FLOOR STATEMENT OF SENATOR SPECTER

July 15, 2010

(Nomination of Elena Kagan)

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized for 30 minutes.

Mr. SPECTER. Mr. President, I have sought recognition to state my position on the nomination of Solicitor General Elena Kagan to be Associate Justice of the Supreme Court of the United States and to comment about the appropriate role of the Senate, what is happening to the doctrine of separation of powers, and how institutionally the Senate might assert itself to stop the erosion of powers from this body to the Court and from the Congress to the executive branch.

I am supporting Ms. Kagan because of her intellect, her professional background, her academic background, and because I think she will be an effective balance in the ideological battle which is being waged in the conference room of the Supreme Court -- the ideological balance which is so sorely needed at the present time.

The hesitancy I have had, as I have expressed it in the hearings, has been on the failure of Ms. Kagan to respond with substantive answers so that Senators would have a realistic idea as to where she stands philosophically on some of the very important questions

of the day -- not how she would decide cases but what standards she would apply if confirmed, and I will be very specific about that.

It has been especially troublesome because Ms. Kagan has been outspoken in the past about the importance of having substantive answers in nomination proceedings. She wrote a now-famous article for the University of Chicago Law Review criticizing Supreme Court proceedings on nominations by saying that they were vacuous and a farce and by name criticized Justice Ruth Bader Ginsburg and Justice Stephen Breyer for not answering questions and, in effect, criticized the Senate and Senators for not asking and pressing questions to find out where nominees stood.

There was a similar article written by a young lawyer in Phoenix, AZ, named Bill Rehnquist, back in 1958, for the Harvard Law Record, where he criticized the confirmation proceeding of Supreme Court Justice Whittaker, saying that the Senate did not ask questions about the important substantive matters. During the confirmation of Chief Justice Rehnquist, I asked him a series of questions which he declined to answer; I cited his own words, and then he answered a few -- not very many, just about enough to be confirmed. Which has been my conclusion, generally, having been a party now to 13 confirmation hearings. Nominees answer just about as many questions as they think they have to.

When Justice Scalia came up for confirmation in 1986, he answered virtually nothing. When the question came up about Marbury v. Madison, he said: Well, I can't answer that question. It might come before the Court.

May the Record show the look of amazement on the face of the distinguished Senator from Minnesota who is presiding. I was frankly amazed by it myself.

But, with the tenor of the times, following the very contentious nomination proceeding of Chief Justice Rehnquist, and other factors, Justice Scalia was confirmed handily, 98 to nothing.

I have seen him frequently at social events. I saw him at one a couple of weeks ago. I commented to a group standing with him that prisoners of war give their name, rank, and serial number, but in the Scalia nomination proceeding he would only give his name and rank. It just about amounted to that.

Following the hearing on Justice Scalia, Senator DeConcini and I were formulating a resolution which would establish standards that Senators would insist on, or could insist on -- some guidance to try to get more forthcoming answers. Then we had the confirmation hearing of Judge Robert Bork, who answered questions. Judge Bork did so in a context of having very extensive legal writings, an article in the Indiana Law Journal in 1971 on original intent. In the context of that

article, and books, many speeches, law review articles, I think it is realistic to say that Judge Bork had no alternative but to answer questions.

Since the Bork hearings, the pattern has evolved where nominees do not give substantive answers. It is a well-known fact of confirmation life that there are murder boards. That is what they call them, when the nominee goes down to the White House and they have practice sessions. Since that time it has been pure prepared pablum. That is what we get in these hearings.

So there had been reason to expect more from Ms. Kagan. We didn't get it. I had expressed at the hearings the concern as to how we could get answers on substantive issues and was there any way to find that out short of voting "no," and rejecting a nominee? I decided it would not be sensible to vote no to issue a protest vote in the context of what has regrettably become the standard. Ms. Kagan was following the accepted practice. Why not, in the face of that strong advice from the White House and the success of all of the nominees who have stonewalled and been confirmed?

I have since discussed with a number of my colleagues the prospect of reverting to what Senator DeConcini and I had thought about in early 1987, to try to establish some standards. Not that Senators would be bound to follow them. We have our stature under the

Constitution to ask questions as we choose. We cannot compel answers. Perhaps they would not be followed. But it could obviate one line of excuse that nominees have given: They better not be too specific or they may breach the standard of ethics. If the Senate were to establish standards as to what we were looking for, for confirmation -- it is our constitutional role -- there might be some benefit.

In looking further, to try to make a determination on the Kagan nomination, there were two of her responses which I found impressive. One was her comments about Justice Thurgood Marshall, for whom she had clerked, who was a role model. There was extensive testimony about her admiration for the way he decided cases. I inferred from that, that looking as best I could to find her philosophy, ideology, where she would stand, that she would be protective of civil rights, protective of constitutional rights, of individual rights, and respectful of rights of the Congress.

The second line of answers which she gave which I thought -- and I do think -- is very important is her very positive attitude about televising the Supreme Court. I will come to that in a few minutes, because there is an urgent need to find some line to have some influence on the Court as to their following precedent on stare decisis, as to their respecting the constitutional role of the Congress in fact finding.

They have judicial independence and are the bulwark of the Republic. The rule of law is what makes the United States famous for the stability of our government and that is very highly prized. In the long history of this country, it has been the courts which have protected civil rights. It was the Supreme Court, as we all know, in Brown v. Board of Education, where the Court did what the Congress did not have the political courage to do, nor did the President have the political courage to do, to integrate schools in America -- the best example but only one example of where the courts have stood up as a bulwark to do what the elective branches have not had the political courage to do.

Now on to the specifics, as to the concerns on the substantive questions to which Ms. Kagan did not give substantive answers. I pressed her hard on the separation of powers. We all know of the three branches of government. Congress was article I, thought by the Framers to be the most important; the executive, President, No. II; and the Court, No. III. I think if the Constitution were to be rewritten today the numbers would be changed. The Court would be No. I, and the other branches would be a distant second and third, but again the executive would be ahead of the legislative branch because of the way the Court has interpreted the law.

Coming to the first line of legislative responsibility, it is fact finding on which we make a determination of what ought to be enacted by way of public policy. The Supreme Court of the United States has changed the rules of the game. For a long time it was a "rational basis" test, to decide whether the record was sufficient for the legislation which was enacted.

Then, in 1997, in a case captioned City of Boerne, the Supreme Court of the United States adopted a new standard: Was the evidence proportionate and congruent; the test of proportionate and congruent. That test, with its fluidity, has been the basis for the Supreme Court legislating, taking over from the Congress. Now it is the Supreme Court which decides the sufficiency of the record on a test which is not discernible with any specificity. Justice Scalia has called the test a "flabby test," which is used for judicial legislation. That was the fact in the case of United States v. Morrison, which tested at the time constitutionality of legislation to protect women against violence and there was, in the hearings leading to that important legislation, a mountain of evidence as described by Justice Souter in dissent. Yet the Court overturned that important statute to protect women against violence, citing the Congress's "method of reasoning." It is a little hard to understand what

that means. We are not perfect around here. There are a lot of failures in this body, especially now -- even some failures across the Rotunda in the House of Representatives. But who can challenge the method of reasoning and what miraculous occurrence is there, when somebody leaves the hearing room of the Judiciary Committee, walks across Constitution Avenue, across the green from this Chamber, and suddenly is in a position to have some superior reasoning? But that legislation went down, as has so much legislation.

Another illustration is in Citizens United, where a 100,000-page report was amassed, detailing the problems with what goes on with money in politics and what the corrupting influence is. As a result, the McCain-Feingold law was passed, and, in Citizens United, the critical section was declared unconstitutional. So there you have a tremendous shift in power from the Congress of the United States to the courts, to the Supreme Court. What we legislate on our traditional standards -- we have the institutional expertise, and I am going to come to that in some greater detail in a few moments, analyzing the positions which have been taken by Chief Justice Roberts and Justice Alito.

But first an analysis of a decisive shift from the power of the Congress of the United States to the executive branch, to the President. Here again I will be specific. Arguably the most dramatic historic

confrontation between Congress and the President is the Foreign Intelligence Surveillance Act, which establishes the exclusive way to invade privacy and get a wiretap contrasted with the Terrorist Surveillance Program, initiated by President Bush, for warrantless wiretapping.

It was a Friday in July of 2005. I chaired the Judiciary Committee. We were in the final day on the reauthorization of the PATRIOT Act, and that morning the New York Times broke the information about this secret program of warrantless wiretapping.

As it was expressed on the floor that day, Senators who had been prepared to vote to reauthorize the PATRIOT Act declined to do so. There was an extended proceeding -- which is not relevant to the specific point I am making now. But back to the point, a Federal judge in Detroit declared the Terrorist Surveillance Program unconstitutional. The case went on appeal to the Court of Appeals for the Sixth Circuit, which declined to hear the merits in a 2-to-1 decision on standing grounds.

The petition for cert. to the Supreme Court to take the case was denied, no reason given. The doctrine of standing is a very flexible doctrine, which I think, in a practical sense, although inelegantly stated, accurately stated, it is the way the Court ducks a case if they don't want to hear the case. It avoids a

judicial decision. But any fair-minded reading of the dissenting opinion in the Sixth Circuit would say there was plenty of room for a judicial decision, adequate basis for standing in that case.

We currently have before the Judiciary Committee legislation on another issue which illustrates the shift of power from the Congress to the executive branch because of the failure of the Supreme Court to decide a case, and that involves the litigation brought by survivors of people killed on 9/11 against, among others, the Government of Saudi Arabia, Saudi princes, and Saudi charities, litigation where there is an enormous factual record showing the connection between financing of al-Qaida and the Saudi charities, which are really instrumentalities of the Saudi Government, and showing the financing from Saudi princes and from the government itself.

The Second Circuit denied the claim on what I think is a spurious ground, saying that Saudi Arabia is not on the list of countries declared by the State Department to be terrorist states. Well, there is an alternative under the immunity statute, and that is for tortious conduct, that is wrongful actions. Certainly that would encompass flying a plane into a building. And Senator Schumer, Senator Lindsey Graham, and I have introduced legislation to clarify this issue.

When an application was made for certiorari to the Supreme Court, the administration opposed having the Supreme Court hear the case on the ground that the acts by the Saudis in financing the terrorists occurred outside of the United States. That hardly is a rational basis when you plot in Saudi Arabia and pay money to bring terrorists to the United States, to board airplanes, to hijack the planes to fly into American buildings, to fly and crash in Pennsylvania, fly and crash into the Pentagon. That certainly happened in the United States. It is arguably the most barbaric conduct in the history of mankind, certainly among the terrorists.

Now I mention these cases because when I pressed Ms. Kagan -- and others did -- what standard would you apply? Going back to the factfinding, the two standards are proportionate and congruent, contrasted with rational basis.

Now, that is not asking a nominee to decide a case; that is asking a nominee to decide a standard -- certainly well within the ambit of Ms. Kagan's famous law review article in 1995. But she simply stated she would not answer.

On the cases involving the terrorist surveillance program and on the 9/11 litigation, would she grant to hear the case -- not how she would decide the case but

would she take the case? Again, a refusal to answer the question.

So in this context, we are really searching for ways to find out more about the nominees, and Ms. Kagan has said just enough to get my vote because of voting my hopes, rather than my fears, that she will be in the mold, as a general sense, of Justice Thurgood Marshall and also because of her position on television, which I think has the potential for being a very ameliorating factor in what goes on in the Supreme Court, and that is the business of publicity.

The famous article "What Publicity Can Do" by lawyer Louis D. Brandeis back in 1913 provides insights as to where we might go in the modern world with television. In that article, Brandeis made the famous statement that, "Sunlight is said to be the best of disinfectants." Well, that may be a little strong for these circumstances. We are not exactly looking at it as a disinfectant, but neither was Brandeis, and he was really talking about publicity as the way to deal with problems in our society. I believe that if we had publicity and people understood what was going on, there would be a realistic chance to have the Court respect the powers of Congress and have the Court respect the separation of power between the President and the Congress.

I now turn to the confirmation proceedings as to Chief Justice Roberts and Justice Alito, which bear very heavily on this subject. Both of the nominees were questioned at length during the course of the nomination proceeding, and this is what Chief Justice Roberts testified to on the question of factfinding:

The reason that Congressional factfinding and determination is important is because the courts recognize they can't do that. The Supreme Court cannot sit and hear witness after witness in a particular area and develop that kind of a record. Courts can't make the policy judgments about what type of legislation is necessary in light of the findings that are made. The courts don't have it, Congress does. It is constitutional authority. It is not our job. He goes on to say:

When the courts engage in factfinding, they are really, in effect, legislating.

These are his exact words in the confirmation hearing:

As a judge, you may be beginning to transgress into the area of making a law. That is when you are in a position of reevaluating legislative findings because that doesn't look like a judicial function.

This is what Justice Alito had to say in his confirmation hearing:

The Judiciary is not equipped at all to make findings about what is going on in the real world, not this 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 the findings.

These two Justices were in the five-person majority which disregarded 100,000 pages of congressional findings to make a declaration that McCain-Feingold was unconstitutional.

Then you had the similar issue of stare decisis.

The best way to limit judicial activism is by respecting what the Congress has done on factfinding, and when the Court disregards congressional factfinding and substitutes its own judgment on policy, they are making the law. That is conceded by the citations I have read.

Then there was extensive questioning of both Chief Justice Roberts and Justice Alito on the issue of stare decisis.

This is what Chief Justice Roberts had to say, in part, about stare decisis:

I do think that it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and

evenhandedness. It is not enough that you may think the prior decision was wrongly decided.

Justice Alito said about the same thing, in part:

> It is important -- That is, stare decisis is important -- because it limits the power of the judiciary. It is important because it protects reliance interests.

These are two of a five-person majority which decided in Citizens United that McCain-Feingold was unconstitutional.

This is what Seventh Circuit Judge Richard Posner, a distinguished jurist and a commentator on the Court, had to say about the role of Chief Justice Roberts in these decisions, coming from his book "How Judges Think":

> Less than two years after his confirmation, he demonstrated by his judicial votes and opinions that he aspires to remake significant areas of constitutional law. The tension between what he said at his confirmation hearing and what he is doing as a justice is a blow to Roberts's reputation for candor and further debasement of the already debased currency of the testimony of nominees at judicial confirmation hearings.

In going into these issues, as to the contrast between what Chief Justice Roberts and Justice Alito testified to and what they have done once on the Court, I do not

challenge their good faith. I understand the difference between what happens in a judicial confirmation hearing and what happens in court when there is a case in controversy to be decided by the Justices of the Supreme Court. But these variations are so stark that had there been an understanding by Senators on these confirmation hearings as to the judicial philosophy and how factfinding would be handled in court and how precedents and stare decisis would be handled in court, to take the opinion by Chief Justice Roberts, his concurring opinion in Citizens United where they disregarded the Austin case as an "aberration" -- there is your license to eliminate stare decisis: the case is an aberration, down the drain. So what happened to precedent? Is Roe v. Wade safe based on that standard? I questioned Chief Justice Roberts at length about Roe v. Wade and the successor case, Casey, and how the case stood.

Austin was not reversed when the Supreme Court had an opportunity to do so. Chief Justice Roberts says in his opinion: Well, nobody asked the Supreme Court to reverse the Austin case. Well, the way the Court reached for the Hillary movie in Citizens United, the way they reconstructed the issue, you do not have to -- it is a thin veneer to say that the Court is guided and that it is determinant who raises an issue and who asked the Court for a decision.

What can be done to have Justices adhere to standards agreed to at their hearings? I spoke earlier

about the sanctity of judicial independence and how the Court is the bulwark of our Republic and the rule of law. The most promising idea that I have found is to demonstrate to the public what the Court does, how powerful the Court is, and how it makes decisions on the cutting edge of all of the judgments in society. It decides who lives and who dies, a woman's right to choose. It decides on late-term abortion. It decides on the death penalty. It decides whether juveniles may be executed for crimes committed below the age of 18. It decides affirmative action, who goes to school, who gets into the best colleges, who gets a job. It decides assisted suicide. It decides cases of international law. It is the ultimate arbiter on all the cutting-edge issues.

America is cited as being the most litigious country on the face of the Earth, but there is not an understanding among the public as to how far the power of the Supreme Court is, how they have taken it from the Congress, how they have let the executive branch take it from the Congress.

In an article published yesterday in the Washington Post, Stuart Taylor, Jr., a noted commentator on the Supreme Court, had some interesting observations on this precise subject. This is what he wrote in part:

> The key is for the Justices to prevent judicial review from denigrating into judicial usurpation.

This goes right to the point of separation of powers, to defer far more often to the elected branches. Well, that is the Congress. That is the hue and cry. That is the question asked every time we have a confirmation hearing in the Judiciary Committee: Will you interpret the law rather than make the law? But these are matters where demonstrably they make the law.

Then Taylor goes on to write:

> ...the justices know that as long as they stop short of infuriating the public, they can continue to enjoy better approval ratings than Congress and the President, even as they usurp those branches' powers.

This is an interesting test, the first time I have seen it articulated this way. It is the "infuriating the public test." Whatever you may say in a democracy, in our society, the public has the ultimate power, and it is felt in many ways, perhaps even by osmosis. But wherever you go, when the public attitude changes on segregation, the Supreme Court changes the decision. When the public attitude changes on sexual orientation, the Supreme Court's position changes on sodomy cases. When we find so many States recognize same-sex marriage, it is a change recognized by the courts, as the Massachusetts court recently did in declaring the Defense of Marriage Act unconstitutional. It wouldn't have happened when it was passed 86 to 14 in the

Senate of the United States in 1996. So how do we activate the doctrine of "infuriating the public"?

The best way, to my knowledge, is to televise the Court. In that magnificent chamber across the green from where I stand, we have a room which seats about 300 people fighting to get in there for about 3 minutes. That is where the most important business of the country is being conducted. Years ago the Supreme Court decided that when it came to judicial proceedings newspapers had a right to be in the courtroom. That same logic would give television cameras and electronic radio similar rights to inform the public. That was a case in 1940. Today the information is gleaned largely from television and, to a lesser extent, by radio. So if the public knew what was going on in the Supreme Court, if they understood it, there would be a chance that they would be a little more respectful of the constitutional doctrine of separation of powers.

When the case of Bush v. Gore was scheduled for argument, then-Senator Biden and I wrote to Chief Justice Rehnquist asking that television cameras be permitted inside the courtroom. To get inside the courtroom that day, one practically had to be on the Judiciary Committee. It was packed. Americans should have been able to see it. Surrounding the building on all sides were mobile television units. I am not sure exactly what they were doing. The most

they could have would be stand-ups outside the chamber because they couldn't get inside the chamber. That day the Supreme Court did release an audio of the proceedings, which was a novelty at that time. They have done that occasionally since, but relatively rarely.

Mr. President, in the face of these factors, I have been pressing for more than a decade for legislation to televise the Supreme Court. It has come out of the Judiciary Committee, once 12 to 6, and, most recently this year, 13 to 6, first, a legislative proposal which would call for the Supreme Court to be televised and, second, a sense-of-the-Senate resolution urging the Supreme Court on its own to be televised.

I believe as a legal matter that the Congress has the authority to require the Supreme Court to be televised. I say that because it is an administrative function. Congress has the authority to decide, for example, how many Justices there will be on the Court, illustrated by the famous Roosevelt Court packing plan where the effort was made to raise the number from 9 to 15 new faces to control the decision. The Congress by law establishes the number of Justices -- six -- for a quorum. The Congress decides that the Court will begin its session on the first Monday in October. The Congress has set the time limits on habeas corpus

matters in the appellate system under the Speedy Trial Act. I think a strong case -- in fact, the appropriate conclusion -- is that Congress has the authority to act in this field.

There are now cameras in the United Kingdom's Supreme Court. They are now televised in Canada. They are now televised in many State supreme courts. They are now televised in two Federal appellate courts.

A recent poll was conducted and released on the day of the start of hearings on Solicitor General Kagan. That poll, conducted by C-SPAN, showed that 63 percent of the American people think the Court ought to be televised. Among the 37 percent who said no, when they were told that the proceedings are open to the public but people have to come to Washington to see them and can only stay for 3 minutes, most of those folks decided they ought to have television.

So the number went from 63 to 85 percent of the American people who think the Supreme Court ought to be televised. That is a pretty good indication that the Congress ought to act; that if the Supreme Court will not open its doors on a voluntary basis, the Congress ought to respond.

On recent nominations I have asked every nominee: What is your attitude on television? I was pleased. Both in the informal meeting with Ms. Kagan and in her testimony before the Judiciary Committee, she said she

was in favor of television; that the more information the public has, the better off our society is. It is a pretty obvious conclusion, but she would press the issue if seated.

Another key factor in my affirmative vote for Ms. Kagan is her sense of humor, her quick wit, which she displayed. She was even almost a match for the distinguished junior Senator from Minnesota, who has had some expert experience in that line. I think that will stand her in good stead in the ideological battle in that small conference room where these big decisions are made.

Chief Justice Roberts said he would be open to the idea. Justice Alito testified he voted for it on the Third Circuit but would want to confer with his colleagues. I believe Justice Breyer said in a hearing on the budget in the House of Representatives a few months ago that television was inevitable. Justice Ginsburg was quoted at one point as saying that if it were gavel to gavel, it would be satisfactory. Justice Scalia has been negative about it most of the time because there would only be snippets, but if some way could be found to have gavel to gavel so that it was not just a snippet, there may be some flexibility on his part.

It is an item whose time has come because, institutionally, we ought to be doing something about

it in the Senate. Institutionally, we have the responsibility to confirm. We aren't doing a very good job of finding out what a reasonable understanding is of where these nominees are heading. While we are fiddling, our institutional power is burning. If we lose much more of it, what we legislate to will not amount to a tinker's dam when the Supreme Court disagrees with our factual findings no matter how voluminous and solid they may be. What power is left is going to gravitate down Pennsylvania Avenue to the White House. So it is time to sit up and take notice.

Ms. Kagan quoted me in her 1995 Law Review article, saying that I said one day the Senate is going to have to stand up on its rear legs and reject a nominee. Well, now is not the right day, in my opinion, for the reasons I have said.

One other point I want to make. I would ask how much time I have remaining, but I think a more appropriate question would be how much time have I gone over?

The PRESIDING OFFICER (Mr. FRANKEN). The Senator has consumed his time.

Mr. SPECTER. What is the answer to my question?

The PRESIDING OFFICER. Seventeen minutes extra.

Mr. SPECTER. Extra?

The PRESIDING OFFICER. Yes.

Mr. SPECTER. Mr. President, I ask unanimous consent for 4 more minutes.

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

Mr. SPECTER. Only one colleague is present. He is the congenial junior Senator from Florida. I thank my colleague.

I want to make one more point. That is on the issue of the Supreme Court taking more cases. Here again, if there was transparency, America would be outraged at the workload on the Supreme Court, as the Court has moved from one clerk, to two clerks, to three clerks, to four clerks. And I do not begrudge them the time between the session ending in late June and the first Monday in October, where they travel and lecture and write books. But I am much concerned about the circuit splits.

For anyone who may be watching on C-SPAN2 -- and I know my aunt and sister are watching -- these cases are very important because if the Third Circuit, having Pennsylvania, New Jersey, and Delaware, decides a case one way and the Ninth Circuit, governing the Western States, decides it another way, and the case arises in Wichita, KS, nobody knows which precedent to follow because the circuits are autonomous.

There are many important cases which the Supreme Court does not decide when there are circuit splits and

they have time to decide them. They have time to decide the conflict between the Foreign Intelligence Surveillance Act and the Terrorist Surveillance Program. They have time to hear the case involving the 9/11 terrorist attacks and sovereign immunity.

But these are the statistics which are very informative: In 1886, the Supreme Court decided 451 cases. In 1987, the Supreme Court wrote 146 opinions. That was cut by less than half in 2006 to 68, in 2007 to 67, in 2008 to 75, 2009 to 73; this in the face of Chief Justice Roberts's testimony at his confirmation hearing that the Supreme Court ought to hear more cases. Ms. Kagan said about the same thing. My recollection is that Justice Sotomayor said about the same thing.

So here, again, it is a matter of the public understanding it. We are very conscious in this body about not missing votes. When I miss votes, it appears in the Philadelphia Inquirer or the Pittsburgh Post-Gazette. The public does not like to see Arlen Specter missing votes. I am paid to vote.

Well, you cannot vote on a case if you do not take a case. But having the discretion not to take the case just leaves this level of workload with circuit splits undecided, and this is something which ought to be handled.

I have legislation pending to compel the Supreme Court to take, for example, the Terrorist Surveillance Program litigation. Most people do not know, but Congress cannot decide cases for the Court. The Congress can mandate what cases they take, as we did the flag burning case, as we did McCain-Feingold, and many other cases.

So it is my hope that when we confirm Ms. Kagan -- and it looks like we will confirm her -- we will pause on the nomination proceedings and focus on their utility, if not to get substantive answers to see what intellectual dexterity the nominee has, but providing an opportunity to review what the Court is doing. We have to bone up on what happened since the last nomination proceeding. I think the record is open to substantial question. I think those questions could be answered for the reasons I have given, if we move ahead with television.

Mr. President, in conclusion, I ask unanimous consent that a full copy of the text of my prepared statement be printed in the Record with these exact words so people will understand what I have said up until now is repeated to some extent in the formal written statement. Mr. President, I refer my colleagues to the two letters which I wrote to Chief Justice Roberts in anticipation of his nominating proceeding, three letters I wrote to Justice Alito,

three letters I wrote to Justice Sotomayor, and three letters I wrote to Ms. Kagan. All have previously been printed in the Record.

Finally, Mr. President, I ask unanimous consent that a copy of an article which I wrote which appeared in USA Today be printed in the Record.

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PRIVILEGES OF THE FLOOR

Mr. SPECTER. Mr. President, I ask unanimous consent that floor privileges be given to Linda Hoffa, a detailee in my office, for the remainder of this Congress.

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