney General, Janet Reno, we have seen the appointment of two female justices to the Supreme Court and two female justices to the New York Court of Appeals, the highest court of my home state. One of those judges is the Chief Judge and the other is a Puerto Riqueña, like I am. As of today, women sit on the highest courts of almost all of the states and of the territories, including Puerto Rico. One Supreme Court, that of Minnesota, had a majority of women justices for a period of time.

As of September 1, 2001, the federal judiciary consisting of Supreme, Circuit and District Court Judges was about 22% women. In 1992, nearly ten years ago, when I was first appointed a District Court Judge, the percentage of women in the total federal judiciary was only 13%. Now, the growth of Latino representation is somewhat less favorable. As of today we have, as I noted earlier, no Supreme Court justices, and we have only 10 out of 147 active Circuit Court judges and 30 out of 587 active district court judges. Those numbers are grossly below our proportion of the population. As recently as 1965, however, the federal bench had only three women serving and only one Latino judge. So changes are happening, although in some areas, very slowly. These figures and appointments are heartwarming. Nevertheless, much still remains to happen.

Let us not forget that between the appointments of Justice Sandra Day O'Connor in 1981 and Justice Ginsburg in 1992, eleven years passed. Similarly, between Justice Kaye's initial appointment as an Associate Judge to the New York Court of Appeals in 1983, and Justice Ciparick's appointment in 1993, ten years elapsed. Almost nine years later, we are waiting for a third appointment of a woman to both the Supreme Court and the New York Court of Appeals and of a second minority, male or female, preferably Hispanic, to the Supreme Court. In 1992 when I joined the bench, there were still two out of 13 circuit courts and about 53 out of 92 district courts in which no women sat. At the beginning of September of 2001, there are women sitting in all 13 circuit courts. The First, Fifth, Eighth and Federal Circuits each have only one female judge, however, out of a combined total number of 48 judges. There are still nearly 37 district courts with no women judges at all. For women of color the statistics are more sobering. As of September 20, 1998, of the then 195 circuit court judges only two were African-American women and two Hispanic women. Of the 641 district court judges only twelve were African-American women and eleven Hispanic women. African-American women comprise only 1.56% of the federal judiciary and Hispanic-American women comprise only 1%. No African-American, male or female, sits today on the Fourth or Federal circuits. And no Hispanics, male or female, sit on the Fourth, Sixth, Seventh, Eighth, District of Columbia or Federal Circuits.

Sort of shocking, isn't it. This is the year 2002. We have a long way to go. Unfortunately, there are some very deep storm warnings we must keep in mind. In at least the last five years the majority of nominated judges the Senate delayed more than one year before confirming or never confirming were women or minorities. I need not remind this audience that Judge Paez of your home Circuit, the Ninth Circuit, has had the dubious distinction of having had his confirmation delayed the longest in Senate history. These figures demonstrate that there is a real and continuing need for Latino and Latina organizations and community groups throughout the country to exist and to continue their efforts of promoting women and men of all colors in their pursuit for equality in the judicial system.

This weekend's conference, illustrated by its name, is bound to examine issues that I hope will identify the efforts and solutions that will assist our communities. The focus of my speech tonight, however, is not about the struggle to get us where we are and where we need to go but instead to discuss with you what it all will mean to have more women and people of color on the bench. The statistics I have been talking about provide a base from which to discuss a question which one of my former colleagues on the Southern District bench, Judge Miriam Cederbaum, raised when speaking about women on the federal bench. Her question was: What do the history and statistics mean. In her speech, Judge Cederbaum expressed her belief that the number of women and by direct inference people of color on the bench, was still statistically insignificant and that therefore we could not draw valid scientific conclusions from the acts of so few people over such a short period of time. Yet, we do have women and people of color in more significant numbers on the bench and no one can or should ignore pondering what that will mean or not mean in the development of the law. Now, I cannot and do not claim this issue as personally my own. In recent years there has been an explosion of research and writing in this area. On one of the panels tomorrow, you will hear the Latino perspective in this debate.

For those of you interested in the gender perspective on this issue, I commend to you a wonderful compilation of articles published on the subject in Vol. 77 of the Judicature, the Journal of the American Judicature Society of November–December 1993. It is on Westlaw/Lexis and I assume the students and academics in this room can find it.

Now Judge Cedarbaum expresses concern with any analysis of women and presumably again people of color on the bench, which begins and presumably ends with the conclusion that women or minorities are different from men generally. She sees danger in presuming that judging should be gender or anything else based. She rightly points out that the perception of the differences between men and women is what led to many paternalistic laws and to the denial to women of the right to vote because we were described then ''as not capable of reasoning or thinking logically'' but instead of ''acting intuitively.'' I am quoting adjectives that were bandied around famously during the suffragettes' movement.

While recognizing the potential effect of individual experiences on perception, Judge Cedarbaum nevertheless believes that judges must transcend their personal sympathies and prejudices and aspire to achieve a greater degree of fairness and integrity based on the reason of law. Although I agree with and attempt to work toward Judge Cedarbaum's aspiration, I wonder whether achieving that goal is possible in all or even in most cases. And I wonder whether by ignoring our differences as women or men of color we do a disservice both to the law and society. Whatever the reasons why we may have different perspectives, either as some theorists suggest because of our cultural experiences or as others postulate because we have basic differences in logic and reasoning, are in many respects a small part of a larger practical question we as women and minority judges in society in general must address. I accept the thesis of a law school classmate, Professor Steven Carter of Yale Law School, in his affirmative action book that in any group of human beings there is a diversity of opinion because there is both a diversity of experiences and of thought. Thus, as noted by another Yale Law School Professor—I did graduate from there and I am not really biased except that they seem to be doing a lot of writing in that area—Professor Judith Resnik says that there is not a single voice of feminism, not a feminist approach but many who are exploring the possible ways of being that are distinct from those structured in a world dominated by the power and words of men. Thus, feminist theories of judging are in the midst of creation and are not and perhaps will never aspire to be as solidified as the established legal doctrines of judging can sometimes appear to be.

That same point can be made with respect to people of color. No one person, judge or nominee will speak in a female or people of color voice. I need not remind you that Justice Clarence Thomas represents a part but not the whole of African-American thought on many subjects. Yet, because I accept the proposition that, as Judge Resnik describes it, ''to judge is an exercise of power'' and because as, another former law school classmate, Professor Martha Minnow of Harvard Law School, states ''there is no objective stance but only a series of perspectives—no neutrality, no escape from choice in judging,'' I further accept that our experiences as women and people of color affect our decisions. The aspiration to impartiality is just that—it's an aspiration because it denies the fact that we are by our experiences making different choices than others. Not all women or people of color, in all or some circumstances or indeed in any particular case or circumstance but enough people of color in enough cases, will make a difference in the process of judging. The Minnesota Supreme Court has given an example of this. As reported by Judge Patricia Wald formerly of the D.C. Circuit Court, three women on the Minnesota Court with two men dissenting agreed to grant a protective order against a father's visitation rights when the father abused his child. The Judicature Journal has at least two excellent studies on how women on the courts of appeal and state supreme courts have tended to vote more often than their male counterpart to uphold women's claims in sex discrimination cases and criminal defendants' claims in search and seizure cases. As recognized by legal scholars, whatever the reason, not one woman or person of color in any one position but as a group we will have an effect on the development of the law and on judging.

In our private conversations, Judge Cedarbaum has pointed out to me that seminal decisions in race and sex discrimination cases have come from Supreme Courts composed exclusively of white males. I agree that this is significant but I also choose to emphasize that the people who argued those cases before the Supreme Court which changed the legal landscape ultimately were largely people of color and women. I recall that Justice Thurgood Marshall, Judge Connie Baker Motley, the first black woman appointed to the federal bench, and others of the NAACP argued Brown v. Board of Education. Similarly, Justice Ginsburg, with other women attorneys, was instrumental in advocating and convincing the Court that equality of work required equality in terms and conditions of employment.

Whether born from experience or inherent physiological or cultural differences, a possibility I abhor less or discount less than my colleague Judge Cedarbaum, our gender and national origins may and will make a difference in our judging. Justice O'Connor has

often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. I am not so sure Justice O'Connor is the author of that line since Professor Resnik attributes that line to Supreme Court Justice Coyle. I am also not so sure that I agree with the statement. First, as Professor Martha Minnow has noted, there can never be a universal definition of wise. Second, I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.

Let us not forget that wise men like Oliver Wendell Holmes and Justice Cardozo voted on cases which upheld both sex and race discrimination in our society. Until 1972, no Supreme Court case ever upheld the claim of a woman in a gender discrimination case. I, like Professor Carter, believe that we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. Many are so capable. As Judge Cedarbaum pointed out to me, nine white men on the Supreme Court in the past have done so on many occasions and on many issues including Brown.

However, to understand takes time and effort, something that not all people are willing to give. For others, their experiences limit their ability to understand the experiences of others. Others simply do not care. Hence, one must accept the proposition that a difference there will be by the presence of women and people of color on the bench. Personal experiences affect the facts that judges choose to see. My hope is that I will take the good from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.

I also hope that by raising the question today of what difference having more Latinos and Latinas on the bench will make will start your own evaluation. For people of color and women lawyers, what does and should being an ethnic minority mean in your lawyering? For men lawyers, what areas in your experiences and attitudes do you need to work on to make you capable of reaching those great moments of enlightenment which other men in different circumstances have been able to reach. For all of us, how do change the facts that in every task force study of gender and race bias in the courts, women and people of color, lawyers and judges alike, report in significantly higher percentages than white men that their gender and race has shaped their careers, from hiring, retention to promotion and that a statistically significant number of women and minority lawyers and judges, both alike, have experienced bias in the courtroom?

Each day on the bench I learn something new about the judicial process and about being a professional Latina woman in a world that sometimes looks at me with suspicion. I am reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent that my limited abilities and capabilities permit me, that I reevaluate them and change as circumstances and cases before me requires. I can and do aspire to be greater than the sum total of my experiences but I accept my limitations. I willingly accept that we who judge must not deny the differences resulting from experience and heritage but attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies and prejudices are appropriate.

There is always a danger embedded in relative morality, but since judging is a series of choices that we must make, that I am forced to make, I hope that I can make them by informing myself on the questions I must not avoid asking and continuously pondering. We, I mean all of us in this room, must continue individually and in voices united in organizations that have supported this conference, to think about these questions and to figure out how we go about creating the opportunity for there to be more women and people of color on the bench so we can finally have statistically significant numbers to measure the differences we will and are making.

I am delighted to have been here tonight and extend once again my deepest gratitude to all of you for listening and letting me share my reflections on being a Latina voice on the bench. Thank you.

Mr. BROWNBACK. 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. BROWN. 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. BROWN. Mr. President, I ask unanimous consent to speak as in morning business.

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

The Senator from Ohio is recognized.

Mr. BROWN. I thank the Chair.

(The remarks of Mr. BROWN pertaining to the introduction of S. 1343 are printed in today's RECORD under ''Statements on Introduced Bills and Joint Resolutions.'')

Mr. LUGAR. Mr. President, today the Senate considers the nomination of Harold Koh to be Legal Adviser to the Department of State. After reading his answers to dozens of questions, attending his hearing in its entirety, meeting with him privately, and reviewing his writings, I believe that Dean Koh is unquestionably qualified to assume the post for which he is nominated. He has had a distinguished career as a teacher and advocate, and he is regarded widely as one of our Nation's most accomplished experts on the theory and practice of international law. He also has served ably in our government as a Justice Department lawyer during the Reagan administration and as Assistant Secretary of State for Democracy, Human Rights, and Labor from 1998 to 2001.

The committee has received innumerable letters of support for the nominee attesting to his character, his love of country, and his respect for the law. He enjoys support from the lawyers with whom he has worked, as well as those including former Solicitor General Kenneth Starr—whom he has litigated against.

Both in private meetings and in public testimony, Dean Koh has affirmed that he understands the parameters of his role as State Department Legal Adviser. He understands that his role will be to provide policymakers objective advice on legal issues, not to be a campaigner for particular policy outcomes. He also has affirmed that as Legal Adviser, he will be prepared to defend the policies and interests of the U.S. Government, even when they may be at odds with positions he has taken in a private capacity. In applying laws relevant to the State Department's work, he has stated clearly that he will take account of and respect prior U.S. Government interpretations and practices under those laws, rather than considering each such issue as a matter of first impression.

Finally, I believe Dean Koh respects the role of the Senate and the Congress on international legal matters, especially treaties. He has promised to consult with us regularly and fully, not just when treaties come before the Senate, but also on the application of treaties on which the Senate has already provided advice and consent, including any proposed changes in the interpretation of such treaties.

Absent extraordinary circumstances, President Obama and Secretary of State Clinton should be able to choose the individuals on whom they will depend for legal analysis, interpretation, and advice. Given Dean Koh's record of service and accomplishment, his personal character, his understanding of his role as Legal Adviser, and his commitment to work closely with Congress, I support his nomination and believe he is well deserving of confirmation by the Senate.

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

The PRESIDING OFFICER (Mr. BENNET). Without objection, it is so ordered.

Mr. KAUFMAN. Mr. President, I ask unanimous consent to speak as in morning business for 18 minutes.

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

SHORT SELLING

Mr. KAUFMAN. Mr. President, I rise again to speak out about the problems in the financial markets caused by abusive short selling activities, which includes naked short selling and rumor mongering. It can also include abuse of the credit default market by planting false suggestions that an issuer's survival is in doubt. My focus today, however, is on the first element—naked short selling.

Let me be clear about my main point. The public believes and the SEC has yet to discount that the effects of abusive naked short selling practices helped cement the demise of Bear Stearns and Lehman Brothers, as well as made it significantly harder for banks to raise critical capital in the throes of this financial crisis. It is no exaggeration to say that abusive short

selling at a critical moment further endangered our financial system and economy and thereby help lead to taxpayer bailouts that have totaled hundreds of billions of dollars. We are still waiting for the SEC's enforcement response. It is likely we will continue to wait, as I will discuss, because current rules are ineffective and unenforceable.

There is still a critical need for better SEC regulations that would help the enforcement division to do its job and stop naked short selling that is abusive and manipulative dead in its tracks.

Yes the SEC in April proposed five versions of a return to the uptick rule, which I believe never should have been repealed in the first place, at least without putting something effective in its place. The uptick rule, which simply required stock traders to wait for an uptick in price before continuing to sell a stock short, was in effect for 70 years—that is 7–0 years—until it was repealed in June of 2007. The comment period for the reinstatement of some form of the prior uptick rule is complete, and it is disappointing, but not surprising, to see that many on Wall Street now oppose that modest step. I continue to urge the SEC to move forward on that front.

As I have consistently maintained in my communications with the SEC, however, reinstating some form of the uptick rule alone puts too narrow a frame on the problems associated with naked short selling. The problem at its root is that the current rules against naked short selling are both inadequate and impossible to enforce. A strict preborrow requirement would address the problem and end it once and for all. Yet the SEC still has done nothing to propose a preborrower rule. If we end up with no uptick rule and no preborrow requirement, the SEC will be bending to the will of an industry that has shown recklessness but clearly lacks remorse.

There is a fierce urgency to fix this problem. Today, the financial markets are teetering on the brink of either continuing with a bull market rally or falling back substantially in what would be the continuation of a severely painful bear market. If the markets of certain stocks fall back precipitously again and if the bear market raiders act again using abusive naked short selling practices to damage and possibly destroy the stocks of banks and other companies, the SEC will have a lot of explaining to do—unless we see responses from the agency in the near term.

I have been writing the SEC and talking about this issue on the Senate floor since March 3. It is now June 24, and the SEC has still done nothing. It is time for the SEC to act.

Let me review the history of this issue and the evidence.

Naked short selling occurs when a trader sells a financial instrument short without first borrowing it or even ensuring it can be borrowed. This converts our securities and capital markets into nothing more than gambling casinos since the naked seller purports to sell something he doesn't own, and may never own, in the expectation that prices of the instruments sold will decline before ever settling the trade. Because this activity requires no capital outlay, it also inspires naked short sellers to flood the market with false rumors to make the prediction a self-fulfilling one.

This practice often leads to fails to deliver. If the seller does not borrow the security in time to make delivery to the buyer within the standard 3-day settlement period, the seller ''fails to deliver.'' Sometimes fails to deliver can be caused by human or mechanical errors, but those types of fails are only a small portion of the actual number of fails to deliver our markets confront continually.

Selling what you do not own and have not borrowed gives a seller a free ride. It effectively says: Show me the money now and you will get your stock sometime in the future. By analogy, it is very much like giving access to the Super Bowl on the day of the game—in other words, giving someone a ticket to the Super Bowl on the day of the game—in return for a promise that the spectator will ultimately produce a ticket long after the big event has occurred.

It is well known that abusive short selling has been linked to the downfall of two major financial firms—Bear Stearns and Lehman Brothers.

According to Bloomberg News:

> Failed trades correlate with drops in share value, enough to account for 30 to 70 percent of the declines in Bear Stearns, Lehman, and other stocks last year.

Let me repeat that. ''Failed trades,'' according to Bloomberg News, ''correlate with drops in share value, enough to account for 30 to 70 percent of the declines in Bear Stearns, Lehman, and other stocks last year.''

The huge increase in naked short selling exacerbated the financial crisis. Listen to this. In January 2007, 550 million shares failed to deliver. By January 2008, 1.1 billion shares failed to deliver. And in July of 2008, 2 billion shares failed to deliver.

These fails to deliver drove stock value down further than the market would have done by diluting stock prices. According to Clinton Under Secretary of Commerce Robert Shapiro in his recent comprehensive study:

> Before Bear Stearns collapsed, its fails to deliver went from less than 100,000 to 14 million, significantly diluting the values of its stock.

As the Coalition Against Market Manipulation stated:

> Just as counterfeit currency dilutes and destroys value, these phantom shares deflate share prices by flooding the market with false supply.

For example, according to EuroMoney, on March 14, 2008, ''128 percent of Bear Stearns' outstanding stock was traded.'' Let me repeat that. On March 14, 2008, 128 percent of Bear Stearns outstanding stock was traded. How can more than 100 percent be traded? It can only occur because of the absence of required borrowers and naked short selling. Without a preborrow requirement, in 1 day, multiple locates allow the same single share of a stock to be sold over and over. And without effective rules or enforcement, millions of shares of stock are sold short and not delivered as required.

Lehman Brothers also faced a similar abnormal increase in fails to deliver before its collapse.

According to Bloomberg:

> As Lehman Brothers struggled to survive last year, as many as 32.8 million shares in the company were sold and not delivered to buyers on time. . . .That was more than a 57-fold increase over the prior year's peak of 567,518 failed trades . . .

Many banks that help to drive the U.S. economy are particularly at risk from abusive short selling practices due to the importance of investor confidence in maintaining their capital.

On September 19, 2008, the SEC implemented a temporary emergency order barring all short selling to protect 799 financial companies, which included many banks, because of the damage naked short selling had done in destroying their company and investor values. But barring all short selling is like throwing the baby out with the bathwater. Proper short selling provides the marketplace with greater liquidity and the prospect of meaningful price discovery.

Naked short selling practices led to market disequilibrium and the SEC recognizing that the only way to protect these companies from unnecessary devaluation was to implement a ban. Many of these companies later moved under the Troubled Assets Relief Program, TARP.

While new regulations issued by the SEC last fall were the first steps to protect companies, the SEC has not done nearly enough. If naked short selling is not policed and rules against market manipulation are not enforced effectively, naked short selling will continue to harm TARP banks and companies. If stronger regulations are not implemented, abusive short selling will impair the government's ability to invest taxpayer money into TARP banks and return them to health and thus limit the effects of the government's economic recovery plan.

The SEC began addressing these issues 10 years ago with a concept release that eventually became known as Regulation SHO, a set of rules that has been amended several times. But a price extracted by Regulation SHO was the elimination of the 70-year-old uptick test.

Reg SHO intended to curb naked short selling by requiring would-be short sellers to have merely a reasonable expectation they can deliver the stock when it must be delivered and imposing a post-trade requirement that would-be short sellers actually

preborrow securities for future trades only if too many fails have already occurred. This is somewhat akin to a ''one free bite at the apple'' approach, something regulators attempt to avoid. The reason is because, in practice, it turns out to be a ''free bite at the apple'' each time a manipulative trader switches brokers—something a manipulative trader can easily do with no penalty.

But this rule has proved effectively unenforceable according to former SEC Commissioner Roel Campos and others. Current SEC regulations allow traders to short a stock if the trader ''reasonably believes that it can locate and borrow the security by the settlement day.''

Reasonableness includes merely glancing at a list of easy to borrow stocks, with no need to continue to locate even if the list is faulty. Let me repeat. Reasonableness includes merely glancing at a list of easy to borrow stocks, with no need to continue to locate even if this list is faulty. That rule, the mother of all loopholes, is much too vague to have any real effect. Any trader who passed Finance 101 could provide proof that he or she ''reasonably believed'' the shorted stocks could be located. In fact, the provision of a false locate is beneficial for generating commissions on the trade.

Ultimately, many commentators and I believe the SEC cannot bring cases against the gravest violators of this rule, because it does not have the means to prove intent. The rule is, in effect, unenforceable. The SEC has, in fact, not brought a single enforcement case for naked short selling. We must change the rules so the SEC Enforcement Division can do its job.

Even former SEC Chairman Christopher Cox said the SEC is:

. . . concerned that the persistent failures to deliver in the market for some securities may be due to loopholes in Regulation SHO.

It is too difficult to prove a trader's motives necessary for proving a fraud violation. I strongly believe the SEC needs to strengthen its rules, surveillance, and the enforcement regarding naked short selling to prevent market manipulation and loss of investor confidence.

Again, according to Robert Shapiro:

. . . there is considerable evidence that market manipulation through the use of naked short sales has been much more common than almost anyone has suspected, and certainly more widespread than most investors believe.

Furthermore, indicators the SEC typically uses to determine the effects of abusive short selling do not accurately reflect the extent of the problem. The so-called Threshold List provided by the SEC tracks sustained fails to deliver of over 10,000 shares, accounting for at least 5 percent of a company's outstanding shares.

According to Shapiro, this list does not capture the naked short sales that occur frequently that are under this threshold, and it does not capture the large volume of short interests that can spike during the 3-day settlement period. Nor does it capture any trades that occur outside of the Depository Trust and Clearing Corporation, so-called ex-clearing trades.

Let us look to other countries. Other countries have taken proper steps to make sure rules that prevent naked short selling are clear and easy to enforce. According to EuroMoney, naked short selling is:

. . . a situation specific to the U.S. markets.

Alan Cameron, head of clearing, settlement and custody client solutions at BNP Paribas Securities Services in London, says he has seen little to indicate similar instances of fails to deliver in Europe. Some European countries such as Spain impose strict fines on failures to deliver. It's not an issue here in Europe.

Therefore, I strongly believe that the SEC must adopt new policies in order to protect the damage to investor confidence and, yes, the damage to our economic recovery that is being caused by naked short selling.

Today, along with Senators ISAKSON and TESTER, and Representative CAROLYN MALONEY, who cochairs the Joint Economic Committee, I wrote to SEC Chairman Mary Schapiro on this subject. Our letter urged that the Commission establish a pilot program to study whether a strict preborrow agreement would work effectively to end the problem of naked short selling. Such a pilot program would lead to the collection of data about stock lending and borrowing and the costs and benefits of imposing a preborrow requirement on all short sales.

Recently, Senators LEVIN, GRASSLEY, and SPECTER, in connection with the release of a General Accountability Office study analyzing recent SEC actions to curb abusive short selling, called for the SEC to consider imposing a strict preborrow requirement on short sales as the best way to end abusive short selling.

I strongly agree. As I have said, a preborrow requirement would address the problem at its most fundamental level and it should be urgently considered by the SEC as it rethinks its regulations and enforcement approach in this area.

Moreover, the system by which stocks currently are loaned and borrowed can and should be greatly improved, improving efficiency and producing cost savings. For example, centralized systems for loaning and borrowing stocks might better enable the SEC to impose fair rules on stock loans and borrowers in connection with short sales as well as enhance the SEC's ability to provide regulatory oversight to prevent naked short selling.

As one commentator has written in EuroMoney in December 2008, the:

. . . SEC knows it has to introduce the preborrow rule if it wants to eliminate fails to deliver for good. As long as there are companies on the Regulation SHO list, then the problem is not being solved. The only sustainable solution to making naked short-selling is a rule requiring both pre-borrow and a hard delivery. . . . for Bear Stearns: only a pre-borrow could put a brake on the naked short-selling.

I urge the SEC to invite a balanced group of commentators, including members of the investing public, to air these issues publicly as it continues efforts to draft and promulgate additional rules to end abusive short selling.

I know there are critics of a preborrow requirement who claim it would limit liquidity. This is not so, and there is no meaningful evidence to support this argument. Indeed, the recent study by Robert Shapiro disproves the claim. Other knowledgable sources, such as Harvey Pitt, former SEC Chairman and founder of LendEQS, an electronic stock loan transaction firm, believe the opposite would occur, because lending would increase.

In Hong Kong, the imposition of a preborrow requirement has been quite successful. Hong Kong implemented the preborrow rule after the Asian financial crisis of 1997 to 1998, when its markets collapsed. In late 2008, while the United States saw an exponential increase in fails to deliver, Hong Kong avoided large spikes in short sales almost completely. Other countries, such as Australia and many other EU members, have also successfully maintained preborrow requirements for years. The United States must urgently address the issue of abusive short selling. If we want to protect our markets, investors, and companies from caustic manipulation, we need better rules.

In closing, I urge the SEC to act decisively, both by following through and reimposing the substance of the prior uptick rule and through a pilot program to study the effects of a strict preborrow requirement. It is way past time to put an end to naked short selling, once and for all.

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

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

MORNING BUSINESS

Mr. REID. I ask unanimous consent we proceed to a period of morning business with Senators permitted to speak therein for up to 10 minutes each.

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

15TH ANNIVERSARY OF THE PROGRESSIVE LEADERSHIP ALLIANCE OF NEVADA

Mr. REID. Mr. President, I rise to call to the attention of the Senate the 15th anniversary celebration of the Progressive Leadership Alliance of Nevada, also known as PLAN. PLAN is a