Mr. LEMIEUX. I again call for the fact that every skimmer in the world that is available should be welcomed by this government. They should be steaming toward the Gulf of Mexico, and we should be doing everything we can to make sure we are cleaning up this oil before it gets on our beaches, before it gets into our estuaries and our coastal waterways. It is beyond belief we are not doing more. It is beyond belief this administration has no sense of urgency about stopping the oil from coming ashore.

I ask, Mr. President—and I will continue to come every day to the floor to ask the question—where are the skimmers? Where is the help? Where are the domestic skimmers? Why aren't we doing the job we should for the American people to protect our beaches, our waterways, and our estuaries?

Thank you, Mr. President.

The PRESIDING OFFICER. The Senator from Texas.

Mr. CORNYN. Mr. President, I see our distinguished colleague from Pennsylvania on the Senate floor, and I know he expects to speak for a little more extended time. He has graciously allowed me to go first.

NOMINATION OF ELENA KAGAN

Mr. CORNYN. Mr. President, I rise to speak briefly on the nomination of Elena Kagan to the U.S. Supreme Court. Of course, this vacancy is being left by the retirement of Justice John Paul Stevens.

The President has the constitutional prerogative to nominate whosoever he chooses, but it is important to recognize the Constitution does not stop there. It also provides a second constitutional obligation or responsibility, in this case upon the Senate, when it comes to the duty of advice and consent.

We know there are only nine Justices on the U.S. Supreme Court and that each has that job for life. It goes without saying—or it should, I would add—that the process in the Senate must be fair and dignified. I wish I could tell you it has always been that way, but I believe the confirmation process of Judge Sotomayor to the U.S. Supreme Court was conducted in that way, and I certainly believe so will this confirmation process as well. But in addition to being fair and dignified, it must also be careful, thorough, and comprehensive.

Our job is particularly difficult because of the fact that Solicitor General Kagan has never been a judge. She is a blank slate in that regard. We do not have any prior opinions to study. While that is not unprecedented, it is somewhat unusual for someone to come to the U.S. Supreme Court without ever having served as a judge. In addition, we know General Kagan has practiced law only very briefly. She was an entry level lawyer in a Washington law firm for about 2 years and then, of course, last year she was chosen by the President to be Solicitor General at the Justice Department. But that brief experience tells us virtually nothing about how she would approach cases as a member of the U.S. Supreme Court.

What we do know about Elena Kagan begins, and largely ends, with her resume. We know the jobs she has held. We know the positions she has occupied and the employers she has chosen to work for. A review of her resume shows us two things. First, Ms. Kagan is very smart. Her academic records are impressive. Second, we know Ms. Kagan has been a political strategist for a quarter of a century, but she has never been a judge. We know she has served extensively and repeatedly as a political operative, adviser, and a policymaker—quite a different job than that she would assume should she be confirmed.

We know General Kagan's political causes date back to at least college, when she volunteered to help a Senate candidate in her native State of New York.

We know that after law school, she worked for two of the most activist Federal judges in the 20th century, Abner Mikva and Thurgood Marshall. Justice Marshall often described his judicial philosophy as ''do what you think is right.'' I wish he had mentioned something about applying the law, but he said to do whatever you think is right. Elena Kagan has called Justice Marshall her judicial hero.

We know that Solicitor General Kagan volunteered for a time in the Michael Dukakis campaign for President in 1988, where she did opposition research.

We know that a few years later, Ms. Kagan advised then-Senator JOE BIDEN during the nomination of Ruth Bader Ginsburg.

We know General Kagan gave up her teaching job to work at the Clinton White House where she was a leading policy adviser on many of the hot button issues of the day. She was a deputy assistant to the President on domestic policy. She was a deputy director of the Domestic Policy Council. During that time, she was a leading policy adviser on a number of controversial issues regarding abortion, gun rights, and affirmative action.

After she left the Clinton White House, Ms. Kagan's political skills helped her become dean of the Harvard Law School and, by all accounts, she was successful in that job as an administrator and as a fundraiser. The one clear legal position she took as dean was her position against military recruiters that the Supreme Court rejected 9 to 0.

Solicitor General Kagan returned to government a year ago when she became Solicitor General following the election of her friend Barack Obama.

Ms. Kagan's resume shows that she is very comfortable in the world of politics and political campaigns. She has worked hard as a policy and political strategist in some very intense political environments. As a policy and political adviser, her record indicates she has been successful.

The question raised by this nomination, though, is whether Elena Kagan can step outside of her past role as political adviser and policy strategist in order to become a Federal judge. I have had the honor of being a State court judge and I know firsthand that being a judge is much different from being a political strategist. The job of a political strategist is to help enact policies. The job of a judge is to apply the law wherever it takes them.

The goal of a political adviser is to try to win for your team. On the other hand, a good judge doesn't root for or fight for a team but, rather, is impartial or, as sometimes stated, is disinterested in results, in winners and in losers.

The important question is whether Solicitor General Kagan can and will set aside her considerable skills as a political adviser to take on a very different job as a neutral judge. Will she apply the law fairly, regardless of the politics involved? Will Solicitor General Kagan appreciate the traditionally narrow role of a judge who must apply the law rather than the activist role of a judge who thinks it is proper to make up the law? Can she make the transition from political strategist to judge?

The hearings on Ms. Kagan's nomination are 1 week from today. I hope the hearings will be a substantive and meaningful opportunity for Elena Kagan to explain how she plans to make that shift from political strategist to judge. Because she has never been a judge, the hearings will be a chance to learn about what she expects her judicial philosophy and approach will be.

Every candidate for the Supreme Court has the burden of proof to show they are qualified to serve on the Supreme Court. Most nominees have a much longer record, including a record of judicial service, which could help satisfy that burden of proof, but not so in Ms. Kagan's case. Given Ms. Kagan's sparse record, however, the hearings themselves must be particularly substantive.

In 1995, then-Professor Kagan gave advice in a Law Review article to the U.S. Senate on how to scrutinize a Supreme Court nominee. She wrote that the ''critical inquiry'' must be ''the perspective [the nominee] would add'' and ''the direction in which she would move the institution.''

I agree. Given Solicitor General Kagan's sparse record and her lack of judicial experience, it is important that the hearings be an opportunity to fill in the blank slate that is Elena Kagan.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

SEPARATION OF POWERS

Mr. SPECTER. Mr. President, I have sought recognition to again alert my

colleagues to what I consider to be a very important matter, and that is that the Supreme Court of the United States is materially changing the traditional separation of powers and that, as a result, the Congress of the United States continues to lose very substantial power in the Federal scheme under the Constitution of the United States. This is a theme I have submitted over the course of the last 30 years, since 1981, with the confirmation proceedings of Justice Sandra Day O'Connor. And in now the 12th proceeding that I will personally have participated in, I raise this issue again to urge my colleagues to take a stand.

The only opportunity we have to influence the process is through the confirmation of Supreme Court Justices. But we have witnessed a series of cases where instead of the traditional doctrine of separation of power, there has been a very material concentration of power which has gone principally through the Court and secondarily to the executive branch.

The Framers put the Congress under Article I. It was thought at the time the Constitution was adopted that Congress would be the foremost branch representing the people. The executive branch is Article II, and the judiciary branch is Article III. Were the Constitution to be written today, I think we would find the course inverted. But what we have seen here is that recent decisions of the Supreme Court have abrogated the traditional deference given by the judicial branch to findings of fact and the determination of public policy arising from what Congress finds in its extensive legislative hearings, with the Court substituting its judgment with a variety of judicial doctrines. During the confirmation process where we examine the nominees, we continue to receive lip service about congressional authority but, once confirmed, we find that the nominees have a very different attitude and engage in very substantial jolts to the constitutional law in effect.

The generalized standard for what would be the basis for upholding an act of Congress was articulated by Justice Harlan in Maryland v. Wirtz in 1968 interpreting the commerce clause, saying:

> Where we find that the legislation as a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.

That is the general legislative standard which had been adopted by the Court in reviewing acts of Congress until the case of City of Boerne v. Flores in 1997. There, the Supreme Court adopted a new standard. They articulated it as congruence and proportionality, with the Supreme Court of the United States reviewing the act of Congress to decide whether it was congruent and proportional to what the Congress sought to achieve, and that entailed an analysis of the record, giving very little deference to what Congress had found.

On its face, the standard of congruence and proportionality suggests that the Court can come out anywhere it chooses. That was the view of a very strong dissent by Justice Scalia in a subsequent case, where he said:

> The congruence and proportionality standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking.

So that when you take a standard of that sort and undercut the traditional deference to congressional fact-finding, you end up with the Court making law instead of interpreting law. Under that decision, we have seen a whole torrent of Supreme Court decisions declaring acts of Congress unconstitutional. Illustrative are the Morrison case, involving the Violence Against Women Act, the Garrett case under the Americans With Disabilities Act, and repeatedly the issue was undercut.

As a result, in the confirmation hearings, many of us—this Senator included—sought to establish an understanding of a nominee's approach to giving the deference to congressional findings. Illustratively—and I have spoken on this subject before—Chief Justice Roberts and Justice Alito used all the right language, but when we find the application of the language, they have done a reverse course. Justice Roberts spoke eloquently about the need for modesty and for the Court not to jolt the system, but to follow stare decisis. With respect to fact-finding, this is what Chief Justice Roberts had to say in his confirmation hearing:

> I appreciate very much the differences in institutional competence between the judiciary and the Congress when it comes to basic questions of fact finding, development of a record, and also the authority to make the policy decisions about how to act on the basis of a particular record. It's not just disagreement over a record. It's a question of whose job it is to make a determination based on the record. . . . [A]s a judge, you may be beginning to transgress into the area of making a law . . . when you are in a position of re-evaluating legislative findings, because that doesn't look like a judicial function.

So there you have a very flat statement by the nominee saying that it is not the Court's role to transgress into the area of lawmaking, which is what does happen in reevaluating legislative findings.

Justice Alito said about the same thing. This is his testimony in his confirmation hearing:

> I think that the judiciary should have great respect for findings of fact that are made by Congress. The judiciary is not equipped at all to make findings about what is going on in the real world—not these sort of legislative findings. And Congress, of course, is in the best position to do that. Congress can have hearings and examine complex social issues, receive statistical data, hear testimony from experts, analyze that and synthesize that, and reduce that to findings. And when Congress makes findings on questions that have a bearing on the constitutionality of legislation, I think they are entitled to great respect.

The decision in Citizens United found the Court reversing recent decisions in the Austin and McConnell cases. Instead of giving the deference to the congressional findings, which was articulated by Chief Justice Roberts and Justice Alito, they did an about-face.

In raising this consideration, I do not challenge the good faith of Chief Justice Roberts or Justice Alito. I recognize and acknowledge the difference between testifying in a confirmation hearing and what happens during the course of a decision when deciding a specific case in controversy. But when we take a look at what happened in Citizens United—and again, this is a matter of the illustration—we have the enormous record that was created by the Congress in enacting McCain-Feingold and the findings of fact there to support what the Congress did, which was invalidated by the Supreme Court of the United States in Citizens United, which upset 100 years of precedent in allowing corporations to engage in political advertising.

The scope and detail of the congressional findings were outlined by Justice Stevens in his dissenting opinion in Citizens United. The statement of facts by Justice Stevens on commenting on the record is not a matter of disagreeing on opinions. People are entitled to their own opinions but not to their own facts, as has been reiterated so frequently. This is what Justice Stevens noted on the congressional fact-finding:

> Congress crafted in the McCain-Feingold legislation ''in response to a virtual mountain of research on the corruption that previous legislation failed to avert.'' The Court now negates Congress's efforts without a shred of evidence on how section 203 or its State law counterparts have been affecting any entity other than Citizens United.

Justice Stevens said this to emphasize not only that the Court's holding ran counter to outstanding congressional judgment but also ''the common sense of the American people,'' who have recognized a need to prevent corruption from undermining self governing since the founding and who have fought against the distinctive corrupting potential of corrupt electioneering since the days of Theodore Roosevelt.

Justice Stevens went on to point out that the record compiled in the context of the congressional legislation was more than 100,000 pages long. He noted that judicial deference is particularly warranted, whereas here we deal with the congressional judgment that has remained essentially unchanged throughout a century of legislative adjustment.

Now, as a result of what happened in Citizens United, we found that, illustratively, Chief Justice Roberts did substantially differently when on the Court in contrast with what he did in his confirmation hearing. In the confirmation hearing, Chief Justice Roberts did acknowledge that the act was a product of an ''extraordinarily extensive legislative record.''

''My reading of the Court's opinion,'' Chief Justice Roberts went on, ''is that

was the case where the Court's decision was driven in large part by the record that had been compiled by Congress. The determination there was based on the extensive record carrying a lot of weight with the justices.''

The matter was particularly problemsome. As Justice Stevens noted:

The Congress relied upon the decision of the Supreme Court in the Austin case.

Stevens noted that overruling Austin was especially significant because Congress had specifically relied on that decision in drafting the McCain-Feingold Act.

So essentially what you have here is relatively recent decisions by the Supreme Court of the United States in Austin and McConnell. You have a very extensive congressional record, which sets forth the factors about the need to avoid corrupt practices and electioneering brought about by money and, beyond the actual corrupt practices, the appearance of corruption, and the legislative effort to set this kind of a factual basis. And you have Justices in confirmation hearings committing to respecting and being deferential to congressional findings. But when the decision comes, 100 years of precedent is overturned. You don't have a modest decision; you have a decision which jolts the system.

It is a difficult matter where we proceed candidly as to where we go beyond getting the most positive assurances we can from the nominees. I suggest to my colleagues that when we begin the confirmation process with Solicitor General Kagan next week, this should be a focus of attention because what is happening is that the power of Congress is being diluted. If you have legislative findings that go for 100,000 pages and then you have Justices who have under oath said that they will give deference to congressional findings; you have Congress enacting the McCain-Feingold law based upon the standards set by the Supreme Court of the United States in the Austin case; you have the relatively recent precedents of Austin and McConnell, for instance, the Federal Election Commission; and then you have a case like Citizens United coming down, that ought to be a sharp focus of attention.

My sense is that the reality is that this body and our counterpart across the Rotunda pay relatively little attention to what the Supreme Court of the United States does. They have the final say. It is often noted that they are right only because they are final. When we have an opportunity, through the confirmation process, to focus on these issues, I suggest to my colleagues that it is high time we do so.

There is a second area where the authority of Congress has been very materially undermined. It has been where the Supreme Court of the United States declines to decide cases. We have a situation where the Court hears and decides relatively few cases. This is against the backdrop where, historically, the Supreme Court of the United States decided many more cases. Going back to 1886, the Supreme Court of the United States had on its docket 1,396 cases and decided 451 cases. In 1987, the Supreme Court issued 146 majority opinions. In 2006, less than 20 years later, the Supreme Court heard arguments in only 78 cases and handed down opinions in only 68 cases. A year later, 2007, the Supreme Court heard arguments in 75 cases and handed down opinions in only 67 cases. In 2008, arguments in 78 cases, decisions in 65 cases. This is in a context where Chief Justice Roberts testified in his confirmation hearing that he thought the Court ought to hear more cases.

In a letter I will submit for the RECORD, there is a detailing of the tremendous number of important circuit splits where the Supreme Court of the United States does not decide which circuit is correct or you have one circuit deciding a case one way or another circuit deciding a case another way, and then the situation arises in yet a third circuit, and there is no guiding precedent. There is confusion, and I suggest that the Court really has the duty to take up these circuit splits and make a definitive decision so that the law is clarified, so that litigants and lawyers can know where the law stands on a specific case. Stated simply and directly, the Court is not too busy to take up these circuit splits.

There are other major cases where the Court declines to hear cases, which I respectfully submit that the Court ought to hear. Illustrative of one of the major constitutional conflicts in the history of the United States has been the controversy over warrantless wiretaps. You have the Foreign Intelligence Surveillance Act of 1978, which in very emphatic terms says the exclusive way a wiretap may be obtained would be through a warrant, where the Federal investigative authorities filed an affidavit of probable cause with a Federal judge or a Federal magistrate, and only after that permission is granted may the wiretap be activated. That is to protect the very basis of privacy and the very strong interdiction of the Fourth Amendment to the U.S. Constitution, which prohibits unreasonable search and seizure.

It has been 5 years since it was disclosed that the executive branch, under the so-called Terrorist Surveillance Program, was undertaking warrantless wiretapping. The activity was being undertaken under the contention that the President had power as Commander-in-Chief, executive authority under Article II to disregard the act of Congress.

It is standard hornbook law. The Congress cannot legislate in violation of the Constitution. But if, in fact, the President of the United States, under certain circumstances, has the authority as Commander-in-Chief to engage in conduct, Congress may not proscribe it, may not eliminate it, may not limit the power of the President that the President has under constitutional authority.

But 5 years have passed and there has been no decision in the case. A Federal district court judge in Detroit declared the act unconstitutional. The case was appealed to the Court of Appeals for the Sixth Circuit, and in a 2-to-1 decision the court decided that there was no standing, which is a popular doctrine for declining to hear a case and ducking the issue.

I believe any fair analysis of the opinion of the court of the dissenting opinion gave much additional weight to the dissenters or, in any event, a very close question, one of paramount importance that ought to have been decided by the Sixth Circuit.

The case was then taken to the Supreme Court of the United States, which denied certiorari. Those issues are still very much in play.

In a case in the U.S. district court in San Francisco, Judge Vaughn Walker has declared the act unconstitutional. It is questionable whether that is a final ruling in the case. But the Supreme Court of the United States, with as many law clerks as they have—four and five each; many more than they have had in earlier days—and with the very light docket they have, there is no reason that a case such as the Terrorist Surveillance Program should not be adjudicated by the Supreme Court so we would know what the law was on that subject.

Another case which I have spoken about on the floor of the Senate involves the litigation brought by survivors of the September 11 attacks on the United States where some 3,000 people were killed. A lawsuit was begun to get damages from the Government of Saudi Arabia, from five Saudi princes, from a Saudi charitable organization which was an instrumentality of the government, and other defendants.

The Congress of the United States in the sovereign immunity law specifically decided that the sovereign should not have immunity in any case where there was a domestic tort involved, such as the conduct involved in 9/11.

The Court of Appeals for the Second Circuit decided the legislation did not apply because it applied only in situations where a nation had been declared a terrorist state. That exception is nowhere in the statute. It had no place in the decision.

When application was made for certiorari to have the case considered by the Supreme Court, the Solicitor General's Office, headed by Solicitor General Kagan, took the position that the Second Circuit was wrong but urged the Court not to take the case on the ground that there were important foreign policy questions involved. Solicitor General Kagan took the position that where no acts occurred within the United States, the Foreign Sovereign Immunities Act did not apply.

Again, this reading was pulled literally out of thin air. Nothing in legislative history or background would

suggest that the victims of 9/11 ought not have a case against the Government of Saudi Arabia and the princes and the charitable organization, an instrumentality of the state. Under those circumstances, no distinction between the acts occurred, but there was plenty of repercussion and plenty of consequence from that tortious conduct when America was attacked. Here the Supreme Court of the United States has denied to hear the case, which leaves the Congress subservient to the executive branch.

The business about being deferential to foreign powers, in my judgment, is not an adequate basis for disregarding the legitimate claims of the people who were killed on 9/11, not sufficient to disregard the congressional enactment which held that there ought not to be sovereign immunity where there is tortious conduct involved; that the doctrine of sovereign immunity ought to apply to commercial transactions but not to conduct such as was evidenced on 9/11.

Again, we have as an adjunct of what happens when the Court disregards congressional findings. You have the action of the Court in declining to hear cases such as the Terrorist Surveillance Program, such as the litigation brought by the survivors of the victims of 9/11 where the authority of Congress is materially undercut.

There has been other action taken by the Supreme Court of the United States. It is hard to pick the description which is sufficiently forceful, whether it is surprising or whether it is astounding. But litigation was brought in a case captioned McComish v. Bennett where the district court in Arizona held that Arizona's Citizens Clean Elections Act was unconstitutional.

In that case, the State of Arizona had decided to provide for matching funds in order to deal with the problems of campaign financing, trying to deal with the issues of corrupting influence of money, both the fact of corruption and the appearance of corruption.

I am not going to take the time now to go through the long list of cases where Members of Congress have been convicted of illegal campaign contributions which rose to the level of being a quid pro quo and a bribe. But the Federal district court in Arizona said the Arizona legislation, captioned the Citizens Clean Elections Act, was not supported by a compelling State interest, not narrowly tailored, and not the least restrictive alternative and, therefore, was unconstitutional under the First Amendment.

The Court of Appeals for the Ninth Circuit reversed saying there was an ample record to support the legislative enactment.

On June 1 of this year, 20 days ago, the Supreme Court of the United States denied an application to vacate the stay. The Court of Appeals for the Ninth Circuit had stayed the decision of the district court so that the Arizona elections could go forward pursuant to the Arizona Citizens Clean Elections Act.

When the Ninth Circuit heard the case, the Ninth Circuit issued a stay that stopped the carrying out of the district court decision on unconstitutionality so that the elections in Arizona this year could proceed under that act. The losing parties in the Ninth Circuit decision then applied to the Supreme Court to eliminate the stay so the district court opinion would remain in effect.

The Supreme Court, on June 1, denied the application to vacate the stay ''without prejudice to a renewed application if the parties represent that they intend to file a timely petition for a writ of certiorari.''

A week later, the Court reversed course and granted the application to vacate the stay on the district court's injunction ''pending filing and disposition of a petition for writ of certiorari.''

This is complex legalese, but what it does is reinstate the conclusion of the Federal district court in Arizona that the Arizona law is unconstitutional and may not be enforced.

It is a little hard to fathom how the Court can do that without even the filing of a petition for a writ of certiorari.

What we essentially have is the Supreme Court was deciding the Arizona case without the submission of a petition for a writ of certiorari, without following the rules of the Supreme Court for the filing of briefs, or without an argument before a decision was made. It has all the earmarks of a flagrant denial of due process of law.

It is true technically that the Supreme Court may reverse and remand and enter judgment as they choose. But in a contest where the procedures are established, in case after case the practice of the Court—you want to have the Supreme Court of the United States review a case? File a petition for writ of certiorari. Then you have to prepare a brief, then you appear before the Court for argument, and then the Court makes a determination, after hearing the case, what ought to be done.

Here we have the Arizona elections disrupted by a conclusion of the Supreme Court of the United States. It is not even a judgment. It is a reinstatement of a stay.

We have the Supreme Court of the United States today on issues of enormous importance—the election of Federal, State, and local officials, an Arizona law trying to deal in a sensible way with the problems of having candidates spend so much of their time on electioneering. A recent study showed those of us in Congress spent about 25 percent of our time on raising money. I think that is a fairly realistic estimate. I think I saw an affirmative nod from the Presiding Officer, the Senator from Virginia.

I would say that is not much off the mark from my own experiences. My first campaign cost less than $2 million, and the last campaign cost some $23 million. We all have offices away from our office so we comply with the law which prohibits us from making telephone calls to raise money or undertaking any of it on Federal property. It takes a lot of time.

We have a number of former Members of Congress who are in jail today across this land, and we have a lot of public skepticism about the influence of money on congressional decisions. We had eight Members of the House of Representatives in one of the Hill newspapers last week about an investigation of a House Ethics Committee where there was an appearance of some issue where votes were changed in the wake of campaign contributions.

Here we have the Supreme Court eliminating the Arizona law without even having a hearing in the case but reinstating the stay. That is a subject I intend to ask Nominee Kagan about next week.

I have submitted a series of letters to Solicitor General Kagan, one dated May 25, one dated June 15, and I am sending another one today, and I ask unanimous consent to have printed in the RECORD the full text of these letters.

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

U.S. SENATE,
Washington, DC, May 25, 2010.

Hon. ELENA KAGAN,
Solicitor General of the U.S.,
Washington, DC.

DEAR SOLICITOR GENERAL KAGAN: At our meeting on February 4, 2009, your confirmation for Solicitor General was pending before the Senate. We discussed, among other things, two cases that raise important questions about Executive-branch incursions on Congress's law-making powers with respect to the jurisdiction of the lower federal courts: Weiss v. Assicurazioni Generali, S.P.A. (hereafter Generali), 529 F.3d 113 (2d Cir. 2010), and In re Terrorist Attacks on September 11, 2001, 538 F.3d 71 (2d Cir. 2008), cert. denied, 129 S. Ct. 2859 (2009) (hereafter 9/11 Litigation). I write to notify you of the topics I intend to cover at your upcoming confirmation hearing with respect to these and related cases.

HOLOCAUST LITIGATION (GENERALI)

This litigation was brought by victims of the Holocaust and their heirs to recover on unpaid World War II-era insurance policies issued by an Italian insurance company. Just a few months ago, the United States Court of Appeals for the Second Circuit affirmed the dismissal of the plaintiffs' claims on the ground that they were preempted by an Executive-branch foreign policy favoring the resolution of such claims through an international commission. The Second Circuit did so in reliance on the Supreme Court's decision in American Insurance Association v. Garamendi, 539 U.S. 396 (2003). There the Court held that this policy, though not formalized in an executive agreement or treaty, preempted a state law requiring insurers to disclose information about certain Holocaust-era insurance policies. The Court relied on cases addressing the preemptive effect of executive agreements purporting to settle claims of private litigants in federal courts. A post-Garamendi development of

note is the Court's decision in Medellin v. Texas, 552 U.S. 491 (2008), where the Chief Justice suggested that the executive branch could settle claims by executive agreement only in the face of acquiescence by Congress.

I intend to ask you, among other questions:

(1) whether you understand the Supreme Court's case law to require a finding of Congressional acquiescence as a condition of giving preemptive effect to an executive agreement;

(2) whether you agree with Justice Ginsburg's dissenting opinion in Garamendi (joined by Justices Stevens, Scalia and Thomas) that an Executive-branch foreign policy not formalized in a treaty or an executive agreement cannot preempt state law; and

(3) what considerations you would bring to bear in deciding whether to vote to grant certiorari in this case, if confirmed. (My office has been advised that a petition for certiorari will be filed soon.)

9/11 LITIGATION

This litigation was brought by over 6,000 victims of the September 11 terrorist attacks against, among other defendants, the Kingdom of Saudi Arabia and five Saudi princes. The plaintiffs pleaded various claims arising from their allegation that the defendants financed the attacks. None of these defendants, though, ever had to defend the case on the merits. The United States Court of Appeals for the Second Circuit ruled that they were immune from suit under the Foreign Sovereign Immunities Act (FSIA). The plaintiffs petitioned the Supreme Court for certiorari. You filed a brief on behalf of the United States urging the Supreme Court to deny the petition. The New York Times reported that your filing came less than a week before President Obama's trip to the Middle East to meet with Saudi Arabia's King Abdullah. See Eric Lichtblau, ''Justice Department Backs Saudi Royal Family on 9/11 Lawsuit,'' New York Times, May 30, 2009. The Court denied the petition.

One of the two key questions in the petition was whether, as the Second Circuit had held, the FSIA addressed the immunity of the Saudi officials. There is, as you acknowledged in your brief, a circuit split on the question: Some circuits have concluded that the FSIA governs the immunity of foreign officials, as distinct from foreign states. Others have concluded that their immunity is governed by non-statutory principles articulated by the Executive branch. The United States argued that the split was not worthy of the Court's review because the ''disagreement appears to be of little practical consequence.'' In earlier cases, however, the United States argued repeatedly that the distinction is indeed of practical consequence in numerous respects. And you have since filed a brief on behalf of the United States in Samantar v. Yousuf (No. 08–1555) urging the Court to hold that the FSIA does not displace ''principles adopted by the Executive branch'' governing the immunity of foreign officials.

The second of the questions raised was whether the defendants could be sued under the FSIA's domestic tort exception. That exception permits suits against sovereigns arising from injuries ''occurring in the United States and caused by the tortuous act or omission of the foreign state.'' 28 U.S.C. 1605(a)(5). You argued in your brief that the exception did not apply.

I intend to ask you, among other questions:

(1) whether you would have voted to grant certiorari in the 9/11 Litigation had you been sitting on the Court;

(2) whether the United States may have placed diplomatic concerns above the rights of 9/11 victims in urging the Court not to grant certiorari;

(3) whether the FSIA governs all questions of sovereign immunity in the federal courts; and

(4) whether you believe that the FSIA's tort exception should have been interpreted to confer immunity on the defendants.

At our meeting on May 13, 2010, when we discussed your confirmation for the Supreme Court, we discussed, among other things, the constitutionality of the Terrorist Surveillance Program (TSP), which brought into sharp conflict Congress's authority under Article I to establish the 'exclusive means' for wiretaps under the Foreign Intelligence Surveillance Act with the President's authority under Article II as Commander-in-Chief to order warrantless wiretaps.

The TSP operated secretly from shortly after 9/11 until a New York Times article detailed the program in December 2005. In August 2006, the United States District Court for the Eastern District of Michigan found the program unconstitutional. In July 2007, the Sixth Circuit reversed 2–1, finding lack of standing. The Supreme Court then denied certiorari.

The dissenting opinion in the Sixth Circuit demonstrated the flexibility of the standing requirement to provide the basis for a decision on the merits. As Judge Gilman noted, ''the attorney-plaintiffs in the present case allege that the government is listening in on private person-to-person communications that are not open to the public. These are communications that any reasonable person would understand to be private.'' After analyzing the standing inquiry under a recent Supreme Court decision, Judge Gilman would have held that ''[the attorney-plaintiffs have thus identified concrete harms to themselves flowing from their reasonable fear that the TSP will intercept privileged communications between themselves and their clients.''

I intend to ask you, among other questions, whether you would have voted to grant certiorari in this case had you been on the Supreme Court.

Sincerely,

ARLEN SPECTER.

U.S. SENATE,
Washington, DC, June 15, 2010.

Hon. ELENA KAGAN,
Solicitor General of the United States, Washington, DC.

DEAR SOLICITOR GENERAL KAGAN: By letter dated May 25, 2010, I identified three subjects that I intend to cover at your confirmation hearing. I write to identify four additional subjects that I intend to cover.

The Supreme Court's workload

The Supreme Court's workload has steadily declined. In 1870, the Court decided 280 of the 636 cases on its docket; in 1880, 365 of the 1,202 cases on its docket; and in 1886, 451 of the 1,396 cases on its docket. In 1926, the year Congress gave the Court nearly complete control of its docket by passing the Judiciary Act of 1925, the Court issued 223 signed opinions. The Court's output has declined significantly ever since. In the first year of the Rehnquist Court, the Court issued 146 opinions; in its last year, it issued only 74.

Chief Justice Rehnquist's successor, John Roberts, testified during his confirmation hearing that the Court could and should take additional cases. But the Court has not done so. During the 2005 Term, it heard argument in 87 cases and issued 69 signed opinions; during the 2006 Term, it heard argument in 78 cases and issued 68 signed opinions; during the 2007 Term, it heard argument in 75 cases and issued 67 signed opinions; and during the 2008 Term, the Court heard argument in 78 cases and issued 75 signed opinions. The figures for the pending 2009 term will likely be in accord.

The Court continues to leave important issues unresolved. They include, as noted in my May 25 letter, the constitutionality of the Bush administration Terrorist Surveillance Program (TSP) and the contours of the Foreign Sovereign Immunity Act's domestic tort exception as applied to acts of terrorism.

Equally significant are unresolved circuit splits. Two prominent academic commentators note that the Roberts Court ''is unable to address even half'' of the circuit splits ''identified by litigants.'' Tracey E. George & Christopher Guthrie, Remaking the United States Supreme Court in the Courts' of Appeals Image, 58 Duke L.J. 1439, 1449 (2009). Questions on which the circuits have split include: May jurors consult the Bible during their deliberations in a criminal case and, if so, under what circumstances? Must a civil lawsuit predicated on a ''state secret'' be dismissed? When may a federal agency withhold information in response to a FOIA request or subpoena on the ground that it would disclose the agency's ''internal deliberations''? Do federal district courts have jurisdiction over petitions to expunge criminal records?

I intend to ask you, among other questions:

(1) Whether you agree with the Chief Justice Roberts's statement at his confirmation hearing that the ''Court could contribute more to clarity and uniformity of the law by taking more cases;''

(2) Whether the Court has the capacity to hear substantially more cases than it has in recent years;

(3) Whether you favor reducing the number of Justices required to grant petitions for certiorari in cases involving circuit splits or otherwise; and

(4) Whether, if you are confirmed, you will join the Court's cert. pool or follow the practice of Justice Stevens (and the Justice for whom you clerked, Justice Thurgood Marshall) in reviewing petitions for certiorari yourself with the assistance of your law clerks?

Deference to Congressional factfinding in reviewing the constitutionality of federal legislation

The constitutionality of federal legislation often turns on how much deference the Supreme Court gives to justificatory factual findings made by Congress. Recent nominees to the Court have emphasized that such findings are entitled to substantial deference. Chief Justice Roberts was especially emphatic on the point. He even testified that when a judge finds himself ''in a position of re-evaluating legislative findings,'' he or she ''may be beginning to transgress into an area of making law. . . .''

In too many cases during the last decade, however, the Court has disregarded Congressional findings of fact to an unprecedented degree. The most recent example was *Citizens United* v. *Federal Election Commission*, 130 S. Ct. 876 (2010), where in striking down the federal ban on independent campaign expenditures by corporations, the Court disregarded what Justice Stevens called in dissent a ''virtual mountain of evidence'' assembled by Congress establishing the corrupting influence of such contributions on the political process. And the Court did so, again in Justice Stevens' words, ''without a shred of evidence'' as to how the challenged provision ''have been affecting any entity'' other than the petitioner in the case.

The Court's disregard of Congressional factfinding has been especially pronounced in cases striking down laws enacted to remediate civil rights violations (whether under

the commerce clause or the Fourteenth Amendment to the Constitution). These included two cases about which I have questioned prior nominees to the Court: (1) *United States* v. *Morrison*, 529 U.S. 598 (2000), which struck the provision of the Violence Against Women Act providing a federal civil remedy for victims of sex-based violence, despite Congress's well-documented findings of relevant constitutional violations nationwide; and (2) *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), which struck the provision of the Americans With Disabilities Act prohibiting disability-based discrimination in employment by states, despite Congress's compilation (in the dissenter's words) of ''a vast legislative record,'' based on task force hearings attended by more than 30,000 people, ''documenting 'massive, society-wide discrimination' against persons with disabilities.'' As I noted in pre-confirmation-hearing letters to Chief Justice Roberts and Justice Sotomayor, the Court in Morrison even went out of its way to disparage Congress's fact-finding competency. Justice Souter noted in a dissent joined by three other Justices that the Court had departed from its longstanding practice of assessing no more than the ''rationality of the congressional [factual] conclusion[s].''

Chief Justice Roberts's statements during oral argument in *Northwest Austin Municipal District* v. *Holder*, 129 S. Ct. 2504 (2009), may portend even worse things to come. The case concerned the constitutionality of a key section of the Voting Rights Act that Congress extended (by a Senate vote of 98 to 0) for another 25 years during my chairmanship of the Judiciary Committee. Ultimately the Court avoided the constitutional question in Northwest Austin by deciding the case on narrow statutory grounds. But during oral argument, Chief Justice Roberts called into question the validity of Congress's legislative findings as to the need for the reauthorization. He said that, in extending the Act, ''Congress was sweeping far more broadly than they need to.''

I intend to ask you, among other questions, whether you think that the Court has been sufficiently deferential to Congressional factfinding and whether you would go about analyzing the sufficiency of the record underlying the reauthorization of the Voting Rights Act.

Television coverage of the Supreme Court

Although the public has the undisputed right to observe the Court's proceedings, few Americans have any meaningful opportunity to do so. Even those who are able to visit the Court are not likely to see an argument in full. There are not nearly enough seats. Most will be given just three minutes to watch before they are shuffled out to make room for others. In high-profile cases, most visitors will be denied even a three-minute seating. As Justice Stevens observed during an interview, ''literally thousands of people have stood in line for hours in order to attend an oral argument, only to be denied admission because the courtroom was filled.'' Those who wish to follow the Court's proceedings must content themselves with reading the voluminous transcripts or listening to audiotapes released at the end of the Court's term. (The Court regularly denies, without explanation, requests to release the audiotapes of oral argument on a same-day basis.) It should come as no surprise that, according to a recent poll taken by C–SPAN, nearly two-thirds of Americans favor television coverage of the Supreme Court's proceedings.

In April 2010, the Senate Committee favorably reported both my resolution (S. Res. 339) expressing the sense of the Senate that the Court should permit television coverage and my legislation (S. 446) requiring it to allow coverage. In the last two Congresses, the Committee favorably reported nearly identical legislation (S. 1768 in the 109th Congress and S. 344 in the 110th Congress) that I introduced.

Statements made by the current Justices indicate that a majority of them—Chief Justice Roberts, Justices Stevens, Ginsburg, Breyer, Alito, and Sotomayor—are favorably disposed toward allowing coverage or at least have an open mind on the matter. Justice Stevens, whom you would replace, has said that allowing cameras in the Supreme Court is ''worth a try.''

Your past statements suggest that you are a proponent of coverage. Soon after becoming Solicitor General, you told the Ninth Circuit Judicial Conference that ''if cameras were in the courtroom, the American public would see an extraordinary event. . . . When C–SPAN first came on, they put cameras in legislative chambers. And it was clear that nobody was there. I think if you put cameras in the courtroom, people would say, 'wow.' They would see their government working at a really high level—at a really high level. That is one argument for doing so.''

I intend to ask you whether, if confirmed, you will support television coverage and, if you will, whether you will try to persuade your reluctant colleagues to do likewise.

Constitutionality of regulation of campaign finance

In *Citizens United* v. *Federal Election Commission*, 130 S. Ct. 876 (2010), the Supreme Court held unconstitutional provisions of federal law prohibiting corporations and unions from making certain independent campaign expenditures in support of candidates for federal office, thereby putting corporations on the same footing as individuals (including citizens). Some organizations opposed to campaign-finance reform have heralded Citizens United as the beginning of the end of campaign finance regulation. The next step, according to the policy briefs of these organizations, is to challenge the prohibition on corporate campaign contributions and, in doing, attempt to eliminate the remaining case-law distinctions between the speech rights of individual natural persons and of corporations. Under existing federal law, corporations may not make campaign contributions. (They may do so only through tightly regulated PACs.) The Supreme Court has upheld this restriction against First Amendment challenge.

Some organizations have even advocated an end to limits on campaign contributions—as distinct from campaign-related expenditures—by individuals. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Supreme Court upheld limits on contributions by individuals, even as it struck down a provision of federal law prohibiting independent expenditures in support of candidates for office. The Court accepted Congress's finding that allowing ''large individual financial contributions'' threatens to corrupt the political process and undermine public confidence in it. Buckley's holding on this point has been well-settled law for nearly 35 years.

I intend to ask you, among other questions:

(1) Whether, under First Amendment law, there remains anything left of the distinction between contributions from a corporation and those from natural persons.

(2) What considerations would you bring to bear in deciding whether to overrule the portion of *Buckley* v. *Valeo*, 424 U.S. 1 (1976), upholding limits on campaign contributions by individuals?

Sincerely,

ARLEN SPECTER.

JUNE 21, 2010.

Hon. ELENA KAGAN,
Solicitor General of the United States, Washington, DC.

DEAR SOLICITOR GENERAL KAGAN: By letters dated May 25, 2010, and June 15, 2010, I identified several subjects I intend to cover at your nomination hearing. I write to identify in advance an additional subject that I intend to cover.

Constitutionality of State Provisions for Publicly Financed Campaign Matching Funds

In the wake of Davis v. FEC, __ U.S. __, 130 S.Ct. 876 (2008), a district court in Arizona struck down that state's provision, passed by popular voter referendum, to trigger matching public funds when a candidate's opponent expended certain threshold amounts in a primary election. In McComish v. Brewer, 2010 WL 2292213, *1 (D. Ariz. 2010), the district court held that Arizona's ''Citizens Clean Elections Act'' was not supported by a compelling state interest, was not narrowly tailored, and was not the least restrictive alternative. Hence, the district court held the Act was ''unconstitutional under the First Amendment.'' Id. at 10.

The Court of Appeals for the Ninth Circuit reversed. In McComish v. Bennett, 605 F.3d 720 (9th Cir. 2010), the intermediate appellate court wrote, ''Plaintiffs bemoan that matching funds deny them a competitive advantage in elections. The essence of this claim is not that they have been silenced, but that the speech of their opponents has been enabled.'' The court noted that ''the burden that Plaintiffs allege is merely a theoretical chilling effect on donors who might dislike the statutory result of making a contribution or candidates who may seek a tactical advantage related to the release or timing of matching funds.'' Describing this burden as ''minimal,'' the court applied intermediate scrutiny to the Act. Thereafter, the court considered whether Arizona's interest ''in eradicating the appearance of quid pro quo corruption to restore the electorate's confidence in its system of government'' was compelling. Quoting the Supreme Court's decision in Buckley v. Valeo, 424 U.S. 1, 96 (1976) the Ninth Circuit recalled that ''[i]t cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest.''

On June 1, 2010, the Supreme Court denied the application to vacate the stay ''without prejudice to a renewed application if the parties represent that they intend to file a timely petition for writ of certiorari'' to the Court. __ S.Ct. __, 2010 WL 2161754 (Jun 1, 2010). A week later, the Court reversed course and granted the application to vacate the stay on the District Court's injunction ''pending filing and disposition of a petition for writ of certiorari.'' __ S.Ct. __, 2010 WL 2265319 (Jun 8, 2010). The practical effect of the Supreme Court vacating the appellate court's stay of the district court's injunction is that Arizona's Citizens Clean Elections Act is, for present purposes, struck down and participating candidates are not going to receive matching funds even if their opponents exceed the triggering expenditures.

I intend to ask you, among other questions:

(1) Whether you would have voted to vacate the stay pending disposition of a petition for certiorari, as five justices appear to have voted in McComish v. Bennett; and

(2) Whether you think that reducing the appearance or reality of quid pro quo corruption serves a compelling state interest.

Sincerely,

ARLEN SPECTER.

Mr. SPECTER. Mr. President, a good bit of the substance of the questions

which I have been directing toward Solicitor General Kagan involves the question as to whether she would have voted to grant cert. I believe that is an appropriate question, whether she would agree that a case ought to be heard. There is a view that questions ought not to be asked as to what a nominee would do once a case is pending before the Court. I think even that doctrine has some limitations. I think cases such as Brown v. Board of Education, cases such as McCulloch v. Maryland, cases which are well established in the law of the land, ought to be the subject for commitment. But I think there is no doubt—in my opinion, there is no doubt—we should ask her whether she would take a case such as the Terrorist Surveillance Program, or a case such as the litigation involving the claims brought by the survivors of victims of 9/11.

The hearings next week on Solicitor General Kagan will give us an opportunity to move deeply into a great many of these important subjects. While it is true that in many instances we do not get a great deal of information from the nominees, I think the hearings are very important to inform the public as to what goes on with the Court. This is in line with the efforts which I have made to provide for legislation which would call for televising the Supreme Court. The Judiciary Committee has twice passed out of committee, by significant votes—once 12 to 6 and once 13 to 6—legislation which would call for the Supreme Court to be televised.

The Congress of the United States has the authority to make directives on administrative matters—things such as how many Justices constitute a quorum, when they begin their term, how many members there are of the Supreme Court. Congress has the authority to mandate what cases the Supreme Court will hear, and—in the cases which I intend to ask Solicitor General Kagan, such as the terrorist surveillance program—whether she would have granted cert.

There are underlying concerns, which I have raised today, of a certain disrespect which characterizes a good many of the Supreme Court opinions. For example, the opinion by Chief Justice Rehnquist in striking down the legislation protecting women against violence, notwithstanding a very voluminous record—a radical change in the interpretation of the Commerce Clause—where the Court, through Chief Justice Rehnquist, said that the Court disagreed with Congress's ''method of reasoning.''

It is a little hard to understand how the method of reasoning is so much improved when you move across the green from the Judiciary Committee hearing room past confirmation; or where you have the language used by Justice Scalia—and I have quoted some of it earlier—in the case of Tennessee v. Lane, where Justice Scalia had objected to the congruence and proportionality standard, which he said was a flabby test and a standing invitation to traditional arbitrariness and policy decisionmaking.

Then he went on to criticize his colleagues for, as Justice Scalia said, inappropriate criticism of an equal branch. This is what he had to say about the proportionality and congruent standard

> Worse still, it casts this court in the role of Congress's taskmaster. Under it, the courts—and ultimately this Court—must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional. As a general matter, we are ill-advised to adopt or adhere to constitutional rules that bring us into constant conflict with the coequal branch of government. And when such conflict is unavoidable, we should not come to do battle with the United States Congress armed only with a test of congruence and proportionality that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed.

So that is fairly strong language in disagreeing with what the Court has done in establishing the test. And Justice Stevens minced no words in his criticism of Citizens United in saying that the decision by the Supreme Court showed a disrespect for Congress. There the Court, in Citizens United, overruled both McConnell v. Federal Elections Commission and the Austin case. Overruling Austin was very significant, Justice Stevens noted, because Congress specifically relied on that decision in drafting McCain-Feingold. Justice Stevens then said that pulling out the rug beneath Congress in this matter ''shows great disrespect for a coequal branch.''

Well, my colleagues, the Congress has an opportunity to assert itself, to demand the appropriate respect which the Constitution calls for and has been implemented under the doctrine of separation of powers. We can find ways to make sure that commitments about respected congressional fact-finding will be observed, or that the rule of stare decisis will be respected; that when there are major decisions coming before the Supreme Court of the United States which involve the power of Congress vis-a-vis the executive branch, that those decisions will be made.

So let's sharpen our lines of questioning, colleagues, as we move forward to the hearings on Solicitor General Kagan a week from today.

I thank the Chair, and I yield the floor.

I had noticed my colleague standing there. I hope I haven't kept him waiting too long.

Mr. BUNNING. The Senator can speak all he likes.

Mr. SPECTER. I thank the Chair.

The PRESIDING OFFICER. The Senator from Kentucky.

AMENDMENT NO. 4380

Mr. BUNNING. Mr. President, I rise to speak in morning business on my amendment to the extenders package, Bunning amendment No. 4380.

First, let me explain why this amendment is needed. When the Senate passed the first version of the extenders package in March, the bill extended all parts of the alternative fuel credit that expired at the end of last year. This included the coal-to-liquids portion of the alternative fuel credit.

I was pleased to hear President Obama mention coal to liquids as an important part of our energy strategy in his State of the Union Address earlier this year. That is why I am surprised to see coal to liquids deliberately excluded from the extenders package, first in the Reid substitute and again in the Baucus substitute.

Let me be clear: The bill doesn't just omit or remain silent on the coal-to-liquids credit. This bill specifically says that the coal-to-liquids credit expired on December 31, 2009, and isn't renewed. That is in the bill.

My colleagues probably know that I have many problems with the underlying bill. It adds tens of billions to our national debt and it contains job-killing tax increases. Options to pay fully for this bill by cutting spending have been offered and rejected, so our children and my grandchildren will foot the bill. But I thought that one element both parties could agree on is that expired tax provisions that taxpayers count on—and have been extended routinely in the past—should be extended.

My amendment is simple: It ensures that the coal-to-liquids portion of the alternative fuel credit will be extended until the end of the year, just like the other expiring parts of the alternative fuel credits included in this bill. The Senate already voted to extend all parts of the alternative fuel credit when it passed the extenders package last March.

Many difficult innovative fuels qualify for the alternative fuel credit, but coal to liquids is the only one that specifically requires reduced emissions. The reduction was originally 50 percent but was raised to 75 percent last year as a bipartisan agreement. I do not understand why the extenders package fails to extend the only part of the alternative fuel credit that called for reduced emissions.

My colleagues who are deficit hawks will be glad to know that this amendment will not add one dime to the deficit. This is because no coal-to-liquids projects will come on line in 2010, so no tax credit will be received. However, if the credit is allowed to remain expired and is not renewed, this will have a very damaging effect on investments in this extremely promising technology.

My amendment is also bipartisan. I am grateful to Senators ROCKEFELLER, BYRD, and ENZI, who are cosponsors. I know that the Senator from Montana, who is the manager of the extenders