The "Justice for Judges" Debate

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EXECUTIVE SESSION

NOMINATION OF PRISCILLA RICHMAN OWEN, OF TEXAS, TO BE UNITED STATES CIRCUIT JUDGE FOR THE FIFTH CIRCUIT

The PRESIDENT pro tempore. The clerk will report.

The assistant legislative clerk read the nomination of Priscilla Richman Owen, of Texas, to be a United States Circuit Judge for the Fifth Circuit.

The PRESIDENT pro tempore. The majority leader.

Mr. FRIST. Mr. President, I would inquire of the Democratic side if they would be prepared to grant a time limitation on this nomination of 2 hours?

The PRESIDENT pro tempore. The Senator from Nevada.

Mr. REID. Thank you very much, Mr. President.

Through you to the distinguished majority leader, first of all, let me really say we could finish this bill quickly tonight. The decision has been made not to do that. We will be happy to come back Friday and cooperate with the majority. We could not agree to a time, but I think as to how we worked before, if we go to that bill Friday, within a very reasonable period of time we could finish it on Friday. But as far as a specific time agreement is concerned, it would be very difficult to do that. But I stand ready and willing to come back to this bill on Friday and finish it on Friday; that is, VA-HUD. It is too bad we could not do it tonight.

In direct response to the majority leader, we would not be in a position to grant a time on Priscilla Owen. We have already voted on this matter on at least two or three separate occasions, as I recall. So in response to the distinguished majority leader's request, we would not agree to a time agreement on Priscilla Owen of any duration.

CLOTURE MOTION

Mr. FRIST. Given the objection, I send a cloture motion to the desk.

The PRESIDENT pro tempore. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 86, the nomination of Priscilla Richman Owen, of Texas, to be United States Circuit Judge for the Fifth Circuit:

Bill Frist, Orrin Hatch, Lindsey Graham, Mike Crapo, Jeff Sessions, Conrad Burns, Larry E. Craig, Saxby Chambliss, Mitch McConnell, Jim Bunning, Judd Gregg, John Cornyn, Jon Kyl, Trent Lott, Mike DeWine, Craig Thomas, Kay Bailey Hutchison.

NOMINATION OF CAROLYN B. KUHL TO BE UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Mr. FRIST. Mr. President, I ask unanimous consent that the Senate now proceed to the consideration of Calendar No. 169, the nomination of Carolyn B. Kuhl, to be a United States Circuit Judge for the Ninth Circuit.

The PRESIDENT pro tempore. The nomination will be stated.

The assistant legislative clerk read the nomination of Carolyn B. Kuhl, of California, to be United States Circuit Judge for the Ninth Circuit.

Mr. FRIST. Mr. President, again I ask the other side if they would be prepared to set a time certain for an up-or-down vote on this nominee after whatever debate they may need.

The PRESIDENT pro tempore. The Senator from Nevada.

Mr. REID. Mr. President, in an effort to understand what is going on here, everyone should understand, these requests require a simple majority vote, and it would be senseless to take a vote on this. That is why we did not object.

I would say with this nominee, Carolyn Kuhl, we have reviewed this in very deep detail and would not be in agreement at this time to set any time limit on the debate. I ask the distinguished majority leader to advise us when we finish this woman and the following nominee, if you would be good enough to tell us when you anticipate voting. We are waiving the request for the requirement of a quorum. So if the majority leader can give us some indication when he desires to vote on this, whether it is 12:01 on Friday morning or later in the day.

Mr. FRIST. Mr. President, in response, we plan on voting Friday morning at a reasonable hour to be defined. That means sometime after 8:30 Friday morning. I will be more specific.

Mr. REID. I appreciate that very much. I object.

The PRESIDENT pro tempore. Objection is heard.

CLOTURE MOTION

Mr. FRIST. I send a cloture motion to the desk.

The PRESIDENT pro tempore. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 169, the nomination of Carolyn B. Kuhl, of California, to be United States Circuit Judge for the Ninth Circuit.

Bill Frist, Orrin Hatch, Lindsey Graham, Mike Crapo, Jeff Sessions, Conrad Burns, Larry E. Craig, Saxby Chambliss, Mitch McConnell, Jim Bunning, Judd Gregg, John Cornyn, Jon Kyl, Trent Lott, Mike DeWine, Craig Thomas, Kay Bailey Hutchison.

NOMINATION OF JANICE R. BROWN, OF CALIFORNIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mr. FRIST. Mr. President, I ask unanimous consent that the Senate now proceed to the consideration of Calendar No. 455, the nomination of Janice R. Brown, of California, to be a United States Circuit Judge for the District of Columbia Circuit.

The PRESIDENT pro tempore. Without objection, it is so ordered. The clerk will report.

The assistant legislative clerk read the nomination of Janice R. Brown, of California, to be United States Circuit Judge for the District of Columbia Circuit.

Mr. FRIST. Mr. President, once again, I ask if we would be able to limit the time for debate on this nominee to 8 hours or 10 hours.

Mr. REID. We object, Mr. President.

The PRESIDENT pro tempore. Objection is heard.

CLOTURE MOTION

Mr. FRIST. With that answer, Mr. President, I send a cloture motion to the desk.

The PRESIDENT pro tempore. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of Rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 455, the nomination of Janice R. Brown, of California, to be United States Circuit Judge for the District of Columbia Circuit.

Bill Frist, Orrin Hatch, Lindsey Graham, Mike Crapo, Jeff Sessions, Conrad Burns, Larry E. Craig, Saxby Chambliss, Mitch McConnell, Jim Bunning, Judd Gregg, John Cornyn, Jon Kyl, Trent Lott, Mike DeWine, Craig Thomas, Kay Bailey Hutchison.

Mr. FRIST. Mr. President, I now ask unanimous consent that the three live quorums required under rule XXII be waived en bloc.

The PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. FRIST. Mr. President, parliamentary inquiry: In terms of the time we used on our side, how much time, in terms of my initial speech, was used by this side?

The PRESIDENT pro tempore. The majority has 4 minutes 47 seconds. The minority has 11 minutes 22 seconds.

Mr. REID. If I can make an inquiry through the Chair, Mr. President, the unanimous consent request, as I have heard the ruling of the Chair, is not counted against anybody; is that the way it is?

The PRESIDENT pro tempore. The time to object or reserving the right to object has been charged to the side making such a reservation.

Mr. FRIST. Mr. President, I suggest the general agreement is to spend an hour, 30 minutes to a side, and if they are not using the time, it will be yielded back to the other side. I ask unanimous consent that I use 15 minutes, 15 minutes for Senator HATCH, and we go to the other side.

Mr. REID. And we would have an hour?

Mr. FRIST. You would have 30 minutes.

Mr. REID. I say to the distinguished majority leader, we have had no time agreement the first hour other than listening to me object.

The PRESIDENT pro tempore. Reserving the right to object and statements made under such objection or reservation has been charged against the side making that reservation.

Mr. REID. I understand. So the Chair has ruled that the statement by Senator BYRD ran against us; is that true?

The PRESIDENT pro tempore. That is correct.

Mr. REID. So the next half hour will be used by Senators FRIST and HATCH, and then we will use our half hour.

Mr. FRIST. Again, I think it is time for us to move forward. Conceptually, we are going to have an hour, 30 minutes either side. Say I used 15 minutes—it may be more—Senator HATCH will speak about 15 minutes, and 30 minutes will be to your side, and we will be going back and forth.

Mr. REID. Fine. My only concern is we have had Senators we have scheduled to speak to use our half hour. Some of them have been champing at the bit here. If they don't speak now, they lose their time, their day in the sun.

Mr. FRIST. I thought I had a pretty good 20-minute speech. I was ready to start, but because of questions directed to me, again, about scheduling—we get things well set and then because of questions—if we can just start now and do as I requested, have 15 minutes and you take 30 minutes, we will be able to get started.

Mr. REID. I am wondering, I ask if we could use the next 15 minutes so my people who have been here, Senators waiting could take the time. I would divide whatever by 3 until the time until 7 o'clock.

Mr. FRIST. Would you please repeat that?

Mr. REID. Then we can start fresh at 7 o'clock with you and Senator HATCH giving us your statements, and we will take the next half hour.

Mr. FRIST. Mr. President, you mean I have Senator HATCH speak?

Mr. REID. We would take approximately 4 minutes each until 7.

Mr. FRIST. No, Mr. President, Senator HATCH is going to follow me, and then we will go into going back and

forth. Senator HATCH has also been waiting 30 minutes. If it hadn't been for these questions, we would have been done 15 or 20 minutes ago.

Mr. REID. I say through the Chair, I am trying to be peaceful and calm here. The Chair ruled we have 4 minutes left.

Mr. FRIST. Would the Chair clarify how much time we have available on either side?

The PRESIDENT pro tempore. The majority has 4 minutes 37 seconds. The minority has 10 minutes 47 seconds.

Mr. HATCH. I ask unanimous consent that immediately after the half hour taken by the Democrats, I be given an additional 11 minutes. I will take 4 right now.

Mr. SCHUMER. I could not hear the Senator from Utah.

Mr. REID. The Senator from Utah said we would go until 7 o'clock and then they would do the next half hour; is that right? Is that what you said?

The PRESIDENT pro tempore. Is there objection?

Mr. HATCH. No, I said I would take the 4 minutes now and then take the 11 minutes after you had half an hour. How is that?

Mr. REID. Out of their time, that is absolutely fine.

The PRESIDENT pro tempore. The Senator is recognized for 4 minutes.

Mr. HATCH. Mr. President, I think it is appropriate to have the chairman of the Judiciary Committee who has had to go through all this rigmarole to say a few words before we get into this debate. I know the distinguished majority leader wanted me to do so.

To be honest with you, Mr. President, just think about it. All we want to do is what the Senate has always done. Once a nominee comes to the calendar, that nominee deserves a vote up or down under the advise and consent clause which is clearly a majority vote.

Never in the history of this Congress have we had what has been happening over the last number of years caused by the Democrats on the other side.

We should be voting on judges tonight, not debating judges. Frankly, there is a vocal minority of Senators preventing us from doing our constitutional duty to vote on judicial nominees. The American people need to know this, and although some of these folks have been moaning and groaning on the other side that we are taking this time, I suggest to them that there is hardly anything more important in a President's life, whoever that President may be, than getting his or her judicial nominations through.

Frankly, it is extremely important because this involves one-third of the coequal branches of Government. We found a continual filibuster on a number of these nominees.

Let me say this. Democrats seem to be very fond of saying: We passed 168 and we only filibustered 4. The fact is, that raw number of 168 we have had to fight pretty hard to get as well. But we have. Never in the history of this country have we had four stopped. That is only part of it.

I can name at least 15 that I have had various Democrats tell me they are going to filibuster. Most of them are circuit court of appeals nominees for the very important circuit courts in this country, people who have the ABA imprimatur, people such as Miguel Estrada; Priscilla Owen, who broke through the glass ceiling for women; Bill Pryor—even though he is conservative, he has always upheld the law even when he disagreed with the law; Charles Pickering, unanimously confirmed to the district court in 1990 and treated like dirt in the Senate—a racial reconciling. Yet he has been treated just like dirt. Carolyn Kuhl—we are going to have her first cloture vote on Friday because they are going to filibuster. Janice Brown—they are filibustering her; Claude Allen, I am told they are going to filibuster Claude Allen. How about Terrence Boyle of the Fourth Circuit? It looks as if they are going to filibuster him. James Deavers is being held up. Bob Conrad is being held up.

Four Circuit Court of Appeals judges for the Sixth Circuit out of Michigan are being held up by our colleagues on the other side; two district court nominees, and I could name some others.

The fact is, for the first time in history, they are treating a President of the United States in a ridiculous, unconstitutional fashion and not allowing him to have an up-or-down vote on his nominees. If they can defeat these nominees, that is their right, but they should not be dragging their feet and making it very difficult for these nominees to come up.

I heard some of the comments about how important the appropriations process is. It is important, but I can tell you we have had foot dragging almost all year by our colleagues on the other side, and it is important, but there is nothing more important than making sure that our courts are well staffed with competent judges who are going to enforce the law for the benefit of the American citizens.

There is nothing more important than that. Frankly, it is the one legacy that any President can leave. When Bill Clinton was President, we helped him put through 377 judges, the second all-time record. I might add Ronald Reagan was the all-time record holder at 382, 5 more than President Clinton. President Reagan had 6 years of a Republican Senate to help him and President Clinton had only 2 years of a Democratic Senate, and he was treated abundantly fair.

There were 47 holdovers at the end. Contrast that to when Democrats controlled the committee and Bush 1 was President. There were 54 holdovers.

Mr. President, this is really wrong what they are doing. It has the potential of exploding this body. Frankly, we can't allow it to continue. It is time for the American people to understand this. I understand my time is up.

Mr. REID. Mr. President, I yield 2½ minutes to the Senator from New York, Mr. SCHUMER; 2½ minutes to the Senator from California, Mrs. FEINSTEIN; and 2½ minutes to the Senator from Wisconsin, Mr. FEINGOLD; in that order.

The PRESIDENT pro tempore. The Senator from New York.

Mr. SCHUMER. Mr. President, they say one picture says a thousand words; one sign will equal 30 hours of palaver. The bottom line is very simple, we have supported and confirmed 168 judges whom President Bush has sent us. We have blocked 4.

All the rhetoric, all the splitting of hairs, all the talking about angels on the head of a pin don't equal that. This debate will boomerang on my colleagues from the other side of the aisle because all the American people have to do is look at that sign and they say: Gee, you're right.

The bottom line is the President, the majority leader, and the chairman of the Judiciary Committee will not be content unless every single judge the President nominates is rubberstamped by this body. That is what they want. We all know it. We have been very careful and very judicious in whom we have opposed.

People who are getting life appointments should not be extremists, should not be out of the mainstream, should not be asked to roll back 30 or 60 years of jurisprudence, and the four we have blocked fall in that category.

The bottom line is very simple: If you want agreement, then read the Constitution and tell the President, in all due respect, to read the Constitution. It says advise and consent. Advise means consult. We get no consultation. Consent means the Senate does its own independent review. That is what we have done.

So I understand why early on this sign vexed my colleagues from the other side. The bottom line is simple: We have been reasonable; we have been careful; we have been moderate; we have been judicious. The other side and the President simply say my way or the highway. That will not stand.

The PRESIDENT pro tempore. The Senator's time has expired. The Senator from California is recognized 2½ minutes.

Mrs. FEINSTEIN. I thank the Chair.

Mr. President, I have served as a member of the Judiciary Committee since I came to the Senate. I take the job very seriously. I try to do my homework in looking at these judges. I very deeply believe that this election provided no mandate to skew the courts to the right. I deeply believe that judges should be in the mainstream of American legal thinking, that they should have the temperament and the wisdom and the intellect to represent us well on the highest courts of our land.

What I wanted to use my time for—and the 2½ minutes will not be enough to do it—is to indicate that during the

time I have been on the Judiciary Committee how I have seen the rules and the procedures of the committee change. Those changes have not been good. They have served to divide the committee more. They begin with changing the American Bar Association's 50-year tradition of rating the qualifications of potential nominees before the President nominates them, to after the President nominates them. I would like to say why I think that is important.

There have been changes made in the so-called blue slip policy so that concerns Senators from a nominee's home State are no longer given any consideration whatsoever. There has been a reinterpretation of a longstanding committee rule, rule 4, prohibiting the majority from prematurely cutting off debate over a nominee in committee. There has been the elimination of the tradition of holding a hearing on only one controversial nominee for appellate vacancies at one time. There have been changes to committee practice——

The PRESIDENT pro tempore. The Senator's time has expired.

Mrs. FEINSTEIN. I hope in the next hour perhaps I might have more time. I yield the floor.

The PRESIDENT pro tempore. The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, I think we ought to be spending 30 hours on the manufacturing crisis in our country. Since January 31, we have lost 2.5 million manufacturing jobs and over 70,000 of them are from Wisconsin alone.

These jobs are more than numbers on a page. They are all too real. The thousands of Wisconsin residents who have petitioned their Government know this firsthand.

In their letters to me—and, Mr. President, I have with me over 2,000 letters that were sent recently to my home by manufacturers, not labor union members but manufacturers from the State of Wisconsin that are desperate about this problem. Thousands of people from all around Wisconsin, from places such as Sparta and Trempeleau and West Bend and Muskego, write that the first and foremost reason behind these lost jobs is our trade policy.

These letters say: Our elected officials say workers will benefit from this free trade policy and the free trade agreements that come with it, but the opposite has occurred. Our trade deficit is increasing at a pace of $1.5 billion per day. That is how many more products we are importing than we are making. As you can see, these trade agreements are not working to the benefit of U.S. workers.

These letters go on to talk about how manufacturing in America is dying a slow death. That is a much higher priority than spending 30 hours talking about four judicial nominations, and we should respond to the desperate situation that the American people are facing with manufacturing job loss.

I yield the floor.

The PRESIDENT pro tempore. Under the previous order, the next hour is equally divided between the two parties, 30 minutes to each side. Who yields time? The Senator from Utah.

Mr. HATCH. As I understand it, I have 11 minutes left; is that correct?

The PRESIDENT pro tempore. The Senator has a half hour.

Mr. HATCH. Mr. President, we should be voting on judges tonight. Instead we are debating judges tonight because a vocal minority of Senators is preventing us from doing our constitutional duty to vote on judicial nominees.

The American people need to know that. That is why we are here. If you stop and think about this sudden new set of arguments or at least arguments they have used for a long time, the Democratic leadership has been blocking all kinds of passage of bills that are America's priorities for the whole year.

Now they are complaining because we want to let the American people know how bad they have been about Federal judges, which, after all, is one of the most important things we do around here. Just think about it. The long overdue fiscal year 2003 appropriations bills were finally enacted on February 20, 2003. For the first time in history, there were filibusters to defeat the President's circuit court nominees, now up to six who are actually filibustered, and at least another nine whom, I have been told, they will filibuster. The sign they have is an absolute outright falsehood.

We needed legal reforms to stop lawsuit abuse against doctors, businesses, and industries that have been virtually banned by the tactics of the minority. Medical liability, class action reform, gun liability, and asbestos reform: they have all been subject to delays or filibuster by the minority.

Similar delays led to a record number of days spent on the budget resolution and the near record number of rollcall votes on amendments, many of which were virtually identical. The distinguished Senator from Alaska understands that as chairman of the Appropriations Committee.

The most innovative waste of time came on the Energy bill. After spending 22 days on the Energy bill last year, we spent 18 days on the Energy bill this year, only to pass the same version of the Energy bill that passed the Senate last year.

Bioshield legislation necessary to ensure proper vaccines in medicine to counter bioterrorism attacks has still not cleared.

The State Department reauthorization has been stalled by Democrats insisting upon unrelated poison pill amendments be voted on prior to passage. I could go on and on.

The fact is, there has been a steady slowdown, steady slow walk around here, ever since we became the majority.

Now, the issues we are highlighting tonight could not be more fundamental to our country, to democracy, to the rule of law: separation of powers. All are at stake in this ongoing debate. Among the constitutional Framers' conceptual breakthroughs was that the judicial branch would receive equal status to that of the executive and legislative branches. An independent judiciary is the thread that binds the country together and ensures law and order. It is important. It is indispensable to the survival of a civilized society.

If it had not been for the restraining force of an independent judicial branch, either the executive or the legislative branches would have usurped incredible power and destroyed the checks and balances that are at the very foundation of our constitutional form of government. So we all have a stake in this debate tonight, and it is my hope that our opponents across the aisle will act to restore the constitutionally required up-or-down vote for judicial nominees. Ultimately, through the ballot box, the people in my home State of Utah and across America will decide who nominates and who confirms judges.

Let me repeat that our Nation's founding document requires that every judicial nominee who reaches the Senate floor receive an up-or-down vote. It is a simple, clear, and fair fact that lies at the heart of this debate. Once they hit the floor, they have always gotten a vote.

Every one of President Clinton's judges who hit the floor got a vote up or down, and only 1 out of 377 was defeated. But a minority of the Senate is rigging the system by engaging in an unfair set of unprecedented filibusters which are the culmination of an outright assault on the independence of the Federal judiciary.

When our colleagues across the aisle controlled the Senate, we saw nominees with the full support of their home State Senators denied hearings and votes for months and months. We saw nominees stalled by demands for unpublished opinions and volumes of written questions. We saw this become more and more serious since the beginning of this year.

We have continued to see ideology used to threaten the independence of our Federal judiciary by essentially requiring nominees to announce their views on issues that may come before them as Federal judges, something that has not happened in the past. But that is what they are requiring of President Bush's nominees, at least some of them.

They treated Miguel Estrada like dirt, while they allowed John Roberts to go through. Roberts was also in the Solicitor General's office. They did not ask for the highly privileged confidential matters for Roberts, but they did for Miguel Estrada.

By the way, most all of these people have high ratings from their gold standard, the American Bar Association.

We have seen for the first time in American history true filibusters of judicial nominees which are preventing the Senate from exercising its constitutional right and duty of advice and consent. This is harmful to the Nation, it is harmful to the judiciary, and it is certainly harmful to our institution. It is harmful to the President. It is harmful to these people who are willing to put their names up and to do this.

Article II of the Constitution of the United States invests in the President alone the power to nominate judges. There is no room for interpretation. The words are explicit. Yet we have seen efforts to usurp the President's constitutional authority not by constitutional amendment but through various proposals on how nominations should be made and demands on who should be nominated that exceed any reasonable interpretation of consultation.

We have also seen the filibusters of judicial nominees that brought us here tonight and prevent us from exercising our constitutional obligation of an up-or-down vote.

This assault on the judiciary is not without victims. There is no question that it is harmful to the Federal judiciary. More than half of its existing vacancies are considered judicial emergencies. So it is harmful to the President. He is not being treated fairly compared to all Presidents before him. And it is harmful to the Senate, whose constitutional roles are turned on their heads. It is perhaps most harmful to the individual lives of the nominees who have been denied a simple up-or-down vote, which they have always gotten before when they have been brought to the floor on the Executive Calendar.

Now let me talk about some of these nominees because I think it is important to remember that they are very real people who want to get on with their very real lives instead of hanging in the limbo of what has become the Senate's confirmation stall.

Let me turn to this particular picture. Former DC Circuit nominee Miguel Estrada, who is an American success story, unanimously gets the highest rating from the American Bar Association, the Democrats' gold standard. He was stopped for over 2 years—actually 3 years. Priscilla Owen broke through the glass ceiling for women and made it so women could become partners in major law firms, one of the most brilliant people in our society. She was an excellent witness, but they just do not want her.

William Pryor, of course, in my opinion, the outside groups tried to smear Pryor, and they did so with regard to his strongly held personal beliefs on abortion.

I might add that Charles Pickering, who I mentioned before, was passed by this body unanimously in 1990. Yet all of a sudden in the next 13 years he is unworthy to be on the circuit court of appeals?

No. It all comes down to abortion. We can go further. We can go further than just these nominees. I have mentioned a whole raft of others. I could name at least 15 colleagues on the other side who have indicated they are going to filibuster. Now that is abominable. All four of those nominees have been waiting years, and in some cases many years, for confirmation. All of them have been denied up-or-down votes.

On Friday, the Senate will consider the nomination of two more outstanding jurists, and let me just put up this second chart. Carolyn Kuhl served in the Reagan administration. She was only 28 years old at the time and they have tried to act like she had all kinds of authority to do things with which they disagree. She has virtually unanimous support from her fellow judges in California, many of whom are Democrats, who say she will make a terrific addition to the Ninth Circuit Court of Appeals.

Take Janice Rogers Brown, this African American woman who was the daughter of sharecroppers. She put herself through college and law school as a single mother—just think about that—and yet she is being treated in a very improper fashion.

I might add that nearly 100 of her fellow judges on the Los Angeles County Superior Court are in support of Carolyn Kuhl. She is a terrific nominee, but they suspect that she is probably pro-life. I do not know what she is. I do not know what Janice Rogers Brown is. They may be right on that, but so what?

I think if a person is otherwise qualified, no single issue should stop them from being able to serve their country on the Federal bench, and if we had taken the attitude they are taking, my gosh, President Clinton would have got very few judges. Instead he got 377, the second all-time record for confirmations.

DC Circuit Court nominee Janice Brown has spent nearly a quarter century in public service, including nearly a decade as a judge in the California State courts. This daughter of a sharecropper became the first African American woman to sit on the California Supreme Court in 1996. Why are they against her? Because they know she is conservative, and they want just one way of thinking among African Americans. She does not qualify because she happens to be conservative. No matter that she won 76 percent of the vote in the last election, more than any other nominee for the California Supreme Court, and wrote most of the majority opinions in the last year.

On Friday, we will have the opportunity to give these two nominees the up-or-down vote they deserve, but it is apparent the minority whip has said they are going to filibuster them.

I am proud to say in my 27 years in the Senate, some of my Democratic colleagues expressed similar views when a different President was in the White House. For example, the distinguished minority leader stated:

As Chief Justice Rehnquist has recognized: The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down. An up-or-down vote, that is all we ask.

That was their philosophy when they had the Presidency and they had the Senate Judiciary Committee and were the leaders in the Senate.

On this point, I agree with Senator DASCHLE. All we ask for is an up-or-down vote. If they want to vote against these people, that is their right, but they need to have an up-or-down vote. Why are they afraid of allowing simple up-or-down votes in the cases of these excellent nominees? Well, because we think—I think—there is more than adequate evidence that on a bipartisan set of votes these nominees would be confirmed by the Senate. If not, let the chips fall where they may. But these nominees deserve a vote. Vote them up or vote them down, but just vote.

I yield the floor.

The PRESIDENT pro tempore. The Senator from Kentucky.

Mr. MCCONNELL. Mr. President, my Democratic colleagues try to justify their unprecedented filibusters of President Bush's nominees by arguing that they want mainstream judges and that President Bush's nominees do not fit that criteria. Mainstream judges—I am a little puzzled by that assertion. I would think, for example, that Priscilla Owen is in the mainstream. She was rated unanimously well qualified by the ABA. She was endorsed by the past 16 Texas Bar Association presidents, both Democrats and Republicans. She has been twice elected to statewide judicial office in Texas, one of the States where they elect judges, and the last time, interestingly enough, she got 84 percent of the vote—unanimously well qualified by the ABA; supported by 16 presidents of the State bar of Texas, Democrats and Republicans, and gets 84 percent of the vote. Sounds like mainstream to me. Yet Democrats filibustered her nomination because of her interpretation of a Texas law saying minor girls could not have an abortion without their parents being notified—not consent but merely notified.

After all, school nurses need a parent's consent to dispense an aspirin to a child. Should not a parent be entitled to a simple notification when their child seeks an abortion? Over 80 percent of Americans think they should. That is a very mainstream notion.

So I was astonished that Democrats would say she was not ''in the mainstream,'' and, frankly, I think the American public would be astonished by such a conclusion that a person so ruling would not be in the mainstream. But ''mainstream,'' of course, is a relative term.

To help the American people understand the Democrats' view, we should look at some of the Clinton judges my Democratic colleagues have supported. Upon doing so, it should be pretty clear

that the Democrats' view of mainstream is colored by the fact that they are sitting on the far left bank.

Clinton class of 1994, Judge Shira Scheindlin, a get-out-of-jail-free card for terrorist sympathizers. In the days after 9/11, Federal agents did their job by detaining a material witness to the 9/11 attacks, a Jordanian named Osama Awadallah. Osama knew two of the 9/11 hijackers and met with one at least 40 times. His name was found in the car parked at the Dulles Airport by one of the hijackers of American Airlines Flight 77, and photos of his better known name's sake, Osama bin Laden, were found in Osama Awadallah's apartment.

Under the law, a material witness may be detained if he or she has relevant information and is a flight risk. The Justice Department thought Osama met both of those tests. While detained, he was indicted for perjury. But Judge Shira Scheindlin, a 1994 Clinton nominee, dismissed the perjury charges and released this man on the street. Her reason? She ruled that the convening of a Federal grand jury investigating a crime was not a criminal proceeding, and therefore it was unconstitutional to detain this Mr. Awadallah.

This was quite a surprise to Federal prosecutors who, for decades, had used the material witness law in the context of grand jury proceedings for everyone from mobsters to mass murderer Timothy McVeigh. So much for following well-settled law.

If anyone wants to read a good article about this case, I recommend the Wall Street Journal editorial from last year entitled ''Osama's Favorite Judge.'' It notes that thanks to Judge Scheindlin, this fellow is out on bail. We wonder how he is spending his time.

Just last Friday, the Second Circuit reversed Judge Scheindlin. The appellate court seemed quite puzzled that she would release this man given his obvious connection to terrorists. The Second Circuit held that his detention as a material witness was a scrupulous and constitutional use of the Federal material witness statute.

It is too bad Judge Scheindlin did not act in a similarly scrupulous fashion. Nevertheless, to Democrats she is probably ''in the mainstream.''

Let us take a look at the Clinton class of 1995, Judge Jed Rakoff. One of Judge Scheindlin's colleagues, a 1995 Clinton nominee, has ruled that the Federal death penalty is unconstitutional in all instances.

Now, some of my colleagues may share this position, but their views differ from the majority of Americans. When Judge Rakoff acts on his personal views, it is a very clear failure to follow Supreme Court precedent. Indeed, Judge Rakoff's rulings so brazenly violated precedent that even the Washington Post, which is against the death penalty as a policy matter, came out against his decision as gross judicial activism.

In an editorial entitled ''Right Answer, Wrong Branch,'' the Post noted that the fifth amendment specifically contemplates capital punishment three separate times. The Post noted:

> [T]he Supreme Court has been clear that it regards the death penalty as constitutional. . . . The High Court has, in fact, rejected far stronger arguments against capital punishment. . . . Individual district judges may not like this jurisprudence, but it is not their place to find ways around it. The arguments Judge Rakoff makes should, rather, be embraced and acted upon in the legislative arena. The death penalty must be abolished, but not because judges beat a false confession out of the Fifth Amendment.

Another editorial, this one from the Wall Street Journal entitled ''Run for Office, Judge,'' said as follows:

> It hardly advances th[e] highly-charged debate [on capital punishment] to have a Federal judge allude to Members of Congress who support capital punishment as murderers. If Judge Rakoff wants to vote against the death penalty, he ought to resign from the bench and run for Congress or the state legislature, where the Founders thought such debates belonged.

Judge Rakoff's ruling would prevent the application of the death penalty against mass murderers like Timothy McVeigh or Osama bin Laden. I guess Judge Rakoff is the kind of mainstream judge the Democrats would like to see on the bench.

There have also been some interesting rulings from the Ninth Circuit, finding the right to long distance procreation for prisoners. My friends on the other side believe very strongly in a living and breathing constitution. They also believe that the rule of law should not be confined to the mere words of the document and the Framers' intent. To them, those are anachronistic concepts. I was truly surprised, however, to read what a panel of the Ninth Circuit had tried to breath into the Constitution.

Three-time felon William Geber is serving a life sentence for, among other things, making terroristic threats. Unhappy with how prison life was interfering with his social life, Mr. Gerber alleged he had a constitutional right to procreate via artificial insemination.

A California district court rejected Mr. Gerber's claim. A split-decision of the Ninth circuit, though, reversed. Infamous Carter-appointee Stephen Rhinehardt joined President Johnson's appointee, Myron Bright, to conclude that yes, the farmers had indeed intended for ''the right to procreate to survive incarceration.''

In his dissent, Judge Barry Silverman—a Clinton appointee who was recommended by Senator KYL—wrote that ''This is a seminal case in more ways in one'' because ''the majority simply does not accept the fact that there are certain downsides to being confined in prison.'' One of them is ''the interference with a normal family life.''

Judge Silverman noted that while the Constitution protects against forced sterilization, that hardly establishes ''a constitutional right to procreate from prison via FedEx.'' The Ninth Circuit, en banc, reversed this decision, but only barely. And it did so against the wishes of Clinton appointees Tashima, Hawkins, Paez and Berzon, who dissented from the en banc ruling.

If anyone wants to read more about this case, I'd recommend George Will's piece entitled, ''Inmates and Proud Parents.'' If there ever was a circuit in need of some moderation, balance, and ideological diversity, it is the Ninth Circuit. It is made up of 17 Democrat appointees, but only 10 Republican appointees.

It is the Nation's largest circuit, covering nine states and 51 million people. It is also reversed far and away more than any other circuit. Indeed, it is reversed so often—from 1996–2000, the Supreme court reversed it 77 out of 90 times—it is known as a ''rogue'' circuit. This has forced its representatives to introduce legislation to allow their States to secede from the Ninth Circuit.

But my Democrat colleagues probably won't give Ninth Circuit nominee Carolyn Kuhl the simple dignity of an up or down vote. Evidently she is not as ''mainstream'' as all these Democrat judges.

If these Democrat judges represent the ''mainstream,'' then quite frankly, I am glad the Democrats think that Priscilla Owen, Carolyn Kuhl, and Janis Rogers Brown aren't in it. Unlike these Democrat judges, I am confident these women will follow precedent and act with commonsense.

The Senate should, as it did with Judge Paez, Judge Berzon, and other controversial Democrat nominees, give these women the simple dignity of an up or down vote.

I yield the floor.

The PRESIDENT pro tempore. The Senator from Nevada.

Mr. REID. Thank you very much, Mr. President.

I talked quite a bit on Monday about this matter dealing with jobs. We should be talking about jobs. We should be talking about unemployment, not four people who have jobs.

What I am talking about, what we are talking about on this side is absolutely valid. One needs only to go to the Web site of the majority leader, Senator FRIST, prior to his pulling from his Web site the information to the following question: Should the President's nominees to the Federal bench be allowed an up-or-down vote on confirmation as specified in the Constitution? Sixty percent, no.

Even the majority leader's Web site indicates that what is going on here is absolutely wrong. The majority of the people who responded, almost 10,000 people, said this is the wrong approach. This is from the majority leader's own Web site.

I also say that this has been referred to as a carnival—I don't know if that is an exact term. But as an indication that it is circus-like, one need only get

an e-mail that was sent to various Senators on the majority side saying:

It is important to double your efforts to get your boss to S–230 on time. Fox News channel is really excited about the marathon. Britt Hume at 6 would love to open the door to all our 51 Senators walking on to the floor. The producer wants to know, will we walk in exactly at 6:02 when the show starts so we can get it live to open Britt Hume's show? Or, if not, can we give them an exact time for the walk-in start?

Mr. President, we have said this should be about jobs, about unemployment. Even Senator FRIST's people who respond to him on his Web site say yes. Is it a circus? Absolutely. You can see from this it is a circus.

Mr. DURBIN. Will the Senator yield?

Mr. REID. I am happy to yield.

Mr. DURBIN. Is it possible for us to get an update during the course of the evening on what Fox News is going to be looking for during this marathon? This opening about the march into the Chamber clearly was priority for the ''fair and balanced'' network. Will we get updates from time to time how Fox News would like to orchestrate the rest of this?

Mr. REID. I say to my friend, perhaps so. If not, maybe we could check with the Federalist Society, which, coincidentally, is starting their convention tomorrow.

The PRESIDENT pro tempore. The Senator is warned to speak through the Chair and not risk the probability of being interrupted and losing the floor.

Mr. REID. Mr. President, I don't understand. I was speaking through the Chair, answering the Senator's question.

The PRESIDENT pro tempore. The Senator from North Dakota must address the Chair and ask for permission.

Mr. DURBIN. There is no Senator from North Dakota.

Mr. REID. I respond through the Chair to the distinguished Senator from Illinois.

The PRESIDENT pro tempore. It protects the Senator's right to the floor.

Mr. REID. I say to my friend that the Federalist Society, as we know, is not mainstream dealing with judicial issues, but extreme, and indicate that may be the case. One of the lead speakers, of course, is Mr. Bork. To even compound the political nature of the operation, Attorney General William Pryor of Alabama is speaking there.

For everyone within the sound of my voice, it sounds to me rather unusual that someone who has the nomination and is trying to get confirmed to be a member of a very high Federal court—I cannot imagine it would be appropriate for that person to appear at an organization that is not in the mainstream, but extreme.

So what we have here, even by Senator FRIST's standards, looking at his Web site, we have the facts as I have indicated previously.

Mr. SESSIONS. Will the Senator yield?

Mr. REID. Not right now. I will not.

We have here from Senator FRIST's own Web site the fact that 60 percent of the people—about 10,000 responded before it was pulled from the Web site—say that the procedure being sought here is wrong.

I also say it is very clear this is a carnival-type atmosphere as indicated by the e-mail setting up the various presentations to satisfy Fox News.

Finally, the Federalist Society, coincidentally, is the typeset for this matter.

I yield 12 minutes to the Senator from California, Mrs. FEINSTEIN.

The PRESIDENT pro tempore. The Senator from California is recognized for 12 minutes.

Mrs. FEINSTEIN. Mr. President, what I was trying to do was essentially trace changes in committee procedure with the difficulties the Judiciary Committee seems to be countenancing in present days. A good deal of it has to do with blue slip policy because it was the second tradition to fall by the wayside when President Bush took office.

Under the Clinton administration, nominees were often blocked not only by home State Senators but by any single Republican Senator. At the very least throughout the years preceding the Bush administration, a home State Senator's objection to a nominee would effectively stop that nominee from moving forward.

Let me show a copy of a blue slip used during the Clinton administration, starting in January of 1999, and sent to each home State Senator. The document itself specifically states that no proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home State Senators.

That policy was followed without fail and without question. Even before 1999, during the Clinton Presidency, the blue slip said ''unless a reply is received from you within a week from this date, it will be assumed that you have no objection to this nomination.''

But still, if there was an objection from a home State Senator, that nominee simply did not move, did not get a hearing, did not get a vote, did not get confirmed. It was, in fact, a filibuster of one.

Today, there is a new blue slip policy, one in which the objections of one or even both of the home State Senators is no longer dispositive. That is part of the problem. This keeps changing, dependent on who is President. This latest policy puts Democrats on the committee and in the Senate in a difficult position.

In the past, if a home State Senator objected to a nominee, that nominee did not proceed; there would be no committee vote and no filibuster on the floor. Fifty-five Clinton nominees did not receive a hearing. This well could have been a filibuster of one. The blue slip is secret; nobody knows.

Let me name some of the Clinton nominees who were filibustered by one or two members of the Judiciary Committee. Elena Kagen, nominated to the District of Columbia Circuit, nominated by Clinton, June 17, 1999. The nomination was returned December 15, 2000. She waited 547 days without getting a hearing or a vote in the Judiciary Committee. She is currently the dean of Harvard Law School.

Lynette Norton, nominated for the District Court for the Western District of Pennsylvania. Nominated by President Clinton on April 28, 1998, in the 105th Congress. Her nomination, which was submitted to the 105th and 106th Congresses, was returned both times without a hearing. She waited 961 days without a hearing or a vote in the Judiciary Committee. Again, a successful filibuster by one or two Senators, in secret.

Barry Goode, nominated for the Ninth Circuit. Goode was nominated by President Clinton on June 24, 1998. After 3 years of inaction, President Bush withdrew his nomination, on March 19, 2001. Mr. Goode waited 998 days without ever getting either a hearing or a vote in the Judiciary Committee. A filibuster of one or two, in secret—no hearing, no opportunity to read a transcript, no opportunity to go back and read writings, speeches, or look into a nominee's background. Just because of one or two Senators, a hearing is denied; the filibuster is complete.

H. Alston Johnson, nominated for the Fifth Circuit, a Louisiana slot. President Clinton nominated Johnson on April 22, 1999. His nomination was returned December 15, 2000. He waited almost 697 days without getting a hearing or a vote in the Judiciary Committee.

This goes on and on and on.

Now, the nominees before us today had hearings. There was debate. There was a markup. There was a debate. There was a vote. We did read their background. And based on knowledge, the minority of this body made a decision that we do not wish to proceed to affirm them. We have over 40 votes to do so. This is not the vote of one person in secret preventing a hearing from taking place. Now that is as much a filibuster as this is.

You are looking at me strangely, Mr. President?

The PRESIDING OFFICER (Mr. TALENT). There is no reason for that. I am just inquiring of the Parliamentarian about the time remaining.

Mrs. FEINSTEIN. And I don't want to use the time because I know Senator DURBIN—how much time do we have remaining?

The PRESIDING OFFICER. The minority has 18 minutes, of which 5½ minutes, approximately, still remain for the Senator from California.

Mrs. FEINSTEIN. Thank you.

So my point is that much of what has been happening in the Judiciary Committee has been to make it more confrontational. The blue slips are an excellent case in point. Changing when the American Bar Association ratings are known is a good point.

I remember during the Clinton administration when the ratings were

done earlier and I had to call a nominee and tell them that because they had been out of the practice of law for a period of time, they were deemed unqualified by the American Bar Association and the President was not going to move their nomination. So without embarrassment to the individual, that nomination was withdrawn.

Today, you do not get the American Bar Association's qualified or partially qualified or unqualified rating until after the nominee is on the Hill.

Now there are those who do not think the American Bar Association's evaluation is worth anything. There are those on the committee who believe it is. So there is a difference in point of view. But at least have the qualification or nonqualification done early enough so that it can save the individual humiliation and also play a major role.

Let me talk for a minute about rule IV because I think rule IV again divided our committee in a way that it did not have to be. Rule IV has been a Senate tradition. It is a rule. It is a hard and fast rule. It prevents closing off debate on a nominee unless at least one member of the minority agrees to do so. Twice this rule has been reinterpreted, really violated, and votes have been forced on nominees well before debate has ended. The committee's rule in question contains the following language:

> The chairman shall entertain a nondebatable motion to bring a matter before the committee to a vote. If there is objection to bringing the matter to a vote without further debate, a rollcall of the committee shall be taken and debate shall be terminated if the motion to bring the matter to a vote without further debate passes with 10 votes in the affirmative, 1 of which must be cast by the minority.

That enables the minority to delay a matter. It is in the rules of the committee to give it more time. This rule is not being followed.

This is one of the only protections the minority party has in the Judiciary Committee. Without it, there might never be debate at all. A chairman could convene a markup, demand a vote, and the entire process would take 2 minutes. This is not how a deliberative body should function. More importantly, it is contrary to our rules. That is one of the reasons we are where we are today.

This rule was first instituted in 1979 when Senator KENNEDY was chairman of the Judiciary Committee. It has been followed to the letter until very recently.

This is a nation of laws. We expect these laws to be obeyed even if they are just Judiciary Committee rules.

Let me give another situation, and that is ignoring traditional State vacancies. There is also a willingness by this administration to simply change the playing field if they do not like a result. Fourth Circuit nominee Claude Allen is one such instance. He is from Virginia. He has been nominated for a position that has traditionally been filled from Maryland. Why? Because President Bush became frustrated that Maryland's two Democratic Senators would not sign off on the nominees he wanted for that position. So he decided to simply go where he could find more friendly company—Virginia's two Republican Senators.

This stark determination to simply fill the bench with conservative jurists at all costs is what gives the minority in the Senate pause when considering whether to simply approve every Bush judge who comes our way or make a stand on some. We have chosen to make a stand on some. There are other attempts to ignore the minority. There are little things as well, things that add up over time to give the clear impression that the majority does not care about the needs or the will of the minority. That simply serves to create, increasingly, a bunker mentality among Democrats in today's Senate.

For instance, earlier this session, the Judiciary Committee scheduled a hearing with three very controversial circuit court nominees on a single panel for an appellate court.

The PRESIDING OFFICER. The Chair needs to inform the Senator from California she has used her 12 minutes.

Mrs. FEINSTEIN. May I finish my statement?

Mr. REID. I yield the Senator 2 more minutes.

Mrs. FEINSTEIN. The point is, these were all controversial nominees. A controversial nominee's hearing can run 8 hours. If you schedule three, you truncate the hearing for each, and you do not allow the minority to do their due diligence in terms of their homework.

I thank the Chair and I yield the floor.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. REID. Mr. President, I yield the remainder of our time to the distinguished Senator from Illinois, Mr. DURBIN.

The PRESIDING OFFICER. The Senator from Illinois is recognized, and he has 11 minutes 45 seconds.

Mr. DURBIN. Thank you, Mr. President, and I thank the minority whip.

First, for those who are following this debate, if it can be characterized as such, you should understand we had an opportunity to finish the appropriations bill for the Veterans' Administration, a $62 billion bill to fund veterans hospitals, clinics, and health care across the United States. We tried.

Senator BYRD of West Virginia came to the floor and said: Can we postpone what we are doing tonight here to finish this important appropriations bill so we can go to conference and get ready to adjourn this session in a timely fashion? Sadly, the Republican side objected to finishing the appropriations bill for the Veterans' Administration. It is their belief what we are doing now took precedence, is more important. It will be up to the voters and the public to make a judgment as to whether they were right.

I would also say that instead of addressing some issues families across America might tune in to follow, such as the unemployment in this country, and what we are doing about it, we are here debating a situation where 4 judges have been held out of 172 submitted by President Bush.

I would think, frankly, we ought to spend a little time really addressing the problem of unemployment in this country. This President has witnessed, in his administration, a loss of more than 3 million private-sector jobs. That is a record. Unless something changes dramatically, this President will be the first President since Herbert Hoover to have lost jobs during the course of his administration. Over 3 million Americans unemployed. Sadly, we have 9 million unemployed across the country today and their unemployment benefits are running out.

UNANIMOUS CONSENT REQUEST—S. 1853

In the interest of at least trying to do something constructive and legislative this evening, rather than just exchanging our comments back and forth, I am about to make a unanimous consent request that the Senate proceed to legislative session, and the Finance Committee be discharged from further consideration of S. 1853, a bill to extend unemployment insurance benefits for displaced workers, that the Senate proceed to its immediate consideration, and that this bill be read a third time and passed, and the motion to reconsider be laid upon the table.

The PRESIDING OFFICER. Is there objection?

Mr. SESSIONS. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. DURBIN. I am not surprised because what we are about tonight is not the issues families care about. We are about a political script. Senator REID of Nevada read to us this all-points bulletin that was sent out to the Senators saying: Be sure and get over here exactly at 6 o'clock. It said: The Fox News channel is really excited about this marathon. Britt Hume at 6 would love to open with all of our 51 Senators walking on to the floor. The producer wants to know, will we walk in exactly at 6:02 when the show starts so they can get it live to open Britt Hume's show, or, if not, can we give them an exact time for the walk-in?

That is what this is about: It is about theater. The theater we are witnessing tonight is one where, frankly, the curtain should come down. We ought to start talking about things people really care about across America. I can tell you, it is not about 4 judges out of 172. We have approved for this President 168 of his nominees. I think it is a new record. I do not think any President in that brief a period of time has had 168 nominees approved. Lest you believe the Democrats dragged their feet, we approved 100 of these judges during the 17 months PAT LEAHY was chairman of the Senate Judiciary Committee. The remaining 68 came through under Republican Chairman HATCH. I think there has been a concerted and conscientious effort to give the President

his nominees. Then, of course, there were 4 who were not approved—168 to 4. So 98 percent of this President's nominees have been approved. By any reasonable standard, this President is doing very well. Most people would agree, except for the 51 Senators on the other side of the aisle. They believe unless the President gets every nominee, this is a miscarriage of justice.

Sadly, though, they are ignoring the obvious. The obvious is the Constitution of the United States gives this Senate the authority to say yes or no, to advise and consent. Article II, section 2: Advice and consent of the Senate. Some of these Republican Senators would like to see this phrase go away and make their argument at least a little plausible, but it is a fact. We have the authority under the Constitution we swear to uphold to make these decisions; and we have made them.

Of course, not only is the Constitution on our side, but the rules of the Senate are on our side. It reminds me in law school, they told you early in a trial advocacy course—and this a cliche, I know—they used to say: If you have the law on your side in your trial, beat on the law. If you have the facts on your side, beat on the facts. But if you do not have the law or the facts on your side, beat on the table. That is what is happening in this 30-hour marathon. Our Republican colleagues are beating on the table. The law is not on their side.

The Constitution says we have the authority to say no. We have said no 4 times out of 172 opportunities. It is constitutional to do so. Are the facts on our side? Are we being unfair to stop 4 judges, approving 168 and stopping 4? I do not think so.

Frankly, if you look at the record of the Republicans in control of this same committee with a Democratic President, you will find some 63 nominees were never given the decency of a hearing. They never had a chance to even appear and introduce themselves to the committee. The decision was made by the Republican leadership, with a Democratic President, not to even let them in the building.

I have been through this. Three of my nominees that happened to. Do you know what it consisted of? If any one Republican Senator objected to any nominee, end of story. They effectively had a filibuster by one Senator. They stopped these nominees in their tracks.

I can recall going to Senator John Ashcroft, our Attorney General, with one extraordinarily talented nominee, and pleading with him, after the man had waited for a year for a hearing, pleading with him to at least meet the man. Let him come before the committee. No way. The answer was no. End of story. End of nomination.

That was the treatment accorded to three judges from my State during the short period of time when I was here and President Clinton was President, as the Republicans ruled the Senate Judiciary Committee.

I lost 3 nominees. Did I rally my Democratic colleagues: ''Let's all get together and hold our breath and turn blue for 30 hours because I have lost 3 nominees''? No. Maybe I could have. Maybe I should have. But I did not. I understood it. I thought it was fundamentally unfair, and I still do.

What we have done to these four nominees is not unfair. Each and every single one of them has had a hearing. Each and every one of them has been able to come to the committee and present their credentials. That never happened to 63 nominees offered by President Clinton.

This President has a pretty good batting average when it comes to the Senate: 98 percent of his nominees have gotten through. But for the 2 percent, we are meeting this evening.

I might add here, if you take a look at the issues at hand, the Senator from Nevada raised an interesting one. Almost without fail, the majority of the 168 nominees were all members of this Federalist Society. It sounds like a secret handshake society. It is something else. I am not sure exactly what it is. I will tell you why I am not sure.

I do know this. If you are an aspiring law student who one day wants to be a Republican nominee for a judgeship, my recommendation to you is to join the Federalist Society today and do not miss a meeting because, frankly, that is a requirement if you are going to make it into the ranks of judges in the future.

What is it about this society? I don't know. But if you scratch the DNA of all these Republican nominees, you are going to find that Federalist Society chromosome. It is in every one of them. Time and again, I have said to these nominees: What is the Federalist Society? What does it mean to you? Some people say it is a rather extreme organization that views the law and the Constitution in a manner that most Americans do not. But when I ask these nominees—I can remember a Professor Viet Dinh of Georgetown Law School where I went to school many years ago. I said: You belong to the Federalist Society. Why? He said: Because I get a free lunch in Chinatown once a month.

Well, I think it is more than that. If you go to their Web site and ask the Federalist Society what they believe, what they put on their Web site is they talk about how we have lost control of the law and the liberals are taking over—all the stuff you expect. Then when you ask each of these nominees: Well, do you agree with that? ''Oh, no,''—with one exception: Mr. Pryor. William Pryor of Alabama says, yes, he does agree with it. If you got to know Mr. Pryor, you would understand he is rather unabashed in his political beliefs.

The fact of the matter is, the nominees we are receiving from the White House are not mainstream nominees. Sadly, of the 168 we have approved, many could be challenged as outside the mainstream, and that is not what America is looking for.

President Clinton knew if he sent up a real liberal, someone who, frankly, had the credentials of the left, he did not stand a chance before Senator ORRIN HATCH's Judiciary Committee. We would strive to find people with extraordinary legal credentials, people who really have made a difference in terms of their practice of law and what they have done; and they, too, suffered before that same committee.

This President has no qualms. The people he sends to us, whether it is Miguel Estrada or whether it is William Pryor or Priscilla Owen, each and every one of them have come back—Charles Pickering—with credentials that just do not pass the middle-of-the-road test.

Why are we doing this for 30 hours? Let's lay it on the line. This memo from Fox News tells you why we are here. We are here to grind raw meat for the Republican rightwing, so television networks like the fair and balanced Fox News network can rail on for days and weeks about this 30-hour tribute to the Republican point of view, so the radio talk show hosts, who blather on every single day from the right, will have much more to talk about. And instead of dealing with real issues, paying for the Veterans' Administration, so we can get that done, and meet our obligations, taking care of the unemployed across America, so they can feed their families and avoid bankruptcy, we do not have time for that. Our time has to be focused and dedicated to this debate.

I will say to my colleagues in the Senate, I think my friends on the Republican side will have to agree with this: Though they do not like the outcome of the four judges we have talked about here, we have given the nominees, even when Senator LEAHY was chairman, ample opportunity to explain who they are and what they stand for. I think what we have asked for is reasonable.

What we ask of every judicial nominee, from a Democrat or Republican President, is really basic. They have to be people who are honest, of high integrity. They have to understand the law. They should be people who do not come to this job with an ax to grind. That is not too much to ask. Four have failed that test; 168 have been approved.

The PRESIDING OFFICER. The time of the minority has expired.

The Senator from Alabama.

Mr. SESSIONS. Mr. President, how much time is left in the first section for the majority?

The PRESIDING OFFICER. Five minutes 45 seconds.

Mr. SESSIONS. Mr. President, in response to a number of things that have been said, first of all, I want to correct Senator DURBIN. I think he misspoke when he said the Senate has said no to these nominees. What the Senate has said no to is an up-or-down vote. They have denied these nominees a vote. In

each case, these nominees have proven they have a majority of the Senators in this body ready and willing to confirm them, if they are given the up-and-down vote. The systematic use of the filibuster that is occurring now has never before occurred in the history of this Senate.

As to the Constitution, I will just point out article II, section 2, quoted by the Senator—this is what it says—the President ''shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors [and] judges. . . .''

Historically, this body has felt that constitutional language meant treaties required a supermajority, two-thirds vote, and judges would be confirmed by a majority vote, and that is what we have done.

I would just like to ask—I was going to ask Senator REID early, the distinguished assistant Democratic leader—name one position taken by the Federalist Society that is extreme. He will not be able to give you one of those, and neither would Senator DURBIN. This is a society of people who meet and discuss ideas. For example, they have had, in recent weeks, Senator SCHUMER's chief counsel speaking to the Federalist Society, as has Cass Sunstein, Marcia Greenberger, Laurence Tribe—three of the architects of the Democratic strategy for changing the ground rules of nominating judges.

This is really odd for me. I know Senator DURBIN said he has some legislation he would like to offer. Maybe he should have offered it Monday when the assistant majority leader was talking 10 hours down here about rabbits and cactus in Nevada and his book. That was all very interesting, but why weren't we doing any work then? I did not hear any complaints then when we were not passing legislation. That would have been an outstanding opportunity, I submit, to move forward.

Let me just say one thing about where we are on nominations. President Clinton had 377 judges confirmed. One judge was voted down on an up-or-down vote on this floor, a majority voted no—only one. When he left office, there were 41 judges pending and unconfirmed—only 41. President Clinton personally withdrew the nominations of 18. That is how they get 60.

When former President Bush left office, under Democrat control of the Senate, as Republicans were under Clinton, he had 54 nominees left unconfirmed. The record of the Republican Senate under President Clinton was superior under any standard of confirmations to that of the Democrats.

I believe we need to remember those numbers. We need to remember the Republicans rejected consistently the use of the filibuster. It was discussed by people. They said: Why don't we filibuster? Senator HATCH and others would say: We do not filibuster judges. This is why you do not filibuster judges. We never filibustered judges. In fact, one nominee I felt strongly about, whom I voted against, I voted for cloture to bring that nominee up for a vote to overcome a hold that was on the nominee.

My colleagues complain about the Federalist Society. They say they are extreme. They take no extreme positions whatsoever. They are a society that believes in the rule of law and they discuss those issues in free and open debate. But they have moved forward here such as Marsha Berzon and Ruth Bader Ginsburg on the Supreme Court.

ACLU members, American Civil Liberties Union members—do you want to know what their stated positions are on a lot of issues? They oppose steadfastly the death penalty. They openly support partial-birth abortion. They are consistently hostile to law enforcement. They oppose pornography laws, all pornography laws, in fact, even child pornography laws. They favor legalization of drugs.

We have confirmed a lot of ACLU members, as the Senator knows. They have stated positions that are contrary to the mainstream of American thought—no doubt whatsoever.

Somebody such as Attorney General Bill Pryor, who has a record of following the law to the letter, whether he agrees with it or not, is castigated because he makes a talk to the Federalist Society. It is suggested that is an extreme thing for him to do and it is not correct.

Mr. President, I yield back the time.

The PRESIDING OFFICER. The Senator from Alabama has 15 seconds.

Mr. SESSIONS. I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

Mr. SPECTER. Mr. President, parliamentary inquiry: Are we now starting 30 minutes of time on this side of the aisle?

The PRESIDING OFFICER. That is correct.

Mr. SPECTER. I thank the Chair.

Tonight the Senate is engaging in a proceeding to call the attention of the American people to a very serious matter which exists on the confirmation of Federal judges. It is not a matter which occurs just when there has been a Republican President, but it has occurred also when there has been a President of the Democratic party, when the Republicans controlled the Senate. It has gone back at least to 1987, during the second 2 years of President Reagan's administration.

When the Senator from Illinois calls this theater, he may be right, but it is factual theater, and it is worth the time of the Senate for the American people to focus on this important issue.

It is now a little after 8 o'clock Eastern standard time. Frequently, the Senate Chamber is dark at this time. It is true we could be conducting other business, but there are many days when the Senate has tarried. For example, on Monday, the day before yesterday, when there had been a longstanding expectation that the Senate would not be in session because Veterans Day is traditionally not a day in session, but we came back specially to try to finish our work by the projected date of November 21, unexpectedly we were greeted with a 10-hour filibuster by Senator REID on the other side of the aisle. He has a right to do that—he is a Senator—under our rules.

It doesn't lie in the mouth of somebody to say we are spending time where we could have been working very hard on the appropriations process. I do hope we finish that process. I have been an appropriator for my 23 years in the Senate, and we should move to complete that work as promptly as possible.

But the subject matter tonight is the confirmation process, and it is a very serious subject. When President Reagan was in office, during the first 6 years where the Republican Party controlled the Senate, President Reagan secured confirmation of 82 percent of his district and circuit court nominees. In 1987 and 1988, when the Democrats were in control, that percentage dropped from 82 percent to slightly above 63 percent. When President George H.W. Bush was in office, all 4 years had the Senate in the control of the Democrats. The Senate confirmed slightly more than 62 percent of President Bush's nominees, and 54 percent of his nominees to both circuit and district courts were still pending in the Senate when his term ended.

President Clinton had about the same experience. In 1993 and 1994, there was an average of 79 percent of his district and circuit court nominees confirmed when his party controlled the Senate. For President Clinton's remaining 6 years, the percentage dropped to 54½ percent. So that the business of having the President of one party stymied or reduced in effectiveness on confirmation when the Senate is controlled by the other party has been really an apportionment of blame pretty much equally between Democrats and Republicans during the course of the Reagan, first Bush, and Clinton administrations.

The matter has come to a substantial decline, when, for the first time in the history of the Republic, some 216 years, there has been a filibuster of circuit court nominees.

I think it is important to note that we are not seeking tonight to break a filibuster. That would occur when we would seek to have those who were objecting to the judges continue to talk and talk until they ran out of energy or effort and stopped talking so that we could come to a vote. That was what happened in the filibusters on civil rights legislation in the 1960s.

The last time there was a filibuster in the Senate was 1987 when the subject was campaign finance reform. Senator

BYRD was the leader of the Democrats. Senator DOLE, the leader of the Republicans, called all of us into the cloakroom behind us in the Senate Chamber at about 2 o'clock one morning and said: I would like all Republican Senators to stay off the floor. The reason Senator DOLE asked everyone to stay off the floor was to compel the party in power, the Democrats, to maintain a quorum of 51 Senators because if there are not 51 Senators present, then any Senator may suggest the absence of a quorum, and the Senate conducts no further business.

When Republican Senators, including ARLEN SPECTER, absented ourselves from the floor at Senator DOLE's request, Senator BYRD, the leader of the Democrats, countered with a motion to arrest absent Senators. Sergeant at Arms Henry Giugni was then armed with warrants of arrest and started to patrol the halls, and the first Senator he found was Senator Lowell Weicker.

Sergeant at Arms Henry Giugni was a little fellow, about 5 foot 6 inches, 150 pounds. Senator Weicker was a big guy—still is—about 6 foot 4 inches, 240 pounds. This was at about 3:30 in the morning. Sergeant at Arms Giugni decided not to arrest Senator Weicker. I think he made a good judgment. Then he started to go around and knock on Senators' doors.

Senator Packwood foolishly answered his door. Senator Packwood was then carried feet first into the Senate Chamber. This is a true story. You don't get many out of Washington, but this is a true story. That incident attracted a great deal of attention. CSPAN became the channel of choice instead of Jay Leno.

In having this proceeding, it is more accurately called a marathon than a filibuster because it is not a filibuster. Republicans are doing most of the talking. We seek to attract the attention of the American people to what is going on in the judicial system.

We have at the present time judicial emergencies in four of the circuit courts of appeals in the United States: the Fourth Circuit, the Fifth Circuit, the Sixth Circuit, and the Ninth Circuit. When these judicial emergencies occur, people are denied their day in court, cases languish, the matters are not decided, and the fact of life is that justice delayed is justice denied.

Without burdening the record unduly, it is worth noting that in the Sixth Circuit where there is a judicial emergency, a 50-percent vacancy rate on that court, a death penalty case has been pending for more than 8 years. A plaintiff in a civil case on a job discrimination suit trying to get a job had to wait some 15 months before the case came up. That individual died before the case was ever heard.

The ultimate answer, I suggest, is that cooler heads are going to have to prevail, and we are going to have to establish a principle where it applies regardless of what party controls the White House or what party controls the Senate.

Three years ago, I proposed a judicial protocol to establish a timetable that 60 days after the President submitted a nomination to the Judiciary Committee, there had to be a hearing; 30 days thereafter, there had to be action by the Judiciary Committee on the nomination; 30 days later, the matter had to be brought to the floor of the Senate. Those times could be extended on cause shown by the chairman of the committee with notice to the ranking member or by the majority leader with notice to the minority leader. But those time parameters should be established.

If there were to be a strictly party-line vote in the Judiciary Committee, then that matter ought to be advanced to the Senate floor even without having the customary majority vote to bring it to the floor.

One of the grave problems which may confront the Senate is what is going to happen next when there is a Supreme Court vacancy. The filibusters conducted up until the present time constitute an effort to elevate the confirmation process which under the Senate rules calls for 51 votes, or a majority, to 60 votes which it takes to end a filibuster.

For those who may not know what a filibuster is, that is when one party keeps talking and talking and talking endlessly. But that may be brought to a close under the rules of the Senate with 60 Senators voting to cut off debate. That then leaves 100 more hours to debate, plenty of time even after cloture, even after debate is ended or limited, before the matter comes to a vote.

It does not require a Nostradamus to predict or to understand that the current approach on imposing an ideological test is a precursor for the Supreme Court of the United States. When the Senate is constituted as it is at the present time, it is easy to project that we will find a Supreme Court nominee, who does not satisfy the standards of the other party, subjected to a filibuster and to have a vacancy on the Court. What we are moving toward is deadlock.

Right now, there still remains an aura of some civility in this Chamber, notwithstanding our disagreements on the tactics that one side or the other may use in the Senate. We know that the next vote is the most important vote. Notwithstanding the rancor of the arguments, we do understand that we are here to conduct the business of the people of the United States. The judicial system is limping along—still in motion but limping along.

We face a grave potential problem. If the current course of conduct continues so that when we have a nominee for the Supreme Court of the United States, we have this deadlock, and then with so many 5-to-4 decisions by the Supreme Court deciding the cutting-edge questions in our society, we may look to 4-to-4 decisions, and that means no ruling by the Supreme Court of the United States.

One additional thought. Senator SANTORUM and I use in Pennsylvania a judicial nominating panel under an arrangement where the President has three nominees and the Democrats have one nominee. During the 24-year period from the time President Nixon was elected until the time President Reagan was elected, Republicans controlled the White House for 20 of those 24 years. It seemed to me it was an undue balance of judicial nominees without having the Democrats with any nominees in the district courts, so an arrangement was made when Senator Heinz and I were the Senators, carried on by Senator SANTORUM and myself, to allow the party out of power, the Democrats, to have one nominee out of three for the President—one for the party out of power. That has had a very salutary effect in bringing a little bipartisanship into the process.

I do not suggest that for the Supreme Court. I do not press it for the court of appeals. But I think it is an idea worth considering for the U.S. district courts.

In conclusion—the two most popular words of any speech—it is my hope that something constructive will come out of this marathon. It is my hope that there will be some attention attracted to it. When the Senator from Illinois characterizes this as theater, I don't think that is especially derogatory because it is fact theater. The American people would be well advised to watch this theater than some of that which is on the national networks tonight. This is real. Those sitcoms go on and on and are repetitious. More important than the factual theater is that we are on a vital issue.

I hope the Senators hear from the American people. I hope the American people tell us what they would like to have done: Whether you would like to have this kind of projected stalemate where nominees wait endlessly and where it takes 60 votes, a supermajority, to cut off debate and bring it to a vote, or whether you would like us to follow the constitutional mandate of 51 votes in confirmation so that these judges may be confirmed, may take their places to see that justice is done in an equitable way within a reasonable time period.

I thank the Chair and yield the floor.

The PRESIDING OFFICER. The Senator from Texas is recognized.

Mr. CORNYN. Mr. President, I want to focus on a chart that was displayed earlier by the Senator from New York where he proudly displayed the numbers 168 to 4. I think it is important we ask the question: what is that chart designed to prove?

On one hand, our colleagues on the other side of the aisle in the Judiciary Committee and here in the Chamber rail against the President's judicial nominees, calling them out of the mainstream and, even worse, mean-spirited, right wing. But if, in fact, our colleagues on the other side of the aisle have voted to confirm 168 of President

Bush's nominees, it refutes that allegation because they have to agree that at least 168 of those nominees met their definition of mainstream.

I would like to associate myself with the outstanding comments of the Senator from Kentucky, the assistant majority leader, Mr. MCCONNELL. I wonder what their definition of mainstream truly is.

The second number of 4 is a number they want to be congratulated for blocking. I submit that just because you observe a stop sign 168 times and comply with the law, you are not to be rewarded for running that stop sign four times. It is still a violation of law, and you are still likely to get a ticket from the police officer.

This is more than just about breaking the law. This is about violating our Constitution, the fundamental law of this Nation.

We know really, rather than 168 to 4, the true number we ought to be focusing on is 0 to 4, and let me explain.

From 1789 to 2002—that is, for all of our Nation's history up until this year—the number of filibusters against judicial nominees of a President was—you guessed it—zero. But this year alone, because of this tactic that our colleagues have devised, to deny a bipartisan majority of this body its right under the Constitution to vote up or down on a judicial nominee, this number is 4.

So rather than 168 to 4—and as I explained, I think that repudiates and flies in the face of some of their arguments about President Bush's judicial nominees, and I deny that they are to be congratulated for unconstitutionally obstructing only 4. The real number we ought to be focusing on, and I hope the American people are focusing on, is zero to four because never, ever, in the history of this Republic has a minority in the Senate denied the right of the majority the vote up or down on judicial nominees. It is just not right. It is not fair. It has resulted in a degradation and a downward spiral in the judicial confirmation process of which no one should be proud.

I submit that four unconstitutional filibusters of these distinguished nominees is four filibusters too many. If we want to look at maybe a little bit of a history lesson, as this chart demonstrates, when Franklin Delano Roosevelt was President of the United States, 4,473 laws were enacted, 4 civil rights laws were filibustered—hardly something to be proud of. But I guess if our colleagues across the aisle are proud of their four, the argument would be that the people who filibustered these civil rights laws during FDR's term ought to be proud of that number.

When President Truman was in office, 3,414 laws were passed, 3 civil rights laws were filibustered. Is that something to be proud of? What our colleagues across the aisle say, because 3,414 laws were passed and only 3 were filibustered, that these folks who filibustered those three civil rights laws ought to be congratulated. I think not.

Then when President Lyndon Baines Johnson was in office, 1,931 laws were enacted, 3 civil rights laws were filibustered. To this hall of shame, I would add the 168 to 4, which is nothing to be proud of; it is something to be ashamed of.

Unfortunately, some people have lost their sense of shame in this process, which has become so degraded and so destructive. Indeed, I submit that the filibusters we have of the President's nominees are an abuse of the process. How can they justly claim that a 60-vote requirement to close off debate can somehow trump the Constitution?

As we have heard before on this floor, everyone knows, who has studied the Constitution, that there are supermajority requirements for certain things, and they are stated in the Constitution: To ratify a treaty or to pass a constitutional amendment, the Constitution is very clear that it requires a supermajority. Everything else requires majority rule.

Indeed, majority rule is fundamental to the democratic form of government. Majority rules: We fight our best fight; we make our best argument. Then we have a vote up or down. If we lose, well, we come back to fight another day. We try to persuade others that we were right and the majority was wrong. That is what our form of government is all about; not denying a majority their right, as stated in the Constitution, to let majority rule.

Believe it or not, that is what is happening and that is the reason we are standing here tonight trying to let the American people know that a terrible abuse of this process is occurring and an abuse of the Constitution, indeed a violation of the Constitution, is occurring. It is a disgrace. It is nothing to be proud of.

The other thing I would point out in the few minutes I have remaining, before I turn the floor over to the senior Senator from Texas, is this process is not only abusing the Constitution and creating a downward spiral in the judicial confirmation process that is very destructive of relationships in this institution, of our ability to get things done, it has made it too partisan, too bitter, too angry, and it is destructive.

I would also point out that the tactics that are being used against some of these nominees are despicable. Unless we stand up and repudiate the tactics of some of those who are opposing the fine nominees of President Bush, such as Janice Rogers Brown, I believe those who have joined cause with them in opposing this fine nominee ought to examine their conscience. I think they ought to reconsider their tactics. I think they ought to reconsider whom they associate with, whom they are joining cause with to tear down some of the fine nominees of this President, such as Janice Rogers Brown.

This is a cartoon that was posted on The Black Commentator on September 4, 2003, with President Bush, a racist caricature of Janice Rogers Brown with Justice Clarence Thomas, Colin Powell, Secretary of State, and Condoleezza Rice standing there. The caption says: ''Welcome to the Federal bench, Ms. Clarence—I mean, Ms. Rogers Brown. You'll fit right in.''

It is easy to see why this process has gone downhill and needs a wake-up call from all of us, because we need a fresh start. We need to disavow tactics such as this. Those who are opposing Justice Brown and other nominees should not be proud of that association any more than they claim to be proud of an unconstitutional filibuster of four of these nominees, including Justice Brown, because if, in fact, we do not get a fresh start, we do not have a clean break with this destructive process, if we do not quit tearing down people who want nothing more than to offer themselves to the American people by serving in positions of honor, such as Federal judges, who will answer the call? If they know that answering the call of public service means that they are going to have their reputation destroyed, they are going to be besmirched, they are going to be painted into a caricature that bears no resemblance to who they really are, who will answer the call? We will all be poorer for it.

I yield the floor.

The PRESIDING OFFICER. Who seeks recognition?

The Senator from Texas is recognized. The Chair informs the Senator from Texas that there are 2 minutes 20 seconds remaining on the Republican side.

Mrs. HUTCHISON. Mr. President, just to get an understanding, after that 2 minutes 20 seconds, then it goes to the Democratic side for 30 minutes and then back to the Republican side? Is that the way it is?

The PRESIDING OFFICER. The Senator is correct.

Mrs. HUTCHISON. Mr. President, in the 2 minutes that I have, I say I think the junior Senator from Texas made a very important point and that is the importance of the delicate balance of powers that was put in our Constitution. I think it is important that we do not say, well, 98 percent of the time we adhere to the Constitution. We need to adhere to the Constitution 100 percent of the time.

The Constitution has always said, from its beginning, that we would have a majority required to confirm the judicial nominees of the President. Now, this is by implication, because when the Constitution meant to have a supermajority, it so stated. We have always had a majority, and that is what, by its silence, the advise and consent part of the Constitution has required for judicial nominees, until last year.

In fact, I think the President is losing his constitutional right to appoint Federal judges. I think this whole situation is going to deter good people from offering themselves for the bench,

and the judiciary must have good people if we are going to keep that very strong separation of powers with three separate but equal branches of Government.

In his first 2 years of office, President Bush was able to get 53 percent of his circuit court judges confirmed. The previous three Presidents each had 91 percent in the first 2 years of their office in the very important circuit court judge appointments.

Now, the circuit court, of course, is the next step below the Supreme Court. So a 53 percent record in the first 2 years is something that I think should not be accepted. It is very important that we try to get votes on these judges.

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

The Senator from Nevada.

Mr. REID. Mr. President, I yield 15 minutes to the Senator from Indiana and 15 minutes to the Senator from Illinois.

The PRESIDING OFFICER. The Senator from Indiana.

UNANIMOUS CONSENT REQUEST—S. 1853

Mr. BAYH. Mr. President, I ask unanimous consent that the Senate proceed to legislative session and the Finance Committee be discharged from further consideration of S. 1853, a bill to extend unemployment insurance benefits for displaced workers; that the Senate proceed to its immediate consideration; the bill be read a third time and passed, and the motion to reconsider be laid upon the table.

Mrs. HUTCHISON. Mr. President, I object.

The PRESIDING OFFICER. Objection is heard.

The Senator is recognized.

Mr. BAYH. Mr. President, this is an unfortunate debate, and I regret that all of us are here this evening. This debate will do nothing to speed the confirmation of judges about which this session has been called to consider. It will do nothing for the economy, for health care, for education, to protect the environment, or to advance the interests of our Nation's security.

It will, however, at least in small part, bring this august body, about which we care so much, to additional disrepute with the American people, making us look ineffectual and irrelevant.

In some respects, the Senate is being reduced to something close to a farce. It is becoming rapidly not the world's greatest deliberative body but instead the world's greatest Kabuki theater, a place where speeches are given to which very few people listen, no minds are changed, and votes are then held with complete predictability of results.

The search for principled compromise, which has always been a long and honorable part, distinguishing this body from other legislative bodies, has been abandoned in favor of sterile, ideological warfare, satisfying to only the most fervent of partisans. After this debate, I suspect that the far right will be satisfied, I suspect that the far left will be satisfied, and that the rest of the American people will be left scratching their heads, wondering, what on Earth are they doing?

I am reminded of nothing quite so much as some lines from Shakespeare when he characterized another instance as: Great sound and fury that signifyeth nothing.

That is tonight's debate: Sterile, empty, barren of results.

This debate, unfortunately, is a microcosm of everything the American people have come to not like about both the Congress and Washington, DC, something that is all too often all process and partisanship, with no progress on matters of substance and importance to the American people.

Too often the American people view Washington as totally self-absorbed, indifferent to their real concerns, and ineffectual in accomplishing much of value on the things that do matter in their daily lives: Health care, jobs, education for our children and grandchildren.

We must stop this cycle of constant recrimination, a process in which the minority obstructs to gain power and then turns around and complains about obstruction once power has been obtained. It makes us all look bad.

If hypocrisy had a monetary value, we could easily erase the Federal deficit because of debates such as the one we are engaged in tonight.

What is this all about? What are the facts that the American people deserve to know? Is it true that judges are being obstructed solely because of their partisan affiliation? That obviously cannot be the case. One hundred and sixty-eight of President Bush's judicial nominees have been confirmed. I assume that all of them, if not almost all of them, are good card-carrying Republicans or he would not have nominated them. Obviously, there cannot be some stonewall to object to Republicans being appointed to the Federal judiciary. This simply is not the case.

Are judges being rejected up to a point based solely upon ideological concerns? This also cannot possibly be the case. Of these 168 judges who have been confirmed, I assume that all, if not almost all, are in fact fairly conservative jurists, or hold out the prospect of being fairly conservative jurists. Otherwise, they would not have been nominated by this President.

So up to a point, it is obvious that conservatives are not being denied their place upon the Federal judiciary. This is all about power, the balance of power between the executive and legislative branches and whether the advise and consent function should be abolished whenever the Senate is controlled by the party of the President. It is all about the balance of power between the minority and the majority caucuses in this Senate and whether the right to debate should be limited in the case of judicial nominees, unlike any other business taken up by this body.

It is also about tipping the balance of power within the Federal judiciary and setting the stage for a Supreme Court vacancy to be filled by someone of even the most extreme ideological conviction and views.

Is that possibly what the Constitution had in mind when it established the right of advise and consent in this Senate? Is that something for which we should abrogate the right to unlimited debate in this Senate, selecting judicial nominees in exclusion to all other topics in this regard? Of course it is not.

We are ignoring the issues this evening that are of most importance to the balance of the American people. When I go home, I hear great talk about the economy and job losses. In the last 3 years, we in the State of Indiana have lost approximately one out of every six of our manufacturing jobs. One hundred fifty-nine thousand jobs, nonfarm jobs, have been lost during this period of time. That is what I hear people talking about. Small business men wonder how they are going to compete in the global economy today. Large business men and women wonder how they are going to make ends meet, particularly with the skyrocketing cost of health care. Many people ask how we are going to compete with China, India, and other countries that all too often seek to abuse the rules of international trade to seek unfair economic advantage. Those are the subjects we should be debating tonight.

Those are the topics that are on the minds of Hoosiers to whom I talk. Very rarely am I asked about vacancies in the Federal judiciary.

When I was returning from Indiana just last evening, one of the security guards, a gentleman who looked somewhat advanced in his years, called out to me as I was going through security, saying: Senator, what about the Medicare drug benefit? Is something going to get passed?

I said: I hope so.

He said: Well, it probably will not be structured the way it ought to be anyway.

I said: Well, I hope not. We are going to go back and see if we cannot hammer out a reasonable compromise.

I see some of my colleagues, including Senator GRASSLEY, who are laboring mightily toward that very end, and I salute him for that. That is what we should be debating tonight, how to reconcile our differences on providing drug coverage to senior citizens who are asking about it; how to make health care available to the American people in a way that is accessible and affordable. That is what is on the minds of Hoosiers to whom I talk. That is what we should be debating this evening in this body.

What about our education standards and what about providing our children and grandchildren with access to quality affordable education? When I think about the economy of the future, more than anything else it is going to require advanced levels of education,

skill, and know-how. We are going to prepare my young sons and the rest of our children and grandchildren to have a better standard of living in a prosperous economy. It is going to be based not upon how strong they are but upon how knowledgeable they are, how well trained they are, how skilled they are. That is going to enable us to build a better economy. We are not debating that tonight.

At no point, in my recollection, have we set aside 30 hours to debate quality health care. At no point, in my recollection, have we set aside 30 hours to debate the economy or what we are going to do to create quality jobs. At no point, in my experience in the Senate, have we set aside 30 hours to talk about what we can do to debate quality education in the way we are setting aside these 30 uninterrupted hours in the wee hours of the morning. This is a clear example of misplaced priorities.

I hope this Senate will extricate itself from the morass into which we have sunk and begin to rehabilitate ourselves in the eyes of our countrymen and women. I hope we can once again begin to address the great issues that are of concern to the American people, that press all around us—what our country can do to be more prosperous, more just and more free. Above all, I hope that we as Senators can remember why we are here, and that is not to wage war upon one another but instead to once again renew the struggle against the ancient enemies of man: Ignorance, poverty, disease. That is why we are here, not sterile ideological debates.

I hope we can learn from this experience so that we will not have to repeat it. I hope we can focus on making progress, not dividing this body over the country. This aisle that separates the chairs, Republicans on one side and Democrats upon the other, gives us the opportunity to build bridges of reconciliation and understanding, forging principled compromise which has always been the hallmark of this institution. We have strayed from this heritage for too long. It is a tradition to which we must return if we are to once again recapture the confidence of the American people.

The final thing I will say is that we had an election in Indiana for our mayors this last Tuesday, a week ago yesterday. Something on the order of 20 percent of the people of my State turned out to vote for our mayors. When I had the privilege of being elected to this body in 1998, about 36 percent of the eligible voters in my State took the time to go to the polls. That is barely one out of three. In the closest Presidential election in the history of our country 2 years ago, decided finally by the Supreme Court, barely half of the American people felt connected enough to their institutions of self-governance to take even the most elementary step of citizenship—going to the polls to register their preference.

What has happened to our democracy? What has happened when 20 percent or 36 percent or a bare majority feel invested enough in the cause of shaping their own destiny to take the time to participate in our elections? If we are going to renew our democracy, if we are going to lead this country to meet the great challenges of our time, if there is one thing I am absolutely certain, it is that it will take all of us, each and every one of us from every ethnic group, racial group, gender, and walk of life.

Too many people have become disillusioned. Too many cynical, too many skeptical whether this body and their government can make a difference anymore. Events such as this debate tonight do not help.

We need to get back to the business at hand, putting before the American people an agenda of hope and opportunity so we can once again reenlist them in the cause of making this the greatest democracy known to man. That, at the end of the day, is what has brought us here. I suggest that is the business to which we must once again return.

I yield the floor.

The PRESIDING OFFICER. The Senator from Illinois is recognized. There are 16 minutes 54 seconds remaining.

Mr. DURBIN. I begin by commending my colleague from Indiana. That was an extraordinary speech. I hope that for a moment Senators on both sides of the aisle will stop and reflect on what he just said. I think it was a challenge to everyone, as strongly as we feel about what we are debating tonight, the appointment of Federal judges; the Senator from Indiana is right. The people across America wonder why we are wasting the time of the Senate on issues that have no importance or relevance to their lives, and because they cannot understand us, they are estranged from us. They do not feel invested in this process, they do not feel a responsibility to vote; they, frankly, think we spend too much time in partisan posturing. The 30 hours of this debate are a classic example of that kind of partisan posture. That is unfortunate.

What the Senator hears in Indiana and I hear in Illinois and I daresay every Senator hears in their State—I have been going back to Illinois for 4 straight years in the month of August trying to tour the State, meeting with business and labor leaders and community leaders, to ask what is going on. For 4 straight years they told me the same thing: Senator, can you do anything about the cost of health insurance? It is killing us. It is killing my small business. It is killing my large business. My family is worried about coverage. What are you going to do in Washington about the cost of health insurance? I have to basically shrug my shoulder and say: I am sorry, that is not on our agenda. We have other things we debate in Washington, not the things you and your family worry about, that keep you up at night. This is a good example.

Would it not have been inspiring if we came together as Democrats and Republicans on the floor to talk for 30 hours about the future of health care in America, to speak to it in honest, nonpartisan fashion, to try to address some of the most controversial parts of it in a responsible, gentlemanly way?

That is what we are expected to do. That is not what this is about. This is about alerting FOX News to grind out their cameras at the entrance of the Senate to watch a parade of Senators come in—Senators who have now disappeared. This is about charts being made, night and day by Democrats and Republicans, to argue their case.

My people living back home in Springfield, IL, and Chicago, IL, I am sure, turned off CSPAN a long, long time ago, if this is the best we can offer them. Sadly, that is all we are offering them.

We left the Veterans Administration appropriations bill—we could have finished it—for veterans hospitals and the millions of veterans across America because we did not have time; we had to start this never-ending 30-hour debate. We cannot entertain a motion made by the Senator from Indiana, a motion I made, as well, to try to do something about the 9 million unemployed Americans whose benefits are running out. We do not have time for that. We have time for this political debate.

That is unfortunate. It is distressing. I have given 21 years of my adult life to public service. I have never regretted a moment of it. I walked away from a law practice and never looked back. This is the most exciting and interesting thing I can think of to do with your life, to be involved in public service. I encourage everyone, regardless of your political stripe, to get involved. You will love the opportunity it gives you to help people. But, frankly, we are not seizing that opportunity or we would not be here tonight. We would not be here discussing a question about whether 168 or 172 judges is the right number.

Is this the best we can do? I think not. I think we can rise to a greater challenge but we have to put aside the partisanship.

I readily concede I have struck a few partisan blows and a few have been thrown my way. That is part of life in the Senate, I am sure, and life in the big leagues. But at the end of the day when it is all over, at the end of the year or end of the session, each of us would like to point back to something we did to improve the lives of the people we represent. What have we done to make the schools better? What have we done to deal with the economic uncertainty of middle-income families? What have we done to deal with the trade laws that are killing us in the Midwest and across the Nation?

I have been a proponent of free trade. It is almost impossible to defend at this moment in time. We are not enforcing our trade agreements. We have lost five or six manufacturers in Indiana and the same is true in Illinois. We

lost 3 million jobs across America. Frankly, many of those jobs will never come back. When we read headlines that say there are 120,000 new jobs in America, that is good news. But ask the hard question, are the jobs we created paying as much as the jobs we lost? If they were manufacturing jobs, the answer is pretty obvious. The answer is no, they are not. We are losing more and more good jobs. Instead of focusing on that as we should, on the things that people care about, we are spending our time in 30 hours of debate over four judges.

The senior Senator from Texas said earlier that the President has a constitutional right to appoint judges. I don't want to correct the Senator from Texas, but she is wrong. The President does not have a constitutional right to appoint judges. The President has a constitutional right to nominate judges. The judges are appointed through the advice and consent of the Senate. Therein lies the difference in our points of view. From the Republican side of the aisle, the President has a constitutional right to name the judges he wants. End of story. But the Constitution says otherwise. And it always has.

Even the most powerful and beloved President has to be held accountable to the people of America through the Senate, through the House, and that is why we are here tonight. At one moment in history when President Roosevelt had been reelected with the largest majority in the history of the United States, Franklin Roosevelt, he decided he had had his fill with the U.S. Supreme Court across the street and they were not treating him well and he came up with a scheme to pack the court, to add more Supreme Court Justices because they just were not ruling on his laws the way he wanted them to. He proposed that to an overwhelmingly Democratic Congress in the House and the Senate and ran into a firestorm of opposition from his own party.

President Franklin Roosevelt, as popular as he was, with the mandate he brought to office—and I will not reflect on this President's mandate in this discussion, but President FDR's mandate was substantial. He felt that he had a moment in history when he could change the Supreme Court. And this Senate, the Democrats in the Senate, said: No, we have to draw the line; this executive branch cannot control the judicial branch and we will stand in the path of a popular and beloved President. And they did. They stopped him.

That, to me, was an important moment in history—when Senators of the same political party said to a President, this Constitution created three branches of Government for good reason.

So tonight we are in a position where many are arguing that this Senate should step back and not assert its constitutional right to speak to the qualifications of judges. It will be a sad day if we allow that to occur.

Let me try to synthesize this into what it is about. It is not about the four judges or two more who might be added on Friday. It is about the next appointment to the Supreme Court across the street. That is the real story. There are a lot of good reasons we are here tonight but the real reason is the next Supreme Court vacancy and the belief on the Republican side of the aisle that if we can hold fast with our approach in stopping people unqualified, unfit, to serve on a Federal court, they will have a difficult time passing through a controversial nominee to the U.S. Supreme Court.

I think, in my heart of hearts, that is why we are here this evening. They are trying to smooth the road, prepare the way for that Supreme Court nominee from this President.

Now, let me give advice to my friends—and they are not likely to take it—on the Republican side. There is a way to avoid all that. Pick a man or a woman who is of such impeccable legal background, great credentials, the kind of person with the integrity that they will be above this kind of political debate. It can happen and it has happened.

In my State of Illinois, a State with two Senators from opposite political parties, we have not had one problem in filling the Federal judicial vacancies. We have done so, Democrat and Republican, with good men and women whom I am certain will serve this country well. I just gave the green light to a nominee who sits on our calendar, and I hope we will move quickly, Mark Philip, who was a clerk to Justice Antonin Scalia. I am a Democrat, approving a former clerk to Justice Scalia. I met him and trust him and I think he will be a great Federal district court judge.

That can happen again. But we have to move away from those who are ideological extremes. We have to move away from those who are lightning rods. We have to move to a center path, which most Americans expect of us.

Sadly, tonight, we are being told this Senate should not even ask questions of these nominees. That is wrong. We have a constitutional responsibility, a responsibility that must be met.

Some have said, incidentally, that ours are the first to ever filibuster nominees. In fact, the Senator from Pennsylvania said it is the first time in the history of the United States anyone has ever filibustered a judicial nominee. Well, this chart shows that is not correct. Abe Fortas of the Supreme Court, subject to cloture motion, filibuster; Stephen Breyer, First Circuit—I am going through the list—Rosemary Barkett, Eleventh Circuit; Lee Sarokin, Third Circuit; Marsha Berzon, Ninth Circuit; and Richard Paez, Ninth Circuit.

The fact is, there have been judges brought to the Senate floor who have been filibustered in the past. The fact is, most of those filibusters failed. The motion for cloture prevailed but the filibuster was on. On the four who are under contention this evening, the filibuster has succeeded. The motion for cloture has not been filed successfully. That is the difference. To say it has never happened before in our history is to defy the obvious. It certainly has happened before.

The point we are trying to make is it is not unreasonable to have 4 nominees out of 172 questioned, to be found lacking.

Let me close by saying, again I commend my colleague from Indiana because I think he put it in perspective. We all know it is true. We could be spending our time doing a lot more important things for America and a lot more important things for the people we represent than squabbling over four judges.

Mr. REID. Will the Senator yield?

Mr. DURBIN. I am happy to yield.

Mr. REID. I ask the Senator, through the Chair, there have been statements made by the majority, for weeks, months, that never ever in the history of the country has there been a filibuster conducted regarding a Federal judge. Would the Senator again state whether or not those statements regarding filibusters of Federal judges having never been held is true or false?

Mr. DURBIN. It is false. It is clearly false. Justice Abe Fortas, 1968; Judge Stephen Breyer, 1990; Judge Rosemary Barkett, 1994; Judge Marsha Berzon, 2000; Judge Paez, 2000. And many others.

The fact is, for those who say there have never been filibusters by nominees, that is clearly not right.

Mr. REID. Another question I ask my friend from Illinois, through the Chair, what I have heard the Senator state tonight is that on numerous occasions—in fact, the chart that is behind you indicates this—that there would be numerous occasions going back to at least 1968, there have been filibuster after filibuster, and sometimes they have tried to invoke cloture on more than one occasion; is that true?

Mr. DURBIN. That is accurate. As noted here, for Judge Breyer, twice. That is a clear example. On some of the others, there could have been more than one time, as well.

The point I would like to make to my friend from Nevada, we also know that under President Clinton, 63 of his nominees never got a hearing. They were never given a chance to come to the floor for this vote because the Republican-controlled Senate Judiciary Committee would not even give them a hearing.

Mr. REID. Will the Senator yield for a question that I ask through the Chair?

Mr. DURBIN. I am happy to yield.

Mr. REID. The Senator from Illinois is a member of the Judiciary Committee. Would you explain to the people watching this—whatever it is—would you explain to the people how a person gets to the Senate floor to be nominated for a judge? How do they

get here? What is the process? Explain to the people of the country what you mean when you say someone never had a hearing.

Mr. DURBIN. It is customary for a Senator of a State, depending on the President's party, to be able to suggest to the White House a nominee to fill a vacancy on the Federal district judge and the Federal circuit court. That nominee is then given to the White House for approval and investigation, FBI background checks, the normal things. If the White House then clears that nominee, the name is sent to the Senate Judiciary Committee. A hearing is scheduled in the normal course where the person is brought before the committee. After the committee has done its investigation, questions are asked and then the person is brought for a vote and eventually finds their way to the floor.

Under the Clinton administration, after the nominee came out of the White House, 63 times, 20 percent of the President's nominees were stopped at that point and never brought to a hearing before the Senate Judiciary Committee. So the argument that we have stopped four belies the reality that when we looked at the numbers from the Clinton administration, 20 percent, not 2 percent but 20 percent, of the judges never got their chance before the Judiciary Committee to even present their credentials and argue for their nomination.

I say to the Senator from Nevada, that is a sad reality. Frankly, this President is being treated far better than President Clinton. This Senate Judiciary Committee, under the leadership of Senator PATRICK LEAHY, a Democrat, approved 100 of President Bush's nominees, gave them hearings and moved them forward.

We tried in a bipartisan fashion to meet our constitutional responsibility. Only 4 times out of 172 have we said no. Only four. It is reasonable for us to stop and ask hard questions of nominees who are asking for lifetime appointments to some of the highest courts of the land.

Mr. REID. Will the Senator yield?

The PRESIDING OFFICER. The time of the Senator from Illinois has expired. However, there is a minute and a half left on the Democratic side.

Mr. REID. Will the Senator answer this question?

The PRESIDING OFFICER. The Senator from Nevada is recognized.

Mr. REID. I direct the question through the Chair to my friend from Illinois. The number 168 on the chart behind you, does that represent 168 people who have been nominated by President Bush who are now serving in the Federal judiciary who have lifetime appointments?

Mr. DURBIN. That is correct. I say to the Senator from Nevada that there are some among those 168 about whom I have had misgivings. Many of them I voted for anyway, understanding this is the President's prerogative to nominate people for the Federal courts.

Going back to the point I made earlier, the President does not have a constitutional right to appoint Federal judges. He has the right to nominate them. Only with the advice and consent can they be appointed to the Federal judicial vacancies. Therein lies the real difference in the argument we brought forward this evening.

I yield the floor.

The PRESIDING OFFICER. The Senator from Nevada has the floor with 27 seconds.

Mr. REID. When the majority uses their time, the half hour will be divided in whichever way the Senator from Michigan, Mr. LEVIN, and the Senator on the other side wishes to divide 30 minutes.

The PRESIDING OFFICER. The Senator from Texas is recognized.

NOTICE

Incomplete record of Senate proceedings.

Today's Senate proceedings will be continued in the next issue of the Record.

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Senate

EXECUTIVE SESSION

Mrs. HUTCHISON. Mr. President, Senator HATCH will be on the floor shortly. Before he gets here, I want to talk about one of the nominees who we will be voting on, once again, with cloture votes on Friday. That is Justice Priscilla Owen. Justice Priscilla Owen has had a vote in the Senate. She has had four or five votes in the Senate.

If we were adhering to the Constitution of the United States, she would be sitting on the Fifth Circuit today. There are three vacancies on the Fifth Circuit. They need to fill their bench. She should be sitting there because she has gotten more than 51 votes. But Priscilla Owen is not sitting on the Federal bench today because we have a new standard that has been put in place for the first time since 1789. Last year, we started having a 60-vote standard for Federal judges.

So Priscilla Owen, although she has repeatedly and every time, gotten over the required 51 percent, is not sitting on the Federal bench today. No. Instead, this very qualified supreme court justice of the State of Texas is doing her job, doing it very well, serving as a supreme court justice in the State of Texas, even though she has gotten the requisite number of votes on repeated occasions to be confirmed as a Federal judge by the standards of this Congress from 1789 until 2002, until the rules were changed because we are now filibustering Federal judge nominees.

Priscilla Owen was endorsed by every newspaper in Texas when she ran for reelection. Priscilla Owen made the highest grade—the highest grade—on the bar exam when she took it. She graduated at the top of her class from Baylor Law School. She has had an exemplary record both as a supreme court justice for the State of Texas and as a practicing lawyer. She is experienced. She is qualified. She was rendered qualified by the ABA system, the committee, and she has been endorsed by Democrats and Republicans throughout Texas. She has been endorsed by Democratic supreme court justices with whom she served on the Supreme Court of Texas.

The former chief justice of the supreme court, a Democrat, named John R. Hill, who also was a Democrat attorney general in the State of Texas—a very fine one, a very respected lawyer

NOTICE

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ROBERT W. NEY, *Chairman.*

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

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in Texas; supreme court chief justice and attorney general of our State—said Priscilla Owen is unqualifiedly the best we could have for this court. She is a person who ought to be on the Federal court.

In fact, he came up here and tried to meet with Democratic Senators to talk about how qualified she is. That Priscilla Owen is not sitting on the Fifth Circuit today is a tragedy, and it is not right.

She is not the only one who has been asked to meet this higher standard. Look at Miguel Estrada, who came to our country as a boy and did not even speak English, who studied so hard that he was able to go to Columbia and become a Phi Beta Kappa, and then to Harvard Law School, where he graduated, again in the top of his class.

Miguel Estrada, the American dream; Miguel Estrada, who sat here since May of 2001, who got the requisite number of votes to be confirmed for the DC Circuit—well over 51—time and time and time again, but he is not sitting on the DC Circuit. He finally said: I can't take this anymore. I have to get on with my life. In September, he said: Take my name off the list.

Why? Why have we set a higher bar for Priscilla Owen and Miguel Estrada—these two perfectly qualified people, with great academic standing, with great records, with experience, everything you would want on the Federal bench?

What are we going to do to the people who would ask for Federal benches in the future? I am very concerned that after watching this process so many of them are going to say: Please, don't throw me in that briar patch.

So, Mr. President, I do not think we should change the Constitution of the United States without going through the process of a constitutional amendment. Have we had a vote on the floor that got a two-thirds majority saying that we will have a 60-vote requirement for confirming Federal judges? Have we done that? That is the process for amending the Constitution of the United States.

But I do not think that since I have been here I have seen a vote that would say: No, it is not a 51-vote margin; it is 60. No, Mr. President, we have not had that vote. But, in fact, the amendment to the Constitution is being put forward without going through the process. Because we now have six people nominated to the circuit court bench who are having to meet a higher standard than 51. And that is not right.

To date, our President, President Bush, has had 63 percent of his nominees to the circuit court confirmed. The previous three Presidents have had 91 percent of their circuit court judges confirmed by this time in their terms.

So I am going to turn the floor over to the distinguished chairman of the Judiciary Committee who has done a wonderful job trying to get these nominations through the process. He has done a magnificent job in trying to bring these great nominees to the floor.

But we are standing here tonight because this is a constitutional issue, and it is important. It is important that these good people, who have submitted themselves for this process to be confirmed as Federal circuit judges, be able to, with dignity, have a vote up or down with the same standard that we have had since 1789; and that is a 51-vote margin.

Thank you, Mr. President. I yield the floor.

The PRESIDING OFFICER (Mr. SUNUNU). The Senator from Utah.

Mr. HATCH. Mr. President, I have been listening to this debate and the populist arguments being made by Democrats who seem to think that having Federal judgeship nominees treated fairly, as they always have been in the past, once they have been brought to the floor, seems to be not right because they think we ought to do something about jobs.

Well, why haven't they? This recession began in the last year of the Clinton administration. I went through just some of the things that show they have had a pattern of obstruction from day 1 around here since we have taken over control of the Senate.

The pattern of obstruction was set on the first day of the 108th Congress when the motion to adjourn was forced to a rollcall vote, something that is usually never done. The long overdue 2003 appropriations bills were finally enacted after we became the majority in 2003, on February 20.

For the first time in history, filibusters were used to defeat the President's circuit court nominees. I have mentioned upwards of 15 that some Democrats have told me they are going to filibuster. They are not going to filibuster all of them, but they are certainly filibustering already more than four. There are six right now by the time you get through with Friday.

I can tell you, there are a whole raft of others they are planning on filibustering. First time in history, treating a President like dirt, and these nominees, which is even more important in this sense, because these nominees—we are going to find that we cannot get the top people in the country to take these positions, especially if they are very liberal or very conservative, even though they are in the mainstream. And that is a big phony shibboleth. Every time they say: Well, they are outside the mainstream of American jurisprudence. They were saying that about Bill Pryor, criticizing the cases that he won as the Alabama attorney general before the Supreme Court. So who is out of the mainstream? It certainly is not Bill Pryor, nor is it any of these other nominees.

Like I say, Priscilla Owen, who has been held up for 3 years now—better than 3 years—Priscilla Owen is on the Texas Supreme Court. She was one of the first women partners in this country. She broke through the ''glass ceiling'' for women. They ought to be giving her a medal instead of treating her in this despicable fashion, and they are only doing it because these inside-the-beltway groups control, in many respects, what they do. It all comes down to abortion.

Now, there are sincere people on both sides of that issue. That is why I did not allow the issue of abortion to stop otherwise qualified candidates from getting a vote up or down on the floor, even though I am personally pro-life and cannot imagine why anybody would want to go for a regime of abortion on demand. There were 1.6 million abortions a year at one time. Forty million abortions in this country—the barbaric practice of partial-birth abortion, which many of my colleagues voted for, even some on this side.

Let me go down a few further here: Needed legal reforms, I mentioned, to stop lawsuit abuse against doctors, businesses, and industries have been virtually banned by the tactics of the minority.

Jobs have been lost right and left because of their refusal to allow decent laws to be passed. Medical liability, class action reform, gun liability, and asbestos lawsuit reforms have all been subject to delays or filibusters by our colleagues on the other side.

As I said, we spent 22 days on an Energy bill last year, and then we had to spend 18 days on an Energy bill this year, when we basically enacted the same bill we did last year.

Bioshield legislation is very important for those of us who work heavily in the area of health care and antiterrorism. Bioshield legislation is necessary to ensure proper vaccines and medicines to counter bioterrorism attacks has still not cleared objections.

The State Department reauthorization was stalled by Democrats insisting upon unrelated poison-pill amendments being voted on prior to passage.

The District of Columbia appropriations bill is subject to a rolling filibuster threat over a provision giving low-income students school choice, where we spend over $11,000 per student and have the lousiest school system in the country.

Last year Senate Democrats failed to pass a budget resolution for the first time since the Budget Act was written in 1974, and they have the gall to come in here and say: Well, we ought to be taking care of jobs.

We are going to take care of jobs if we can get some cooperation from them. But all the taking care of jobs in the world may not amount to much if we do not have a good Federal judiciary to make this system work, to make sure our constitutional way of life continues.

They passed no welfare reform. They took no action to ban cloning. They passed no Medicare prescription drug plan. They confirmed a record low number of judges. They enacted only 2 of the 13 appropriations bills and delayed enactment of a Homeland Security Department for months. It is this

dismal record of inaction that Democrats hope to repeat.

Now, we are committed to delivering the Healthy Forests bill and the CARE Act to the President's desk. The Democrats are refusing to name conferees to the bill that passed with strong bipartisan support. I could go on and on.

But my friend from Nevada—it is kind of interesting to me that he would take 10 hours out of the Senate's time on Monday to filibuster, when we all came here prepared to vote on appropriations bills.

I think it is pretty bad to come in here and say that we should not do what we should for judges, when they themselves have been filibustering not just judges but virtually everything else with a slow walk.

Mr. MCCONNELL. Will the Senator yield for a question?

Mr. HATCH. I am glad to yield, without losing my right to the floor.

Mr. MCCONNELL. I notice my friend's voice from Utah is cracking a bit, and I thought I might give him a moment's relief by asking him a question or two.

Mr. HATCH. Sure.

Mr. MCCONNELL. I would ask the chairman of the Judiciary Committee, was it not the case that the current DC Circuit Judge John Roberts and nominee Miguel Estrada were nominated on the same day in May of 2001?

Mr. HATCH. That is correct.

Mr. MCCONNELL. I would ask my friend from Utah, is it not true that the rationale for defeating Miguel Estrada given by the other side was that either he or the Justice Department or both of them refused to turn over the working papers that he had produced during his period as a lawyer in the Solicitor's Office of the Justice Department?

Mr. HATCH. That is correct. These are the most confidential private papers of the Solicitor General's Office, the lawyer who represents all of the public.

Mr. MCCONNELL. Right. Was it also not the case, I ask my friend from Utah, that every single living Solicitor, who are either current or former Solicitors, the majority of which are Democrats, concurred with the Justice Department's position that these working papers should not be turned over?

Mr. HATCH. That is correct. Four of the seven former Solicitors General were leading Democrats, who said that what the Democrats are doing is wrong.

Mr. MCCONNELL. People such as Seth Waxman and Archibald Cox?

Mr. HATCH. Right.

Mr. MCCONNELL. All concurred?

Mr. HATCH. Right.

Mr. MCCONNELL. All concurred that these types of working papers should not be turned over?

Mr. HATCH. That is right.

Mr. MCCONNELL. Is it not the case, I ask my friend from Utah, that both John Roberts and Miguel Estrada worked in the Solicitor's Office?

Mr. HATCH. They both worked there. They both were excellent appellate lawyers. By the way, Estrada worked not only with the Bush administration but with the Clinton administration. And he had high marks.

Mr. MCCONNELL. The same two gentlemen we just discussed, who were nominated on the same day back in May of 2001, by President Bush, for the very same court?

Mr. HATCH. Right.

Mr. MCCONNELL. Nominated to the same court, the same experience in the Solicitor's Office. And is it not the case, I say to my friend from Utah, that John Roberts was passed out of committee and subsequently confirmed on a voice vote in the Senate?

Mr. HATCH. A unanimous voice vote on the floor, but only after waiting 12 years through three nominations by two different Presidents.

Mr. MCCONNELL. He certainly had to wait a while, did he not?

Mr. HATCH. Right.

Mr. MCCONNELL. Is it not the case that you had two nominees nominated on the same day, to the same court, having had the same experience in the Solicitor's Office, and one nominee was rejected because internal papers in the Solicitor's Office were requested and not turned over, and no such request for the same kind of office papers were made of now Judge Roberts?

Mr. HATCH. John Roberts, who was one of the finest appellate lawyers in the country, as was Miguel Estrada, was treated completely differently once the Judiciary Committee considered him. And I had to force them to consider him. Yet he passed this body by unanimous consent.

Mr. MCCONNELL. So the request was made for certain papers of one nominee and the precise same papers of the other nominee were not requested?

Mr. HATCH. That is exactly right. They treated Miguel Estrada differently from John Roberts.

Mr. MCCONNELL. Let me ask my friend from Utah, is there any conceivable basis for such disparate treatment for the same two people, nominated for the very same court on the very same day, going through the very same Judiciary Committee? Can the Senator from Utah think of any rational reason for this kind of disparate treatment?

Mr. HATCH. Not a legitimate reason. The only reason was they believed him to be pro-life. I don't know whether he is to this day because we do not ask those questions.

Mr. MCCONNELL. But the stated reason, I would say to my friend from Utah, you just confirmed a moment ago. The stated reason for not confirming Miguel Estrada was that he would not turn over these papers or the administration would not turn over these papers.

Mr. HATCH. The phony reason.

Mr. MCCONNELL. That was the stated reason.

Mr. HATCH. The phony reason they hid behind.

But let me make this point. Miguel Estrada, as great an attorney as he is, having argued 15 cases before the Supreme Court, having the highest recommendation of the American Bar Association, their gold standard, they did not want him to come through this process because they knew, or at least they perceived, that he was on the fast track to become the first Hispanic on the Supreme Court and they just cannot tolerate having a conservative Hispanic on the Circuit Court of Appeals for the District of Columbia, let alone on the Supreme Court.

Mr. MCCONNELL. So I say to my friend from Utah, what we have is a situation where a white male nominee, to the very same court, with the very same experience, was treated one way and a Hispanic-American nominee, nominated to the very same court, on the very same day, was treated differently?

Mr. HATCH. That is absolutely right. But even Roberts had to go through a lot of pain to get there—12 years waiting, nominated three times by two different Presidents.

We put him out of the committee after a 12-hour hearing. You hardly have that much for Supreme Court nominees. There were two others on that list. They complained because there were three on one day's hearing. They ignored the fact that TED KENNEDY, when he was chairman, had seven circuit nominees one day, and another four. We had at least 10 other times when we had three.

Then once we put him out of the committee, I had to bring him back in the committee so they could have another crack at him. They could not touch him. He was that good. So he had to go through an inordinate process to get there. But they knew they did not have anything on him. They know they didn't have anything on Miguel Estrada.

Mr. MCCONNELL. It sounds to this Senator, I wonder if the chairman concurs, that there was a sort of rule created and applied to Miguel Estrada——

Mr. HATCH. It was a double standard.

Mr. MCCONNELL. That was not applied to John Roberts, two nominees considered for the same court at the same time.

Mr. HATCH. Absolutely right. Roberts was treated like all other nominees during the Reagan years, Bush 1 years, and the Clinton years. He was not asked to give his opinions on future issues that might come before the Circuit Court for the District of Columbia.

Because Miguel Estrada answered the same way basically as all the other people who had passed in prior years, they held that against him. The big phony issue was knowing that the Solicitor General's Office did not give the most privileged, private documents in that department without making that department unworkable.

Mr. MCCONNELL. Which is why, I say to my friend, they didn't ask for those papers on John Roberts.

Mr. HATCH. That is right. They did treat Roberts differently, no question about it. They gave him a rough time, too. Miguel Estrada is in a league of his own in the way he was mistreated, but Roberts was mistreated, too. Roberts sits on the Circuit Court of Appeals for the District of Columbia after having been unanimously approved here.

Let's talk about how important that is. We have had 40 rollcall votes on the floor. You talk about delays. You talk about fouling up this body. We have had 40 rollcall votes on people who got unanimously confirmed. Can you imagine what it takes to go through 40 rollcall votes? It slows down the Senate like you can't believe, and muscles up the Senate like you can't believe. It is all a big game to try and make this President not successful. But Miguel Estrada had to go through that as well.

Mr. MCCONNELL. So I say to my friend from Utah, and I will conclude with this, the practical result of that is this immigrant who came to the United States as a teenager, speaking broken English, realized the American dream, went to undergraduate and law school, was a star student, argued 15 cases before the Supreme Court, was denied an opportunity to get an up-or-down vote on the Senate floor by the creation of a standard that was not applied at the very same time to another nominee who was not a minority.

Mr. HATCH. And, by the way, was never applied to any nominee, to my knowledge, in the past. Miguel Estrada was singled out with a double standard for the sole purpose of defeating his nomination and getting him to withdraw.

Mr. MCCONNELL. They were having a hard time, I say to the chairman, trying to find some basis upon which to defeat this guy. He was unanimously well qualified by the ABA, right?

Mr. HATCH. Their gold standard.

Mr. MCCONNELL. He argued 15 cases before the Supreme Court.

Mr. HATCH. Very few people even argue one case.

Mr. MCCONNELL. He received outstanding recommendations from everyone with whom he worked. They were having a real struggle, weren't they, I say to my friend, the chairman, trying to find some basis upon which to reject this truly outstanding nominee.

Mr. HATCH. It shows the lengths they would go to on that side—at least the leaders on that side—to screw up a nomination of a very good person.

Take Janice Rogers Brown. She is a terrific African-American justice on the California Supreme Court. She wrote the majority of the majority opinions on that court last year, and yet they come here and say she is outside the mainstream. They are outside the mainstream when they make arguments such as that.

There is only one reason they are against Janice Rogers Brown and filibuster her: because she is an African-American woman who is conservative and pro-life. For these inside-the-beltway groups, that is their single issue.

I had friends on the other side tell me, when I asked, ''Why are you doing this,'' say, ''Well, the groups will score this as a vote, and then they will come against whoever votes that way in the next election.'' These guys don't have the guts to take on the groups.

Mr. MCCONNELL. Isn't it true, I ask my friend from Utah, in California where the justice to whom you just referred serves on the supreme court, you have to stand periodically for continuation?

Mr. HATCH. That is right.

Mr. MCCONNELL. You can be rejected. Is it not true she got three-fourths of the votes?

Mr. HATCH. Better than that. She got 76 percent of the vote. She was the top vote-getter among four supreme court nominees.

Mr. MCCONNELL. This is in that bastion of conservatism, California.

Mr. HATCH. I think the Senator makes a very good point.

Mr. MCCONNELL. This nominee who was called outside the mainstream—outside the mainstream—gets about three-fourths of the vote in that bastion of conservatism—California—and the other side suggests she is somehow unacceptably conservative? That is absurd on its face, I argue to my friend.

Mr. HATCH. It certainly is. I went to one of my friends on the other side—and I won't mention the name because I don't think that would be proper—and I said: What did you think of Janice Rogers Brown? His answer was: She's terrific—which she was in front of the committee. Yet every Democrat went against her in committee and I think cited horrendously bad arguments to do it.

They can point to 8 or 10 cases with which they didn't agree, but with which a lot of people do agree, and then they say she is outside the mainstream when she has tried hundreds of cases and decided, as a majority opinion writer, the most majority opinions in that court last year and I think in prior years as well.

It is really unseemly, and that is why we are so upset here. Let me tell you, if we continue down this course, we are going to severely harm the Federal judiciary and get only people who really are not only outside the mainstream, but are Milquetoast, who can't make a decision to save their lives. Once you get to the Federal bench, you have to be able to make tough decisions.

Mr. MCCONNELL. Isn't it also true, I say to my friend, the chairman, that one of the arguments used on some of the nominees is because they have certain personal beliefs, that they won't uphold the law? Has that been an argument frequently made?

Mr. HATCH. That is a frequent argument. I think the best illustration of that happens to be Bill Pryor.

Mr. MCCONNELL. Which is what I was going to ask my friend, the chairman.

Mr. HATCH. They criticized him for cases he won before the Supreme Court, saying he is outside the mainstream because they disagreed with the cases. In fact, they think Rehnquist is out of the mainstream. They think Scalia is out of the mainstream. They certainly think Clarence Thomas is out of the mainstream because they want a single approach, a minority approach to everything that has to be liberal, and if you are not liberal, you are outside the mainstream, even though some of the greatest judges ever to sit on the Federal courts and Supreme Court were conservatives. Some of the great ones were liberals, too, but understood the role of judges.

Mr. MCCONNELL. This is the same Bill Pryor who is currently standing up against the Alabama chief justice.

Mr. HATCH. Right.

Mr. MCCONNELL. Who has been defying a court order by refusing to remove the Ten Commandments from a public building. It is very unpopular in Alabama to be against that guy.

Mr. HATCH. Bill Pryor is getting savaged by the rightwing because he basically sued to have the chief justice removed for not following the rule of law.

Mr. MCCONNELL. A classic example of following the law and not his own personal beliefs; is that not correct?

Mr. HATCH. That is absolutely correct. Just fast forward to this week. As the Atlanta Journal Constitution reported this week, Bill Pryor filed a pretrial brief asking the Alabama Court of the Judiciary to remove Judge Moore from the Alabama Supreme Court because of Moore's defiance of the Federal court order to remove the Ten Commandments display. Bill Pryor's brief stated, quoting from the Atlanta Journal Constitution article: Moore should be removed because ''he intentionally engaged in misconduct and because he remains unrepentant for his behavior.''

I could go on about Bill Pryor. During his hearing—a lengthy hearing—he was asked over and over by virtually every Democrat who showed up about his deeply held personal beliefs. He answered every question the way a judicial nominee should. Even though he had deeply held beliefs, he would obey the law.

The PRESIDING OFFICER. The time controlled by the majority has expired.

Mr. HATCH. I thank the Senator for his excellent questions.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Mr. President, I ask the time of the half hour allotted to this side be divided between myself and Senator DODD and that I may proceed for 15 minutes.

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

Mr. LEVIN. Mr. President, what I wish the majority would be allowing tonight is consideration of legislation that addresses the loss of over 3 million jobs in this country during the last few

years, most of them manufacturing jobs.

What I wish the majority would be allowing us to do tonight is to consider legislation to extend the unemployment benefits to those Americans who have lost their jobs in this recession, the way we have extended unemployment benefits in previous downturns.

Those needs of the American people and a dozen other needs are what we ought to be spending our time on tonight and every day until those issues, and many other critical issues, are addressed.

Instead, those on the other side of the aisle decided to spend 30 hours rehashing the reasons that 4 out of the 172 of President Bush's judicial nominees have not been confirmed by the Senate. That is their right, but it is wrong.

In my home State of Michigan, the unemployment rate is 7.4 percent. In fact, Michigan has lost and continues to lose more manufacturing jobs than almost any other State in the Nation. Mr. President, 2.5 million of the 3.3 million jobs which the U.S. economy has lost since January 1, 2001, were in manufacturing. We lost over 160,000 of those jobs in Michigan alone. Other States face large job losses, but what we should be doing is helping people who lost jobs, acting to stop the currency manipulation by China, Japan, and other countries, and the one-way street in trade which has been such a large part of the loss of jobs in this country.

The first act of this Congress last January was to extend unemployment benefits through the end of this year because Congress did not act last year. That made the 2002 holiday season mighty grim for those workers whose benefits had expired. Current law provides 13 weeks of additional Federal aid to laid-off workers who have exhausted their 26 weeks of regular State benefits. However, this administration has shown no interest in either extending the deadline for the program or authorizing new benefits. The trust fund that is to be used for unemployment benefits currently has over $20 billion in it. Why this administration balks at extending unemployment benefits is beyond me since that is what the money in that fund is for.

I, along with a number of our colleagues, propose we extend the December 31 deadline for another 6 months so newly unemployed workers can receive Federal assistance, but also making available an additional 13 weeks of Federal unemployment benefits for a total of 26 weeks. That is what we have done in prior recessions. We responded during the 1974 recession. Federal benefits were extended to 29 weeks.

In the 1981 recession, Congress extended benefits to 26 weeks. In the 1990 recession, 26 weeks were provided, 33 weeks to States with high unemployment.

While the unemployment numbers released last week were somewhat of an improvement, in terms of manufacturing jobs, that loss continues, and the long-term economic forecast continues to be pessimistic.

On this track, this administration will be the first administration to lose private sector jobs since Herbert Hoover.

In one moment I am going to propound a unanimous consent request that I know my Republican colleagues will want to hear, and I want to alert them of the fact I will be propounding that request in a moment. I hope our Republican colleagues will give us consent to take up unemployment insurance extension legislation this evening. Perhaps then this 30-hour exercise will be fruitful.

I think I have alerted the Republicans that we would be making this unanimous consent request.

UNANIMOUS CONSENT REQUEST—S. 1853

I ask unanimous consent that the Senate proceed to legislative session; that the Finance Committee be discharged from further consideration of S. 1853, which is a bill to extend unemployment insurance benefits for displaced workers; that the Senate proceed to its immediate consideration; that the bill be read a third time and passed; and that the motion to reconsider be laid on the table.

The PRESIDING OFFICER. Is there objection?

Mr. MCCONNELL. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. LEVIN. Mr. President, since the majority has now determined we will spend 30 hours of the time of the Senate rehashing 4 of the 172 judicial nominations that haven't been confirmed, I want to address what is an even deeper issue than the majority's effort to weaken and water down the role of the Senate in exercising its advice-and-consent responsibility.

That even more fundamental issue is our Nation's historic and constitutional system of checks and balances. Those checks and balances are an integral part of the unique design of our founding document in restraining the potential excesses and extremes of the executive branch. We share the obligation and responsibility with the judicial branch.

Our rules in the Senate are aimed at restraining the potential abuse of the rights of the minority by the majority within the legislative branch itself.

In June of this year, Robert Caro, the eminent Pulitzer Prize winning historian and author of ''Master of the Senate,'' his great biography of former President and Senate majority leader Lyndon Johnson, wrote to our Senate Rules Committee addressing this subject and quoting from his book. Here is what he said:

> . . . in creating this new nation, its Founding Fathers, the Framers of its Constitution, gave its legislature . . . not only its own powers, specified and sweeping . . . but also the powers designed to make the Congress independent of the President and to restrain and act as a check on his authority, [including the] power to approve his appointments, even the appointments he made within his own Administration . . . and . . . the power to approve Presidential appointments was given to the Senate alone; a President could nominate and appoint ambassadors, Supreme Court Justices, and other officers of the United States, but only ''with the advice and consent of the Senate.''

Robert Caro goes on to say:

> The Framers wanted to check and restrain not only the people's rulers, but also the possibility that the majority will be used in Madison's words ''to oppress the minority.'' The Framers, he [Madison] said, established the Senate as the body ''first to protect the people against their rulers; secondly to protect the people against the transient impressions into which they themselves might be led . . . The use of the Senate is to consist in its proceeding with more coolness, with more system. . . .

One of the historical tools for the protection of the minority which is developed in the Senate from its earliest days is the principle of extended debate. The exercise of this right of Senators, particularly when it is used to block actions which the majority fervently wishes to take, is embodied in our Senate rule that you must have a supermajority of 60 percent of the Senate on matters where there is strong opposition.

Filibusters have played an important role in moderating action in the Senate. It is widely recognized the Senate is a less partisan place—you may not be able to discern that tonight, but generally this is a less partisan place than the other body in our Congress or virtually any other democratically elected legislative body anywhere in the world.

As Senator BYRD said in his series of scholarly addresses on the floor of the Senate about Senate history:

> Arguments against filibusters have largely centered around the principle that the majority should rule in a democratic society. The very existence of the Senate, however, embodies an equally valid tenet in American democracy: the principle that minorities have rights.

Senator BYRD goes on to say in his study:

> The most important argument supporting extended debate in the Senate, and even the right to filibuster, is the system of checks and balances. The Senate operates as the balance wheel in that system, because it provides the greatest check against an all powerful executive through the privilege that Senators have to discuss without hindrance what they please for as long as they please . . . Without the potential for filibusters, that power to check a Senate majority or an imperial presidency would be destroyed. It is a power too sacred to be trifled with.

Lyndon Baines Johnson said in 1949:

> . . . If I should have the opportunity to send into the countries behind the iron curtain one freedom and only one, I know what my choice would be . . . I would send those nations the right of unlimited debate in their legislative chambers.
>
> If we now, in haste and irritation, shut off this freedom, we shall be cutting off the most vital safeguard which minorities possess against the tyranny of momentary majorities.

In May of 1994, when the Republican minority blocked Senator CLINTON's nomination of Sam Brown to be ambassador, one of our Republican colleagues said the following:

In considering the nomination of Mr. Samuel W. Brown to be the Ambassador to CSCE, I have reflected on the latitude which ought to be accorded the President in making this decision for the ambassadorship, reflecting as well on the constitutional responsibility of the Senate for advice and consent as a check. . . . . I am troubled by a situation where the only pressure point Republicans have in the U.S. Government is on cloture. Once cloture is obtained, there are more than enough votes on the other side of the aisle to cover the day. While the House is not involved in this matter, the House is overwhelmingly Democratic; there is a Democrat in the White House. The only place Republicans can assert any effective, decisive action is by stopping somebody from coming up. We have 44 votes, and we have more than enough, if there is unity among the Republicans, to do that. I think Mr. Brown's nomination and the responsibilities at the Conference on Security and Cooperation in Europe are sufficiently important to preclude his nomination.

The filibuster succeeded in blocking this nomination.

There are many reasons to at least consider modification to the Senate rules regarding the procedures for ending debate, the process we call cloture. Those rules have been modified a number of times before, but one of the reasons to consider modifying our rules is not the reason which is motivating our current majority in the Senate: irritation with the fact that only 98 percent of President Bush's judicial nominees have been confirmed by the Senate. That irritation that a substantial minority of Senators would stand in the way of getting their way 100 percent of the time has led to this 30-hour talkathon and their apparent desire to amend the Senate rules to let them get their way 100 percent of the time.

We find ourselves tonight debating not whether unemployment insurance should be extended for Americans who have lost their jobs, not how to create more jobs in our economy, not how to better provide for the education of our children, or to strengthen our homeland security, or reduce the cost and increase the availability of prescription drugs, but, rather, listening to the re-argument of the case for the 4 nominees out of 172 nominees the Senate has not confirmed.

They want a 100 percent confirmation success record, and they appear to be willing to throw over the very essence of the Senate and its check-and-balance role to accomplish it. The Constitution says the President shall nominate, and, by and with the consent of the Senate, shall appoint ambassadors and judges.

William Maclay, one of the first two Senators from Pennsylvania, wrote the following:

Whoever attends strictly to the Constitution of the United States will readily observe that the part assigned to the Senate was an important one, no less than that of being the great check, the regulator and corrector, or, if I may so speak, the balance of this Government. . . . . The approbation of the Senate was certainly meant to guard against the mistakes of the President in his appointments to office [and] the depriving power should be the same as the appointing power.

I thank the Chair, and I yield the floor to my friend from Connecticut.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, I begin by thanking my colleague from Michigan for his comments. I intend to share some similar thoughts this evening.

First of all, let me begin by stating my own views about this process this evening and note—some have chosen to use the word anger—but I rise more in sadness.

We are gathered to engage in this—I do not know what it is properly called—I guess a filibuster. It is unique in that the majority is conducting a filibuster. Normally, a filibuster, for those who are interested in how this works, is conducted by a minority within a minority, but we find ourselves this evening a few short days away from the end of this particular session with a tremendous amount of unfinished business, and we are spending the next 30 hours—or 26 hours, whatever is left—on this particular debate and discussion, which I suppose has some value in the mind of some. As far as this Member is concerned, I regret in some ways even addressing the matters before us this evening. The better approach might have been to protect the rights of the minority but not to engage in this debate.

There may be four votes that will occur on Friday. Three of them involve individuals who are seeking appointment to the Federal judiciary. With all due respect to these particular nominees, putting aside one's views or whether they are for or against them, history will probably little note nor record for any great length of time who they were. That is not in any way to suggest they are not worthy individuals, but in the passage of time, these nominations will not register terribly significantly in the history of the debates of this great Chamber.

I arrived as an employee of the Senate about the age of 17 when I sat on these steps. Lyndon Johnson was the majority leader of the Senate. There was Everett Dirksen and Senator McClellan. It was a sea of giants who served in this body. I tried to imagine this evening whether or not they might proceed in a debate like we are having, but I cannot imagine them doing so, quite candidly.

I am afraid we are diminishing dramatically the incredible historic role of this institution by this process. When I think of all the matters that deserve our attention, when I think of all of the Herculean debates that have occurred in this Chamber throughout the 217-year history of our country, some of the great debates deciding who we were as a society—I sat on that step over there and listened to the all-night debates on civil rights in the early 1960s. I listened to southerners argue vehemently on behalf of their position regarding States rights. They were incredible debates. Never once in all of that process that I watched as a child sitting out there did I ever hear anyone suggest we ought to change the rules of the Senate.

Even among those who were outraged that there were those who were arguing about denying a substantial minority of citizens of this country the right to participate freely in the democratic institutions of America, never once did anyone suggest we ought to somehow curtail the right of a minority to be heard in debate, extended debate. Never once. Yet here we are tonight, having an extended debate over three or four judicial nominations. We may be asked on Friday to cast a ballot about amending the rules of the Senate to fundamentally change what has been a central ingredient of why this institution has been as celebrated and honored throughout the 217-year history of this country. That I find rather appalling, that we would gather at this hour with all of the other issues in front of us.

I spent 2 hours yesterday at Walter Reed Hospital. I took my 2-year-old daughter out to visit with the young men there, many of whom are missing limbs. I saw several of my colleagues out there, by the way. SAM BROWNBACK was out there. I went to spend a quiet couple of hours to express to these young men my great admiration for what they had done for their country.

I would like to think they might think something larger of this institution other than that we would engage in a discussion and debate tonight about three or four judicial nominations. Other of my colleagues have made comments about the numbers that have been approved and not approved. I am not a member of the Judiciary Committee. I have heard my colleagues extol the virtues of these nominees. I have heard others excoriate them. I will leave that debate for others. The vote I am most worried about is the possible fourth vote that may occur on Friday, and that is whether we are going to change the nature of this institution because some of us are disappointed about some outcomes of votes. I would hope whatever else ensues or passes over these next 30 or 40 hours that when it comes to that vote, maybe there will be those who will get up and defend this institution.

It is inappropriate for me to do so, but I will note the fact that there are those watching this debate this evening in this Chamber who are of a younger generation. They are students, I suspect, in some way wanting to participate or witness what some have tried to describe as an historic event. I would hope they take note of the arguments in debate about what is important, why the Founders created this institution, why we are not a unicameral body, as some State legislatures—why

we are a bicameral body, why it is there is down this corridor a House of Representatives at that end of the building and a Senate at this end. What are the fundamental distinctions between these two branches of one House? Why are we different? Why do we exist? What did the Framers have in mind when they created this institution? It is this very debate that gives justice, gives rationale to the existence of the Senate.

One needs only to go back to the Federalist papers, and as I look around this Chamber there are the forebears of those who sit in these seats who made the most eloquent arguments on behalf of the notion, of the idea, of having extended debate and the right and power to amend. Those are the two central ingredients which make this institution so unique.

When we begin to erode those very powers, then the very justification for this institution begins to diminish. We end up creating nothing more, potentially, than a mere image of the body that is at the other end of this hall.

I gave some remarks going back a number of weeks ago in front of the Rules Committee. I am the ranking Democrat of the Rules Committee. As such, I bear a responsibility, along with my colleague from Mississippi, who is the chairman of the committee, to consider such matters. I have great respect for the majority leader, but I would hope as we discuss the idea of amending rule XXII, that we would keep in mind what the Framers had in mind when it came to nominations, particularly nominations of a life tenure.

It is one thing to be talking about nominations during the duration of a given administration, but with judicial nominations it is for life. Depending on how young that person may be, an Federal judicial appointment can go on for decades. And so the Framers, given the experience they had come through, with the tyranny of a king, desired to create a system whereby the third coequal branch of government would have powers delineated between the executive branch to appoint and the legislative branch to approve, to provide its advice and consent.

If the ability of this institution to thoroughly exercise that right of advice and consent is destroyed, then we run the risk of creating a judicial branch, a coequal, that becomes nothing more than the hand servant of the executive. That is what the Founders worried about. It is what Senator Rutledge of South Carolina argued for when he spoke eloquently about the importance of keeping an independent judiciary.

In fact, for many weeks, during the constitutional convention, they argued the President ought to have no rights when it came to judicial nominations, that that right ought to be exclusively contained in the Senate of the United States. As a result of compromise, it was ultimately decided that the power to nominate individuals should reside in the executive, and the power to approve should remain here, thus guaranteeing, to the extent possible, an independent judiciary.

What is being suggested by the fourth vote we may be asked to cast on Friday is that we undermine that very principle which has survived for 217 years. I would hope with a resounding vote, both Democrats and Republicans, whatever strong feelings there may be about these three or four nominees, or whatever the number is, that we would not allow this institution to be diminished, caught up in the passions of these nominations.

History will not record nor remember who these people are, but if we undermine this institution's ability to do what our Founders asked us to do, then history will record forever our shortsightedness.

I regret in a sense having to engage in this debate. I was stunned to learn that in addition to this 30 hours of ''circusry'' going on here, and the three votes that will occur on Friday, there may be a serious effort to vote on whether this institution should give up its right to be able to have extended debate on judicial nominations.

This institution and its history deserve more. The fact that the Senator from Michigan and I have to arise at 10 at night to argue about something as fundamental as a rule change in the Senate and to be asked to vote on it with maybe 5 minutes of deliberation before that ballot is cast on Friday is incredible to this Member. It is incredible we would have to do this.

Does not anyone care about being here? We are only temporary stewards. My colleagues and I are just guaranteed a short amount of time to be a part of this institution. We do not own this. We bear an historical responsibility to those who came before, but an even greater one to those who come afterward, to see to it we maintain the order and the ideals embodied in the creation of this institution. That we would relegate a fundamental change in the rules of the Senate to a debate occurring between 10 and 2 and 3 and 4 and 5 a.m. in the morning, with a vote to that may be cast on Friday without further deliberation, I find stunning in its dimensions.

This is a matter that deserves far more deliberation and thought, whatever one's views may be on these nominations. To find ourselves, with all of these other issues that are in front of us, to have to defend the Senate in the wee hours of the morning about a rule that has sustained us as an institution, is something I regret deeply.

I hope my colleagues, whatever their passions may be about Miguel Estrada, Priscilla Owen, William Pryor, and Charles Pickering—I do not know these individuals. I presume they are good people, whatever differences we may have, as I am sure there have been people who have been nominated in previous administrations who are also good people who were rejected because the majority today disagreed with them. I am sorry that happens to people, but unfortunately, that is one of the aspects of a process such as we have, as imperfect as it is.

The idea that our passions are so wrapped up in these individuals that we are willing to squander the rules of the Senate is disturbing. We should always know that it may only be a short time before roles may be reversed. This party in the minority may be the party of the majority in the future. And in the future, the party of the President may, of course, be different. I would hope we would never suggest changing the rules of the Senate because we are momentarily disappointed that certain individuals, whatever contributions they may have made in their lives and to their communities, are so deserving that they warrant changing the rules of the Senate because they are not getting a position they seek. I hope we have not come to that.

I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I enjoyed the stirring remarks of my colleague. However, I think he completely ignores the fact that the filibuster rule did not even begin until 1917, and it did not come into fruition until the 1940s. Nevertheless, we have changed the rules in this body many times. But we are not asking for a change of the rules. We are asking for a recognition. There is a difference between the Executive Calendar, where the precise meaning of the Constitution is advise and consent under section 2, clause 2 of the Constitution, and the legislative calendar where we do have a right to filibuster. So that distinction needs to be made.

I yield 5 minutes to the distinguished Senator from Pennsylvania, and then I will be happy to take questions on this side.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SANTORUM. Mr. President, I want to respond directly to the comments made by the Senator from Connecticut. I too sit on the Rules Committee and I take a responsibility here, being a steward, as the Senator from Connecticut said, a temporary steward of this place. One would think, if they listened to the comments of the Senator from Connecticut, that what the Republicans are trying to do is change the rules.

I have a chart of the last 11 Presidents since the ''filibuster rule'' has been around: 2,372 judicial nominations confirmed, zero filibustered.

Who is changing the rules? This is a wonderful world we have: That left is right, right is left, up is down, in is out.

The rules have been changed by practice. They hold up a chart 168 to 4. This states 2,372 to nothing. Never been done. Walk through these Halls. Stand in this Chamber. If the walls could speak of the great debates, the intense,

partisan, vicious debates that occurred in this Chamber, fights that have occurred on the floor of the Senate because of the passions of the moment, so firmly believing that what you were fighting for was right.

But not once, not one time did they put that passion for that short-term partisan or political or policy game in front of the sacred constitutional process that governs this country.

What does that constitutional process dictate in the case of judicial nominations? Look at the precedent my friends. Look at the precedent. No filibusters. Because the Constitution says that it is a majority vote. In spite of the rancor, in spite of the partisanship and the stakes so high so many times in our country's history, they always had the perspective because, yes, I say to the Senator from Connecticut, they knew they were temporary stewards. They took that responsibility seriously so they did not corrupt the rules.

Why are we changing the rules? We are not trying to change the rules. We are trying to bring back the rules that have been in this country for 214 years. We are trying to change the rules? We are not being good temporary stewards? Me thinks thou doest protest too much. We are simply trying to set this Senate back to the days the Senator from Connecticut recalls as a boy, when giants did stroll this Senate, where big matters were at stake, but they put the integrity of the process, the integrity of the Senate because we are a country of laws and rules and constitutions. We do not twist them and corrupt them to meet the short-term political needs that some interest group off the Hill was pleading for you to do.

That is what is happening here. That is what occurs here, and will occur, unfortunately, if we do not have a change of heart by a number of people on the other side of the aisle again on Friday so the 98-percent button that I see and the 168 to 4 will now be 168 to 6 and then 168 to 7 and then to 8 and then to who knows? Because once we corrupt the system, once we twist the rules to meet our partisan end, there is no end other than a complete debasement of what this Senate has stood for 2,372 times before.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. HATCH. I yield without losing my right to the floor a question of the Senator from——

Mr. REID. We cannot hear you.

Mr. HATCH. I yield to the Senator from Colorado without losing my right to the floor.

Mr. ALLARD. I thank the fine Senator from Utah.

Mr. HATCH. I have laryngitis. What a time to have laryngitis. But that is the way it is. I apologize for my voice.

Mr. ALLARD. I thank the fine Senator from Utah for yielding.

Many papers in the State of Colorado have expressed a concern that we are not voting on judicial nominees, along with many papers throughout the country. I have three papers that expressed a view. I would like to have the chairman respond to the comments made in these three papers.

Many people throughout Colorado wonder what the impact might be on having a filibuster and how that will affect the Federal judiciary. Many of them live in the great city of Pueblo. In fact, the Pueblo Chieftain observed, ''some liberals are trying to create a second legislative body,'' referring to the judiciary, ''that will pass measures which they cannot get passed because they're often opposed by a majority of Americans.'' The paper fears this will lead to ''a serious erosion of the separation of powers.''

Does the Senator from Utah share those concerns?

Mr. HATCH. I sure do. The paper got it just right. I have seen three major editorials from the Chieftain and from the Rocky Mountain News calling the Democratic filibuster an irresponsible escalation of the judicial nominating war.

I agree with both. The Denver Post said ''a change in Senate procedure is long overdue.'' ''[T]here is no good reason to oppose a supermajority of the Senate that was not contemplated in the Constitution.''

They got it just right.

Mr. ALLARD. That is correct. I thank the chairman for responding to those comments made in those three major papers in the State of Colorado.

We do need to move on for a vote. They express the view of many in Colorado. I thank the chairman for giving me an opportunity to ask the question.

Mr. HATCH. I yield to the distinguished Senator from Virginia without losing my right to the floor.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. ALLEN. I wish the Senator from Michigan, Mr. LEVIN, were still on the floor. In his arguments, he cited a quote from Lyndon Baines Johnson as to what would be the best gift that could be given, I believe he said, to the Soviet Union or those behind the Iron Curtain. He thought the best gift would be unlimited debate.

I could think of a lot of other things you would want to give people who are repressed than unlimited debate. Maybe freedom of speech, freedom of expression, freedom of religious beliefs, private property rights, due process, equal protection of the law, maybe even the right to bear arms so they can overthrow the dictatorship.

Unlimited debate—that does not strike me as what is needed in a democracy. What one wants is adherence to the Constitution, accountability and responsible action by those who are elected by the people. And we want fairness, which is being denied here, without potential for filibustering.

This is what Senator LEVIN said that President Johnson said: ''If I should have the opportunity to send into countries behind the iron curtain one freedom, and only one, my choice would be to send those nations the right of unlimited debate in their legislative chambers.''

I expect they could have had all sorts of unlimited debate but what one wants is adherence to our U.S. Constitution.

Let me share with our distinguished chairman of the Judiciary Committee, Senator HATCH, some words that have been said recently: Judgeships are currently vacant, causing undue delays in justice for citizens served by the court. The candidates for these vacancies deserve to have an up-or-down vote on their nominations. The Senate should not be playing politics with the Federal judiciary.

Guess who said that? Senator CARL LEVIN in a press release on May 24, 2000.

Then Senator LEVIN said, on October 3, 2000, in the CONGRESSIONAL RECORD: I believe the Nation as a whole deserves to have these nominees and other nominees awaiting hearings and votes acted on by this Senate, as well. I believe it is also unfair. Perhaps this is the most important of all to the people who await justice in their courts.

Senator LEVIN said that on October 3, 2000.

Then Senator LEVIN also said that leadership had a responsibility to advise and at least vote on judicial nominees.

And parallel to the debates we are having on several of the judges this evening that will go on through tomorrow and into the morning on Friday, he said: Two of the women who we are focusing on today are from Michigan. They are nominees for the court of appeals. The truth of the matter is that the leadership of the Senate has the responsibility to do what the Constitution says we should do which is to advise and at least vote on whether or not to consent to the nomination of nominees for these courts.

That was September 14, 2000, 3 years ago. I wish that Senator LEVIN were still on the floor so I could ask him whether he was right in 2000, saying the Constitution demanded and required Senators to act and vote on nominees. Or does he really believe that the most important responsibility is for endless debate?

I say to the Senator from Utah, Mr. HATCH, what we have seen is stalling and more stalling and more stalling. They can debate endlessly, but at the end of every debate, at the end of every examination, of everyone's qualifications and capabilities, and whether Miguel Estrada, Priscilla Owen, or any other of the nominees, ultimately the responsibility is, as Senator LEVIN said 3 years ago, it is our responsibility to act, to vote. The Constitution demands it. Accountability to our constituents and our respective States demands it. And fairness should not continue to be denied to these many nominees because

of the obstruction and also the very inconsistent statements that have been made this year compared to past years.

I ask the chairman of the Judiciary Committee, would you find these statements to be prior inconsistent statements which call into question the desirability of having endless debates in the Senate or in the committee, especially after the committee has decided on a majority vote to report out, favorably, a judicial nominee?

Mr. HATCH. That is a good question because it seems as if our friends on the other side forget when they were in the majority and they had the Presidency and they all wanted votes up and down and all of a sudden they do not.

The Senator is right in pointing out these disparities. All of a sudden when the worm is turned, they do not want to live up to their own words. I am not sure that Senator LEVIN does not want to live up to his own words, but if he does want to live up to his own words, then he should not be voting with the Democrats. He should be voting for cloture.

Mr. ALLEN. I have a followup question. In view of our friend from the Commonwealth of Pennsylvania and his articulate, passionate statement, Senator SANTORUM, out of the thousands and thousands of nominations, how many have been filibustered? Zero, is that not correct?

Mr. HATCH. Zero. Until this.

Mr. SCHUMER. Will the Senator yield?

Mr. HATCH. I will yield to the distinguished Senator from Virginia for a question and then I will yield to the distinguished Senator from Minnesota without losing my right to the floor.

Mr. WARNER. Mr. President, first, may I thank the distinguished chairman of the Judiciary Committee.

Mr. SCHUMER. Will the Senator yield?

The PRESIDING OFFICER. The Senator from Utah has yielded to the Senator from Virginia for the purposes of asking a question.

Mr. HATCH. The Senator will have his half hour in about 15 or 20 minutes.

Mr. WARNER. I thank the Presiding Officer and I thank the distinguished chairman of our Judiciary Committee.

I say to my colleague from Virginia how proud we are to be from the Commonwealth of Virginia from whence so many Framers of the Constitution came. I compliment you on your remarks tonight. I am privileged to serve with you because you represent, in my judgment, all the fine things about the Commonwealth. I try, in my humble way these 25 years, to do the same.

The Senator referred to this Constitution. The question I have to our distinguished chairman is very simple. I want to go back to the hot summer of 1787, when 55 individuals had gathered from the Colonies to work from May 25 to September 17 to frame this precious document. It was a long, hot summer. Tireless trips from their homes to Philadelphia. As a consequence, today, our form of government is the oldest continuously functioning government on Earth today. I have been challenged on it. But almost every other government in existence at the time this Constitution was written have fallen into the dustbin of history. Someone challenged me about Switzerland. Yes, Napoleon crossed the Alps and ceased that government for a period of time. This is a government that has continued to function.

As the delegates emerged on the final day, September 17, Ben Franklin walked down the steps and was met by a reporter. I thought of that little history tonight when a reporter asked me, what is it that you are doing tonight in the Senate? Mr. Franklin answered that question on September 17, 1787. He said to that reporter: We have given you a Republic, if you can keep it.

This Constitution explicitly gives to the President of the United States the power to appoint the judges. In Section 2, it explicitly gives to the Senate, not the Congress, but to the Senate, the responsibility of advice and consent.

Three coequal branches of the Government and the judiciary perform that critical function of keeping the power of each of the other two, executive and legislative, in balance. That is what we are doing tonight. I ask the distinguished chairman, are we not, in the immortal words of Ben Franklin, here tonight for one sole purpose, to keep our Republic?

Mr. HATCH. That is the way I view it. I have to say this is a very dangerous thing the Democrats are doing for the first time in history. It has caused a tremendous amount of angst on everyone's part and awful partisanship because it has never been done before. It is time to move on.

I yield to the distinguished Senator from Minnesota.

Mr. COLEMAN. Mr. President, I thank the distinguished chair of the Judiciary Committee, the Senator from Utah, for yielding. I have a question that reflects upon the implications, changing the constitutional standard. The Senator from the Commonwealth of Pennsylvania noted that of the past 11 Presidents' judicial nominees, 2,372 were confirmed, zero filibuster. The President was elected and he has served his responsibilities on the part of his office; we have our responsibility. I take it that the Senator from Utah would say part of those responsibilities in the Constitution give us the opportunity to vote, a majority vote to confirm or deny the confirmation of judges.

The question I have concerns a comment that appeared in a Minnesota paper. Like the Senator from Colorado, Minnesota papers have commented on this problem. There was a column by George Will, a nationally syndicated columnist, that appeared in the Duluth News Tribune. He said the following, and I ask the Senator from Utah whether he would agree with this statement: If the Senate rules, exploited by an anticonstitutional minority, are allowed to trump the Constitution's test and two centuries of practice, the Senate's power to consent to judicial nominations will have become a Senate right to require a 60-vote supermajority for confirmations by thus nullifying the President's power to shape the judiciary, the Democratic Party will yield a Presidential power without having won a Presidential election. Would the Senator from Utah agree with this statement?

Mr. HATCH. I certainly do. That is what is behind this. I think the Senator points it out very well. So did George Will.

Mr. SCHUMER. Would my colleague from Utah yield for a question?

Mr. HATCH. Not on my time.

Mr. SCHUMER. We have had some misstatements on the floor about how many filibusters we have had.

Mr. HATCH. About what? I did not hear the Senator.

Mr. SCHUMER. I said, we have had some misstatements repeatedly by the Senator from Virginia and the Senator from Minnesota about how many have been filibustered. There have been a bunch who have been filibustered, it is just that we happened to succeed. Isn't that correct?

Mr. HATCH. I am not going to yield at this time to the distinguished Senator. I will yield to the distinguished Senator from Tennessee.

Mr. COLEMAN. Will the Senator, if I could just follow up—so the record is clear——

Mr. HATCH. Yes.

Mr. COLEMAN. It is clear, in the history of this great Republic, the Senate has not denied a confirmation of a circuit court nominee by filibuster?

Mr. HATCH. That is right, in the history of the Senate. Absolutely, Will was right, because that same commentary was pointed out by Alexander Hamilton. He wrote in Federalist Paper 76 the Senate's role is to refuse nominations only for ''special and strong reasons'' having to do with ''unfit characters.'' That is not what our Democratic colleagues are doing. What they are doing here is denying up-and-down votes to very qualified people, who by their own gold standard, the American Bar Association, are proven to be qualified.

I believe it is abysmal that has happened. I think Senators have pointed out here this evening this is a very important debate that has to occur.

The American people need to know a militant minority, 45 Democrats, basically, is thwarting the will of the majority and taking away the dignity of an up-and-down vote to qualified judicial nominees by this President, which has never happened, once they hit the floor, which has never happened before.

In the Clinton years, all 377 judges were confirmed—only one was rejected, but he got an up-and-down vote, which is more than our people are getting.

Mr. COLEMAN. I thank the Senator.

Mr. HATCH. I yield to the distinguished Senator from Tennessee, without losing my right to the floor.

Mr. ALEXANDER. Mr. President, if I could ask the Senator a question. Maybe he could help me understand something I am having a difficult time understanding.

I had the privilege of serving as a law clerk in the 1960s to the Honorable John Minor Wisdom on the Fifth Circuit Court of Appeals. Judge Wisdom was among the four Republican-appointed judges who presided over the peaceful desegregation of the South. I have lived in the South and grown up in the South and know something about what those years were like.

I have been mystified, since I am not a member of the Judiciary Committee, by the treatment of Judge Pickering of Mississippi and Attorney General Bill Pryor of Alabama. I do not know Judge Pickering. I have met him briefly only twice. My staff and I studied his record. I have heard insinuations and words that were carefully chosen by the other side to suggest he was guilty of not being sensitive on racial issues. Yet when I looked into his record, I discovered, quite to the contrary. He had been living in Laurel, MS. In 1967, just to cite one example, he had testified in public against the leader of the White Knights of the Ku Klux Klan, which were the closest thing we had to terrorists in the United States of America in the last half century—an act of courage.

So here is a man who throughout his whole life was far out front on issues of race relations. He was living in an area where it was hard to do, and he had not been quiet, he had not been backward, he had been far out front of his neighbors on issues of race relations.

Then I learn about Mr. Pryor, the Attorney General of Alabama, and I realize in hearing Senator SESSIONS talk that he, too, was a law clerk to Judge Wisdom, the great civil rights judge in the South. I hear it said Mr. Pryor is somehow insensitive to racial and other matters.

Yet looking into his record, I learned he is at the moment seeking to oust the chief judge of Alabama in the case involving the chief judge's failure to obey a Federal court order to remove the Ten Commandments from the State Supreme Court, that the State Attorney General of Alabama wrote all the football players and coaches in Alabama to say they could not pray before football games because the law did not allow it, that he wrote to the district attorneys telling them they could not enforce a law against abortion, that he took a case all the way to the United States Supreme Court that was against the Republican party to which he belonged. It seemed to me here is a man who I recall Judge Wisdom talking about as a wonderfully talented young man. The judge was very proud of him. Here he has this record of upholding the law when it would be enormously unpopular in Alabama and certainly must be against his own views.

What is it about these two southerners, the latter one, the editor in chief of the Tulane Law Review, a law clerk to Judge Wisdom, this distinguished person; and then Judge Pickering, who was a leader for civil rights, endorsed by former Governor William Winter, the Democrat, endorsed by Frank Hunger, Al Gore's brother-in-law. What is it about the other side that will not allow us to have an up-or-down vote on those two southerners who have been nominated by the President to be a judge?

Mr. HATCH. Well, to be honest with you, it all comes down to abortion, according to some of my top Democrat friends. That has become a litmus test issue for Democrats because the inside-the-beltway groups the Democrats talk about do not want people on the courts who are pro-life, even though they are committed to upholding Roe v. Wade because that is the law of the land.

In the case of Judge Pickering, Judge Pickering was unanimously confirmed as a Federal district court judge in 1990. He has served well. He is one of the people who brought about racial conciliation in the State of Mississippi and was treated in a despicable fashion here.

In the case of Bill Pryor, I do not think anybody who looks at his record can say he will not uphold the law, no matter how much he disagrees with it, because that is what a judge will have to do.

Mr. ALEXANDER. May I ask the chairman, did he not, as Attorney General of Alabama, advise the local district attorneys they could not enforce a law passed by the Alabama State legislature——

Mr. HATCH. That is correct.

Mr. ALEXANDER. Because it would be in violation of a Supreme Court decision?

Mr. HATCH. That is right. If I recall it correctly, it had to do with partial-birth abortion, even though he hates partial-birth abortion, as anybody who looks at it carefully. It is a barbaric practice, at the very least. He upheld the law.

I do not know you can ask anything more of anybody than that. Plus, this is a fellow who graduated No. 1 in his class from Tulane University School of Law, who is very bright and was very candid and open with the committee, and yet being filibustered for no good reason. It really is unseemly.

Mr. ALEXANDER. I wonder if the chairman remembers—I have heard a lot of talk tonight about what a great protection of minority rights the filibuster is.

Mr. HATCH. Yes.

Mr. ALEXANDER. I am trying to think back to the 1950s and the 1960s. How many rights of African Americans in the South were protected by the filibuster in the 1950s?

Mr. HATCH. That is right.

Mr. ALEXANDER. In the 1960s? How long was civil rights legislation held up in this very body by the filibuster? What was it that caused the cloture rules to be changed so now it takes 60 to override instead of 67? It was the Nation's anger about the filibuster, denying equal rights for African Americans in the South in the United States.

What is so great about the filibuster in terms of protecting the rights of minorities and individuals if it delayed progress on civil rights for so long in this country?

Mr. HATCH. The distinguished Senator raises some good points. There is no question the filibuster rule was despicably used during that time. But I still believe most of us would agree that rule XXII, the filibuster rule, can and should apply to the legislative calendar. We have a right to set our own rules through the legislative calendar. But the Executive Calendar is a calendar that is subject to our right to advise and consent, which under article II, section 2 is a majority vote, and it is being distorted by our friends on the other side.

The PRESIDING OFFICER. The time controlled by the majority has expired.

The Senator from Nevada.

Mr. REID. Mr. President, first of all, I want to lay it on the record that CARL LEVIN, the senior Senator from Michigan, is not inconsistent in any way. We all know what happened to CARL LEVIN and the Michigan delegation is the fact that there were no hearings on the judges he wanted—no hearings.

That is the reason some 20 percent of the Clinton nominees never made it. They refused to hold hearings. CARL LEVIN would have welcomed the procedure we are going through because if it had gotten here, and there had been an attempt to filibuster, cloture would have been invoked.

CARL LEVIN, I say to my friend, the junior Senator from Virginia, is not and has not been inconsistent in any way.

I want to refer to this. We have to understand what we are talking about here. Mr. President, 168 judges have been approved; 4 have been disapproved. For people to continually come on this floor, as if history facts have no bearing on what they are talking about—they believe, on the other side, if they keep saying it long enough, that there have never been filibusters before—that people will believe it.

I show everyone this New York Times headline of September 25, 1968. Headline: ''Critics of Fortas Begin Filibuster, Citing 'Property'.'' ''Griffin Attack Lasts 3 Hours. . . .''

Of course, we know that was a filibuster. Senator BYRD participated in it, as we recall. I say to my friends on the other side of the aisle, please do not say this is the first time there has been a filibuster, because it is not true. It is not true.

I also want to refer to the next chart, something that is important to the American people. What do I think we should be dealing with? During the time President Bush has been President, we have lost more than 3 million

jobs in the private sector. I think that is fairly significant.

Also what we should be talking about is my next chart to show what the President of the United States and his administration have done to create jobs in America.

Here is what the President has done to create jobs. Can everyone see this chart? In fact, we can turn it around. It is the same on the other side, isn't it? Let's see what is on the other side. Yes, the same thing. This is what the President has done to create jobs: nothing.

He has lost 3 million jobs. That is what we should be talking about here tonight, not the fact this is the first filibuster we have ever had in the history of the country. You can say it once, twice, 1,000 times—it is not true. Other judges have been filibustered and we have had attempts to invoke cloture. It has been successful sometimes; sometimes it has not been successful.

Let's look at this next chart. It is interesting we are spending 30 hours talking about things we should not be talking about. We are talking about judicial vacancies, which are at the lowest rate in almost 15 years. What we should be talking about are those things that are going up, not the thing that is going down. We should be talking about the 44 million Americans who tonight will go to bed with no health insurance. That is what we should be talking about. We should also be concerned about the millions of Americans who are underinsured.

Mr. President, 44 million people have no health insurance, and we are here spending our time lamenting about the 4 people who want job increases; that is, they want to get better jobs. Miguel Estrada, let's not shed too many tears for him. He makes a half a million dollars a year. I think we should be talking about the people who have no health insurance, about the people who have lost jobs in this administration—the 9-plus million people who are unemployed, as we speak. Why can't we spend that time, that is, 30 hours dealing with issues that are important to the American people?

We also know, in addition to having 44 million people uninsured, that during the last 3 years those people who are poor in America have increased in numbers. The numbers have ballooned. We have the poor getting poorer and the rich getting richer, and we are squeezing the middle class so it is getting smaller and smaller. Wouldn't it be nice if we talk about poor people? I recognize they do not have lobbyists. Maybe they do not have Gucci shoes and these big limousines, but they still deserve our time.

The poor are getting poorer and the rich are getting richer. Shouldn't we spend part of this 30 hours talking about them? The unemployed: We have talked about that issue. I have talked about it tonight on more than one occasion. But the American people have to recognize that during the administration of George Bush the unemployment rolls have gone up.

The national debt: What has happened to the national debt during the last 3 years? It has gone up, way up. It is interesting to note that during the last 3 years of the Clinton administration, we were spending less money than we were taking in. We were actually paying down the national debt. We were being criticized for paying it down too fast: Be careful; you can't do that.

Well, whoever heard that term really took it in spades because the fact of the matter is, we are now increasing the national debt. This year's budget deficit will be the highest in the history of our great country.

Everything that is going up we are not talking about. We are talking about people who have jobs, and they lost an opportunity to get a promotion.

I ask unanimous consent that the Senate now return to legislative session and proceed to the consideration of Calendar No. 3, S. 224, the bill to increase the minimum wage, that the bill be read a third time, passed, and the motion to reconsider be laid on the table.

The PRESIDING OFFICER. Is there objection?

Mr. CORNYN. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. REID. I am not surprised. I am not surprised. We have the audacity on this side of the aisle to ask that the minimum wage be increased from $5.15 to something more. Why, these people who draw minimum wage, think about it, if they work 40 hours a week, 52 weeks a year, and don't get any time off for vacation, they can make the grand sum, working a whole year, of $10,700. What pigs. They want to get that much money?

I say we should recognize the people drawing minimum wage are not a bunch of high school kids working in a fast food chain. The fact of the matter is 60 percent of the people drawing minimum wage are women. For the majority of those women, that is the only money they get for them and their families. I cannot imagine that we have had such a difficult time bringing up something so important to the American people, the minimum wage, to increase it from $5.15 an hour, maybe increasing it $1, maybe increasing it $1.50.

I know that is pushing the envelope a lot to think this body would take up something as unimportant as people getting an increase in the minimum wage. No. What we should do is worry about four people, four people, one of whom makes a half a million dollars a year downtown. Then we can also worry about other people, those other three who, between them, make about a half a million dollars.

I have no understanding in my heart how the majority can continually deny us the opportunity to do something about the minimum wage.

Remember, the judicial vacancies are at their lowest level in almost 15 years. While we are here talking all night about judges, 44 million people, as I have indicated earlier, will go to sleep tonight with no health insurance, none, and millions of others have insurance that is not very good.

Nine million, almost 10 million people will go to bed tonight wondering if tomorrow they will finally be able to find a job—recognizing that the average person who loses a job in America today is out of work for 5 months. That is the average, 5 months. And it does not matter. It does not matter what strata we are talking about. People in America have trouble finding jobs. The average is 5 months.

We have tried earlier today, through a unanimous consent request, to spend some of these 30 hours talking about having an extension of unemployment benefits. No.

We have asked tonight to increase the minimum wage, to debate that. No.

I think it pretty well describes what is going on here today.

This is an issue that people think if they talk about how unfair we are, that, yes, what we have done here is so bad—we have approved only 98 percent of the President's requests to become judges. Only 98 percent. If we had it up to 99 percent, would we only be here for 15 hours?

I think this is a travesty. I say that without any question. Others have referred to it as a carnival and a circus. Whatever it is, the unemployed, those people who are poor, those people who have no health insurance are not getting their time in the Senate.

Who is getting time? Four people: Estrada, Owen, Pickering, and Pryor. That is not fair.

I yield to the Senator from New York.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. I thank the Chair.

Mr. President, I listened to the debate, and I would say basically, kindly, it is just a repetition of arguments we have heard over and over again. A little less kindly, sound and fury signifying nothing.

I tried to ask some questions of the other side a few minutes ago and was rebuffed. It is no wonder because we are not having a coming together here. We are not having an elucidation. What we are having is a rehash of arguments we have heard over and over again.

It is not going to change anything, I say to my colleagues. It is not going to change a thing. There is only one way to change things, and that is for the President and the other side to follow the Constitution and take the words ''advise and consent'' seriously. If they think we can be bludgeoned, if they think more talk radio makes a difference, it is not going to make a difference. In fact, I would argue to my colleagues, this debate is helping us because the hard-right media, the talk radio, and the others don't mention this fact.

This chart is worth 30 hours of palaver, of gibberish. The Wall Street

Journal today has an editorial with the pictures of the six. Do they mention how many have been approved? They don't dare. They have had editorial after editorial and some of them criticize me. I write letters, and they don't publish them. You would think if they are going to do a whole editorial being critical of someone, they would give them the courtesy of publishing a letter. They are not interested in the debate of facts. No.

At least we are getting a chance to show this. One picture is worth a thousand words; one chart is equal to all the talk we have heard. Nothing will change that.

This is actually going to help our side. It is backfiring. I know many of you on the other side didn't really want to do this, but I guess I have to say to those of you who argued for it, thanks.

I heard from a constituent earlier tonight. They were watching the debate. I said: Did you know about 168 to 4? No. Most people don't because the big storm on this has come from a small narrow band on the hard right. We know the other side has to pay attention to them. They accuse us of being subject to beltway liberal groups. There are groups on both sides. They both feel as passionately.

I don't know why one group is any better than the other, but the group on that side has made this an issue. They just can't stand the fact that four have been rejected—four.

I begin by saying, better be careful about what you wish for because this at least is an even airing of the facts. What I would like this to be is a real debate. I would like us to ask each other questions. I would like us to challenge each other's assumptions and misstatements. But it is obviously not happening. Obviously not at all.

Mr. CORNYN. Will the Senator yield for a question?

Mr. SCHUMER. I will be happy to yield for a question. I give the Senator from Texas the courtesy I was not given.

Mr. CORNYN. I would like to ask the Senator from New York, of the individuals he has listed on his chart, isn't it true that all but Judge Fortas were ultimately confirmed to the positions to which the President appointed them?

Mr. SCHUMER. Yes, reclaiming my time, that is exactly the point. I haven't gotten up to this chart, but I will go to it now.

Mr. CORNYN. If I may——

Mr. SCHUMER. Let me please answer my colleague's question. The bottom line is the other side has said—and in the chart of the Senator from Pennsylvania, he was careful. He said ''successfully filibustered, none.'' Then when it was repeated by many of the other colleagues, they said there has never been a filibuster.

As my good colleague from Nevada pointed out, there have been filibusters. Here are some of the judges who have been filibustered.

Don't claim there has never been a filibuster. In fact, I would ask anyone on the other side, when you filibustered just 3 years ago, did anybody object and say the Constitution is being defiled? Judge Berzon was filibustered in 2000. Judge Paez was filibustered in 2000. Judge Sarokin was filibustered in 1994.

I didn't hear the outcries from the Senator from Pennsylvania or others that filibuster is constitutionally wrong. Oh, no. Oh, no. So the one difference——

Mr. CORNYN. Will the Senator yield?

Mr. SCHUMER. Let me finish—the one difference—and then I will be happy to yield for a question—is this. We succeeded. Do you know why we succeeded? I will tell you why. Because President Clinton made an effort to nominate moderate judges, by and large; because President Clinton did far more of the advise-and-consent process than President Bush, and President Clinton was able to persuade 15 or 20 Members from the other side to finally vote for these judges.

We have had no advice, meaning consultation. I am consulted in New York, and we have filled every vacancy. On the main court of appeals nominees, there is no advise, and that means there isn't consent.

I would argue this to my good friend from Texas: No President has chosen judges through an ideological prism more than President Bush. He said it when he ran, to his credit. He was going to appoint judges in the mold of Scalia and Thomas, two of the most conservative judges we have. Some of them are to the right of Scalia and Thomas. Clearly, Justice Brown is. I believe Miguel Estrada was. He has appointed judges ideologically. Then we are supposed to not challenge that ideology? It is two-faced. It is hypocritical.

Most of President Clinton's nominees—not all, but most—were not legal aid lawyers or ACLU attorneys. They were partners in law firms; they were prosecutors. Anyone who has followed this knows President Clinton decided to nominate, by and large, decidedly moderate judges. That is why the filibusters were not successful.

Our filibusters are successful, frankly, not because of any of us. It is because President Bush has decided to nominate people from the hard right so that he gives us no choice. Nothing would please me more—and I am one of the leaders in this—nothing would please me more than for Counsel Gonzales to call some of us in and say: How do we come to some kind of comity? Guess what, the same thing that happened in New York and a few other States will happen nationally.

Will most of the judges be far more conservative than me? Yes. Will many of the judges disagree with my view on choice or affirmative action or anything else? Yes. But at least we will feel they will interpret the law, not make law.

As my good friends know on the other side, the Constitution requires interpretation of the law, and ideologues, far left or far right—I don't like far-left judges, either—want to make law because they feel they are so right and the country is so wrong, and so they try to make law.

Mr. CORNYN. Will the Senator yield——

Mr. SCHUMER. The Founding Fathers in their wisdom—I will yield in a minute, and maybe the Senator would ask the others on their time to yield to us as well. Then we can get some debate here and maybe make a little progress instead of just talking past one another.

The bottom line is this: We are defending the Constitution. We are saying there should be some balance. President Bush didn't win by a landslide. This Senate is not 62 to 38 or 70 to 30. This country is narrowly divided, and that means when laws are made, they tend to move to the middle. The prescription drug law is an example right now. But judges don't have to move to the middle. Once they are appointed, they are there for life, and they have virtually absolute power over cases. All we have is the constraints within their own heads.

My good, learned friend from Texas knows that in the ''Federalist Papers,'' Alexander Hamilton said ideology should play a role. My good friend from Texas—he is a student of history—knows one of the first nominees of George Washington, John Rutledge, was rejected because of his views on the Jay Treaty. My good friend knows in that Senate that rejected John Rutledge were a good number of the Founding Fathers. So this is not new. This is not made up. In fact, what is new is the view on the other side that if they don't get their whole way, they want to change the rules. If there had been for 20 years protests from many of my colleagues who sat in those seats in 2000 and 2000 and 1994 and 1994 when there were filibusters, maybe we could feel there was some genuine feeling here, some genuine fidelity. Instead, I would argue most of those who study logic know that things can be made; that the weakest arguments are outcome determinant. In other words, you look for the outcome you want and then you make the argument. That, I would argue, with all due respect, is what my colleagues are doing.

The bottom line is filibusters were not an abomination to the Constitution when President Clinton nominated. And, by the way, in the inverse case, holding back judges from even getting a vote in the Judiciary Committee was perfectly OK. That didn't unbalance the Constitution.

What my colleagues have done is taken the result they want, which is 172 to 0, and then come up with an argument that all of a sudden filibusters are bad. Blocking judges can't be bad because look at all these judges the other side blocked and didn't even

allow to come up for a vote. So it can't be that blocking judges is wrong. But it also can't be that filibusters are wrong because they did them in recent history. They just didn't succeed.

Now they have this twisted logic that only a successful filibuster is bad. That doesn't make much sense. I am sure my good colleague from Alabama wishes his filibuster had succeeded. He felt it passionately. He felt Judge Berzon and Judge Paez were too far over, maybe.

Mr. SESSIONS. Will the Senator yield for a question?

Mr. SCHUMER. I will be happy to yield since I mentioned the Senator's name.

Mr. SESSIONS. Did the Senator know that although the Senator from Alabama strongly opposed Berzon and Paez and voted against both those nominees, that there were holds on those nominees, and the Republican leader, TRENT LOTT, moved for cloture to move the nominations forward, and this Senator, as did TRENT LOTT, voted for cloture to bring an up-or-down vote and voted against the nomination although we——

Mr. SCHUMER. Let me reclaim my time.

Mr. SESSIONS. That is not the kind of filibuster we have going on today.

Mr. SCHUMER. I simply say to my colleague——

The PRESIDING OFFICER. The Senator from New York controls the time.

Mr. SCHUMER. Thank you, Mr. President.

What I said before was, and I say it again, I did not hear an outcry about filibustering being wrong or being unconstitutional or being evil when these judges came up. I didn't see people get on the floor for 30 hours. There were four of them in the last 6 years. I didn't even hear people get on the floor for 3 hours and take up time to say why filibustering is bad.

Do you know why they say it is bad now? Because we have succeeded. Again, why have we succeeded? Because President Bush has changed the way people are appointed to the judiciary. He has nominated judges through an ideological prism to a far greater extent than any President in history.

I say to my colleagues, do you want to get it to be 172 to 0? Tell the President to sit down with us, to advise, to come to some compromise, and then you will probably get 172 to 0. But as long as this process continues where there is no advise and consent, as long as this process continues where certain judges who believe decisions that have been discredited 50 and 100 years ago should be law, we have no alternative but to do what we are doing.

Mr. REID. Will the Senator yield for a question?

Mr. SCHUMER. I will be happy to yield to my colleague for a question.

Mr. REID. Does my friend from New York support the unanimous consent requests—plural—that have been entered today on the record and rejected by the majority, first of all to extend up employment benefits? Does the Senator from New York believe we would be better advised to go forward on something like that than on these four people who do have a job?

Mr. SCHUMER. I say to my colleague, most definitely, because, first, not only do these people have a job, but they shouldn't be on the bench.

Mr. REID. I ask another question. Does the Senator also agree that rather than going through 30 hours of this—first of all, with all due respect, everybody, including me, everything that has been said so far tonight in these 5 hours has already been said.

Mr. SCHUMER. More than once.

Mr. REID. And I am sure for the next 25 hours, there will still be nothing new. Having said that, I ask my friend from New York, does he think it would be a good idea that the unanimous consent requests I proffered where I asked to do something about the minimum wage right here on the Senate floor tonight, does the Senator think that would be a good idea to help the American people?

Mr. SCHUMER. I say to my colleague, it would be an excellent idea. This debate, as I mentioned earlier, is not going to accomplish a thing. In fact, if it accomplishes anything, since we haven't had the media drumbeat on our side the way the others have, it is going to help us; it is going to get this very fact out. Why not have a debate on something we haven't debated, such as minimum wage, such as health care, such as energy policy, instead of having two people decide energy policy. Nobody knows what the conference report will be. Let's have a debate about that.

Here we are repeating over and over and over and over again the arguments that have been made and made and made.

The bottom line, I say to my good colleague from Nevada, is there are 100, 200, 300 better ways to spend 30 hours in the Senate than redebate these issues. If this is frustration on the other side because 4 of the 172 have been blocked, the solution is not to repeat the same arguments which we regard as specious. The solution is to come to the middle and compromise and talk to us, as we have done in certain States.

I say this to my colleagues: Stop using outcome-determinative arguments. Filibusters are fine when you do them. Only when we do them successfully are they no good. And blocking judges? That is just fine. You blocked so many more than we have. This argument is like trying to thread a needle: Blocking judges is OK; filibustering is OK; only successful filibustering is unconstitutional.

I doubt many legal scholars of any political persuasion would be able to sustain the contradictions in my friends' arguments from across the aisle.

The bottom line is simple: We believe advise and consent really means what it says.

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

Mr. SCHUMER. We believe keeping judges in the mainstream is within what the Founding Fathers wished us to do. I will have more to say in the next hour.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. KYL. Mr. President, it is my understanding that there is a rough sense between the Democratic and Republican sides that the next hour, at least on our schedule, had been designated, that the Republican time would take half an hour and the Democratic side half an hour. If there is a different point of view on that side, perhaps that could be expressed. Otherwise, we would go forward. If there is not, then what I would like to do at this time is yield 5 minutes to the Senator from Idaho.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAIG. Mr. President, I have spent a fair amount of time on the floor tonight listening. I am a freshman on the Judiciary Committee. There are a great many things Senators can do. They can speak flamboyantly, they can speak articulately, they make history, but they cannot rewrite history.

I heard a few phrases tonight that were trying to rewrite a little of the history. So I thought for a few moments I would read from a letter from the Senator who was there for the Abe Fortas debate, not a filibuster but a debate, a cloture vote. We are trying to say tonight that cloture votes are somehow filibusters. Well, my goodness, what an interesting term of art. Most importantly, what an interesting play of words.

Filibusters are nonstop speaking. Cloture votes are simply to gain the majority necessary, a supermajority, to continue the work of the Senate. Now, those are the rules of the Senate.

Let me read a letter that came to us from Robert Griffin, Republican Senator from Michigan. He writes to the Honorable JOHN CORNYN, chairman of the Subcommittee on the Constitution:

> Dear Mr. Chairman: An Associated Press piece which appeared yesterday in many of the Sunday newspapers (copy attached) speculated that Chief Justice Rehnquist and/or Justice O'Connor might retire this year or next, and concluded with this comment: Presidents have not had much success in appointing Supreme Court justices in election years. . . . The last person to try it was Lyndon Johnson in 1968, when he failed to elevate Justice Abe Fortas to replace Chief Justice Earl Warren. Republicans filibustered the nomination and Johnson backed off.

That is what the article in the paper said. Here are the facts from a Senator who was on the floor at the time debating the Abe Fortas nomination. He goes on:

> Whether intended or not, the inference read by many would be: Since the Republicans filibustered to block Justice Fortas from becoming Chief Justice, it must be all

right for Democrats to filibuster to keep President Bush's nominees off the appellate courts. Having been on the scene in 1968, and having participated in the debate, I see a number of very important differences between what happened then and the situation that confronts the Senate today.

First of all, four days of debate on a nomination for Chief Justice is hardly a filibuster.

He goes on to speak of the remarks that he gave in closing out that debate.

When is a filibuster, Mr. President? . . . There have been no dilatory quorum calls or other dilatory tactics employed. The speakers who have taken the floor have addressed themselves to the subject before the Senate, and a most interesting and useful discussion has been recorded in the Congressional Record.

Those who are considering invocation of cloture at this early stage on such a controversial, complex matter should keep in mind that Senate debate last year on the investment tax credit bill lasted 5 weeks—

In other words, Senate leadership is now considering imposing a cloture vote on the debate that has gone on for 4 days. Nothing was said about a filibuster. So we go on, and he speaks about that. Then he says:

While a few Senators, individually, might have contemplated the use of the filibuster, there was no Republican Party position that it should be employed. Indeed, Republican leader of the Senate, Everett Dirksen, publicly expressed his support for the Fortas nomination shortly after the President announced his choice. Opposition in 1968 to the Fortas nomination was not partisan. Some Republicans supported Fortas; and some Democrats opposed him.

Then he goes on to speak about the cloture vote. There were 45 in favor of the motion and 43 against.

What happened the next day, when the President, a Democrat President, could see he simply did not have bipartisan support on the floor for a majority, 50 plus 1? He pulled the Abe Fortas nomination. There was no filibuster. There was simply a cloture vote.

Now, it is a term of art that is trying to be finely defined tonight and finely written. When is a filibuster a filibuster? When is a cloture a cloture? Well, my colleagues cannot use the Abe Fortas example as a filibuster because simply this Senator will never allow other Senators to rewrite history. History is what it is at the time it is recorded and the CONGRESSIONAL RECORD clearly demonstrates——

Mr. SCHUMER. Will my colleague yield for a question?

Mr. CRAIG. I will not yield at this time.

It is simply a fact recorded in the CONGRESSIONAL RECORD, so spoken by Robert P. Griffin, then the Senator from Michigan, who was there debating the cloture.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. KYL. Mr. President, I yield 5 minutes to the Senator from Virginia.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. ALLEN. Mr. President, I thank the Senator from Arizona. We have heard some comments about we ought to be talking about jobs and the economy. On this side of the aisle, we are always looking at ways to make our tax laws, our regulatory policies, and our legal system more conducive to more jobs with more investment in this country.

We have heard this evening all sorts of excuses and justifications for filibustering. For example, we heard mentioned earlier by the Senator from Michigan, Mr. LEVIN, a citation as justification from Lyndon Johnson who said: ''If I should have the opportunity to send into countries behind the iron curtain one freedom and only one, my choice would be to send those nations the right of unlimited debate in their legislative chambers,'' to which my view was, gosh, there are a lot more important rights, such as freedom of expression, freedom of religion, property rights, due process under the rule of law.

When we get to the rule of law and how important that is for the credibility in this country, whether it is people in this country or outside of America to take a risk and invest in this country, the fair adjudication and administration of laws is very important. It is vitally important that we have judges on the courts so that if there are contractual disputes, or if property is being taken, or if there is a dispute, it is as expeditiously handled and decided rather than being delayed because of insufficient judges.

In many of these circuits, we have judicial emergencies. In fact, it is a fundamental principle of the American judicial system that justice should be blind, that people can get a fair hearing regardless of who they are, where they come from, or what they look like. Surely, nominees to the Federal bench deserve the same rights to a fair hearing as any of us.

Our sense of what is right for the country tells us that the most political among us realize that it is imperative that our courts are in working order. Common sense tells us that many of America's highest courtrooms do not have judges to run them and as a result the legal system cannot function.

When it is said that the economy is somehow not doing as well as it should, all of us, on this side of the aisle, President Bush and his Cabinet, are working to make sure that our economy gets stronger and more jobs are created. In fact, the gross domestic product is the best in nearly 20 years. We had negative growth in 2001, obviously because of a variety of factors, including, of course, the terrorist attacks. The gross domestic product has grown every quarter since the passage of the Economic Growth and Tax Relief Reconciliation Act of June of 2001.

It grew our economy by a 7.2-percent annual rate the third quarter of this year. This was the fastest pace of growth since 1984, almost 20 years ago. Employment continues to make gains. Payrolls increased by 126,000 new jobs, net new jobs, in October. The stock market continues to grow. That means more money for people's nest eggs, for their security and retirement.

Business is reacting favorably to tax relief and corresponding economic growth, where businesses are growing, thereby providing more jobs. We also find an increase in disposal household income, where mothers and fathers have more money so they are spending it on their children, which is great for those who are selling whatever products or services that they are purchasing, as well as whoever is packaging, transporting, fabricating, assembling, or manufacturing what they are purchasing.

Dividend relief also is leading to billions of new dividends distributed to shareholders. All of this is going on now. It also is important, though, that we have judges and the fair administration of the rule of law in the laws that we pass.

We cannot have activist judges. Activist judges create uncertainty. Businesses want to know what the laws will be so they can make those strategic long-term decisions. To have judges coming up with activist inventions of new laws that were not written or adopted by the legislative branch is dangerous for security, jobs, and investment in this country.

To put a fine point on judges, look at the Ninth Circuit Court of Appeals. Ask those affected every day by the decisions by our Federal appellate courts whether confirming circuit court nominees is important.

The people of California almost had their constitution gutted by a three-judge panel in the Ninth Circuit only to have a larger panel of the same circuit reinstate their constitutionally authorized gubernatorial recall election. I think it is pretty important who sits on the Ninth Circuit.

I am sure those in circuits where, for example, schoolchildren in Montana, Nevada, Arizona, and Idaho, who cannot say the Pledge of Allegiance because of leftwing activist judges in that circuit, who say that if one person takes offense at some other revering our flag, then the pledge is unconstitutional, would say these judges do matter.

They matter in our everyday lives. They matter in our schools. They matter in our businesses. Let's put in judges who will interpret the law, not invent it.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. KYL. Mr. President, I thank the gentleman for his comments, both on the status of our economy and the great economic growth that we are now enjoying, but also the last point about the importance of confirming judges.

I hope people around America are watching tonight so they will understand why we are talking about the importance of confirming judges nominated by the President to the Federal bench.

We have all heard the phrase, ''justice delayed is justice denied.'' The

reason that is a common phrase is because there is a lot of truth to it. What we are seeing around the country today is delay in justice because the Senate is denying the President a mere up-or-down vote on some of his nominees to the bench.

While it is possible for minority members, along with some in the majority, to defeat a judge on an up-or-down vote, that has only happened one time, a few years ago, since I have been in the Senate.

The judges who are being denied confirmation would all pass with a majority vote, but the minority is holding them up through the mechanism of the filibuster. I will have more to say about that mechanism in a moment.

The key point the Senator from Virginia made was that it is important we confirm these judges, as important as many of our other functions.

Let us reflect for a moment. The Senate was given some very unique responsibilities by the Framers of our Constitution. Among those unique responsibilities is the sole ability to ratify treaties and confirm nominations of the President. Advice and consent of the Senate is the way the Constitution refers to it.

The House of Representatives, with all of the great responsibilities of that body, does not have this authority. This is alone the job of the Senate, and it is a job that the Senate, throughout its entire history, has taken very seriously. Never, in the history of the Senate, has there been a successful filibuster of a nominee to the bench by the President. That is what is so striking, what is so important, what is so significant, about the activity of the minority party during the course of the last couple of years, and it is why we are here tonight talking about this and trying to move America to move our Democratic colleagues to recognize that it is only fair to provide an up-or-down vote for these candidates. That is all we are asking.

We have talked about the fairness to the nominees themselves. Miguel Estrada, one of the most competent attorneys in the country, after more than 2 years, finally withdrew his name from consideration because he had to move on with his career. We could talk about the fairness to these nominees of having to languish for months, for years, without even the courtesy of an up-or-down vote. We could talk to the fairness of the President. We could talk to the fairness of the majority in the Senate.

What I want to address briefly is the fairness to the American people in denying justice by the delay in filling vacancies, vacancies which are emergency vacancies.

What is an emergency vacancy? An emergency vacancy is one which has been determined by the Judicial Conference, which is a nonpartisan entity that acts as the principal policymaking body for the administration of the U.S. courts, that there are so many cases per judge in a particular circuit or district that an emergency exists; there are not enough judges to take care of the cases in any reasonable timeframe, as a result of which litigants suffer.

Perhaps the clearest way to make this point is, every schoolchild knows that the Constitution of the United States guarantees a criminal defendant a speedy trial, but they cannot get a speedy trial if there is no judge. So what happens is that all of the other litigants in the courts have to go to the back of the line and stay there until all of the criminal defendants have had their speedy trial.

In some cases, that means the civil cases languish for 3, 4, 5, 6 years. That is justice denied in the case of those litigants whose justice has been delayed.

What are these judicial emergencies? There are 12 judicial emergencies on the circuit court of appeals including the Ninth Circuit, the Fifth Circuit, the Sixth Circuit, and the Fourth Circuit. Democrats are obstructing nominees for every one of those circuits. For all three of the nominations who have already been filibustered—Priscilla Owen, nominated to fill one of the two Fifth Circuit judicial emergencies; Charles Pickering to fill one of the Fifth Circuit judicial emergencies; and Bill Pryor, nominated to fill an Eleventh Circuit judicial emergency—in each case, the filibuster is preventing us from filling a seat which has been declared a judicial emergency.

This is not some theoretical exercise. This is a problem that has to be dealt with, and the Senate is falling down in its responsibility to fill these emergencies.

Democrats have also threatened to filibuster other nominees who have been named to fill judicial emergencies in other circuits, by name, Carolyn Kuhl, who I would like to speak about a little later, nominated to fill a Ninth Circuit judicial emergency, Henry Saad for the Sixth Circuit, Susan Neilson for the Sixth Circuit, Richard Griffin for the Sixth Circuit, David McKeague for the Sixth Circuit, and Claude Allen to fill a judicial emergency in the Fourth Circuit.

The cost of judicial vacancies to litigants in civil rights cases not being able to vindicate their civil rights in commercial disputes, in contract disputes, in regulatory cases involving Federal regulations, in every kind of case one can mention, there are cases languishing and litigants who are not being given their rights because there are not sufficient judges to hear their cases.

I mentioned the Ninth Circuit. That is the circuit in which my home State of Arizona is located. I am very familiar with the delays in that circuit. It is hurting the economies of our States. It is hurting the rights of litigants in our States. I will mention a couple of details to make the point.

The Ninth Circuit is the largest circuit in the country. It hears appeals from California, Arizona, Nevada, Idaho, Montana, Washington, Oregon, Alaska, and Hawaii. There are over 5,200 cases pending in the Ninth Circuit. It has the largest civil docket in the Nation, more than 1,500 cases. Since early 2001, cases filed in the district court of the Ninth Circuit and that make their way through the court of appeals take longer to resolve than they did 2 years ago. In 2001, it took 30 months for a case to go from original filing to a final decision on appeal. By June 2003, it took 31 months. This 1-month increase in delay may seem small but the delay adds up across the circuit. There are more than 4,100 cases in the Ninth Circuit affected by this delay.

That means there are more than 123,000 extra days that have been spent by both parties waiting for a decision. It takes 5 months longer to resolve a case in the Ninth Circuit than the national average of courts of appeal, 31 months versus 36 months. That is what has affected my State and other States in the United States Court of Appeals. The filibuster that has been conducted by the Democrats is responsible for the inability to fill these vacancies. Not just vacancies, but judicial emergencies.

The last point I make before yielding time, if the Senator from Alabama is still here and would like to speak briefly, to answer a question that has been asked of me by constituents in Arizona. They remember the movie ''Mr. Smith Goes to Washington'' with Jimmy Stewart. A couple of them have read in the history books about the great filibuster Strom Thurmond conducted over 24 hours. They asked me, if the Democrats are filibustering these judges, why can't you make them talk all night? The answer to that question is, that is not the nature of a modern filibuster. When Jimmy Stewart and Strom Thurmond were speaking that long, they were trying to hold the floor, as our colleague from Nevada did a couple of nights ago when I think he spoke over 8½ hours. He did not want to give up the floor because he did not want business to be conducted.

In the case of Strom Thurmond and Jimmy Stewart, in the movie, they did not dare give up the floor because they were a one-man band for their cause. They may have had one or two colleagues with them, but basically they were it. They knew as soon as they gave up the floor, the leader would say: I ask unanimous consent we now vote on the matter they were arguing about. They would object and say, I object, and under Senate rules that is enough. It only takes one person to object to go to the next stage. The next stage is filing a cloture motion and then a vote occurs. If 60 Senators say, ''We are ready to vote,'' you take the vote on whatever matter it is. In this case, it would be the nomination of these judicial nominees. They might pass by 51 votes, but you cannot take the vote until 60 Senators agree.

That is the rule that applies on the legislative calendar. Up until now no one thought it would be a rule that would be abused with respect to the Executive Calendar, the calendar on which the judicial nominees are considered.

The Democrats have decided to seek to apply that 60-vote rule so if more than 40 of them vote no to take a vote, we would not have the 60 votes necessary to take that vote and the majority rule would never be permitted to prevail. That is the way it has been for the last several months. We have taken a cloture vote several times and each time there are 44, 45 Democrats who vote against cloture. They vote against taking the final vote. That means there may be 55 or 56 on the other side with some Democrat support, obviously, willing to take the vote. But we cannot get that number up to 60.

Up until now, in the interpretation that has prevailed, we cannot take the final vote which would pass for all of these nominees; 51 votes would be secured for every one of the nominees that have been filibustered. That is why we cannot make someone talk all night. If our colleagues on the Democrat side wished, they could have one person on the floor all night tonight and simply object to our request to go to these votes. But they would not have to talk if they did not want to.

I am pleased they are joining in this debate so we can actually have a discussion about these candidates. In that sense, I guess we have forced an all-night discussion. It is a discussion that should have occurred a long time ago. It is a useful discussion, but it is not a discussion at the end of the day that I suspect will change any of their minds, as a result of which, as long as we adhere to the 60-vote rule that has always been the rule in the past, we cannot get to a vote where the majority would be able to prevail. That is what the Senate rules are.

On Friday, we will have a vote to change the rules. That vote requires a two-thirds majority to pass. It is unlikely that will occur, either.

That is the state of play right now. That is why, to answer the question, ''Can you make somebody talk all night,'' the answer is no, not if they have 40 friends, because if they have 40 friends, all they have to do is vote ''no'' when you have a cloture vote and you cannot go on to your final vote. That rule may sound arcane, but I also say on legislative matters, it has been used by both parties to defeat legislation that did not have a 60-vote majority. It is a right Senators have always felt important, for important matters to require 60 votes. To pass a treaty, it takes two-thirds. The Constitution explicitly spells that out. But to confirm a judge, the Constitution has no super-majority requirement.

There are a lot of people who believe the real intent of the Framers was that a simple majority should apply. Perhaps one day that issue will be tested. Until then, we are with the proposition that as long as any Senator objects, it takes 60 votes to get to a final vote in which a simple majority would prevail. As of right now, that is what is being applied in the case of these judicial nominees.

The important point for Americans to understand is the minority has thwarted the will of the majority; that the consequences are significant for the country; that emergency judicial vacancies are not being filled; and while this is unfair to nominees themselves, it is even more unfair to the American people because the judicial vacancies remain vacant.

It is a solemn responsibility of the Senate to act on the President's nominees. We are not fulfilling that responsibility. It is for that reason the Republican majority decided to take this time tonight and tomorrow to try to bring this matter to the attention of the American people to urge our colleagues to reconsider their position in opposition to even taking a vote on these nominees so eventually we can get to the point where we can simply have an up-or-down vote on the nominees President Bush has made for these important positions.

I reserve the balance of the time allotted to the Republican side during this hour. If there is another Republican wishing to speak, I am happy to recognize that person. If not, I am happy to yield the floor to colleagues on the Democrat side for whatever time is remaining and pick that up a little bit later.

I yield the floor.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. I am happy to yield to my colleague.

Mrs. HUTCHISON. I am happy for the Senator to go forward and then we will come back at the end of the hour.

Mr. KYL. Mr. President, I inquire how much time remains of the half hour?

The PRESIDING OFFICER. Two and ½ minutes.

Mr. KYL. If either Democrat who is on the floor would like to speak, fine. Otherwise I will go ahead and use that time.

Mr. REID. Mr. President, it works better when we use our time and do not get mixed up so no one owes time.

Mr. KYL. I am happy to follow the precedent we have established and use the remaining 2½ minutes.

I wanted to speak to the qualifications of some of these nominees. Obviously, during the short period of time I have, I am not going to be able to do that except that I said I wanted to mention the qualifications of one of these nominees, Judge Carolyn Kuhl, nominated to the Ninth Circuit Court of Appeals, a judge who would be sitting on cases I might argue to the Ninth Circuit Court.

She has been a judge in a State trial court in Los Angeles since 1995. The American Bar Association rated her ''well qualified,'' their top rating for the Ninth Circuit Court of Appeals. She has served as a superior court judge in Los Angeles County in both the criminal and civil divisions and supervising judge of the civil division, the first woman to hold that position. Before that, she was a partner in a prestigious law firm in California. Before that, she served in the Department of Justice. She worked as a deputy solicitor general of the United States and argued cases before the United States Supreme Court in that capacity. She has extraordinary bipartisan support. A bipartisan group of 23 women judges on the superior court who serve with Judge Kuhl have written to our Judiciary Committee and said, ''As sitting judges, we, more than anyone, appreciate the importance of an independent, fair-minded and principled Judiciary. We believe that Carolyn Kuhl represents the best values of such a Judiciary.'' That is from a bipartisan group of judges.

A bipartisan group of nearly 100 judges who serve with her said: We believe her elevation to the Ninth Circuit Court of Appeals will bring credit to all of us. As an appellate judge, she will serve the people of our country with distinction, as she has done as a trial judge.

There are a variety of other endorsements that have been made of this fine candidate. The bottom line is we reviewed her record, we heard her testimony. She made a tremendous impression on all of us on the committee. The worst a couple of people on the other side can say is they disagreed with a couple of her decisions. I daresay if that was the test of every one of us as Senators, we would be in a sorry position because we cannot go very long without people disagreeing with us philosophically on positions.

Judge Carolyn Kuhl, it is plain, will follow the Constitution. She is one of the candidates we need to act upon. I urge my colleagues to consider these remarks in consideration of her nomination.

Mr. REID. Mr. President, the first 15 minutes will go to the Senator from California, Mrs. BOXER, and the second 15 minutes to the Senator from New York, Mr. SCHUMER.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. I am glad Senator KYL brought up the Kuhl nomination because I will be talking a little bit about that nominee and her background and the number of people from all sides of the spectrum who oppose this nominee and the fact there is a very serious case involving a breast cancer patient who she ruled against in terms of her privacy rights. I will get into that. Judge Kuhl was overturned immediately. I will get into that and why it is we have taken a stand on a handful of these very extremist, very controversial judicial nominees.

First, I remind us of the scorecard. If I were the Republicans and I got 168 of

the judges I wanted and only was turned down for 4, I would do what my mother said when I was a kid: ''Honey, if you get 90 percent of what you want, say thank you, give the person a hug, and leave the room.''

Instead, what do we have? We do not have smiling, we do not have thank you's. We have 30 hours of wasted time to hear people complain and whine about the fact they did not get four.

Somebody wrote a book once, called ''All I Really Need to Know I Learned in Kindergarten.'' I honestly think this is the most childish situation. The President gets 168 and does not get 4 and his party is up in arms.

How does that compare to President Clinton? Let's take a look at that. President Clinton had 63 nominees blocked, or 20 percent of his nominees. President Bush has, up to now, four—I suspect if we get these new two women we are talking about coming forward on Friday, hopefully, there will be six, but tonight there are four. That is 2 percent, and we have complaining going on.

I do not get it. I feel like BARBARA in Wonderland. It makes absolutely no sense. I cannot figure it out. It is like the kid who comes home from school and says to his dad, ''Dad, I got 98 percent; aren't you proud of me?'' Dad says, ''What happened to that other 2 percent?'' What is it about? We all learn to be gracious when we win. When we win 98 percent, we should be gracious.

Here are the names of the Clinton nominees who were blocked. Fifteen times more judicial nominees blocked than that of President Bush. Why were they blocked? The other side felt, for whatever reason, maybe they did not feel they came from the mainstream.

I remember speaking to Senator HATCH. He actually called me into his office. We had a very good talk. This is when he was chair of the Judiciary Committee and President Clinton was President. He said to me: ''I just want you to know, BARBARA, if your side sends over from California liberal judges, they will never go anywhere. Do not send me liberal judges.''

I said: ''Orrin, I get it. I am a pragmatist. I have a committee advising me. I will so instruct them.'' We got almost all of our nominees through.

When President Bush was elected, I said to Senator HATCH: ''I hope you are not going to send us rightwing nominees, because they are out of the mainstream and this President promised us mainstream nominees.''

Remember the night the Court decided he had won the election? The President came out—I will never forget it—we needed healing, and he came to the mike. It was very healing. He said: ''I will govern from the center. I am a uniter, not a divider.''

Yet we see some of these nominees who are coming down who are so far off to the right they are falling off the charts. I want to be clear. I want to say this unequivocally to my colleagues. I don't deserve to be here if I don't exercise the right given to me in the Constitution of the United States, which I revere. If I don't exercise that right, I do not deserve to be here. If I don't stand up and block some of these people, I do not deserve to be here. It is as simple as that. You can come to my State, you can call me every name in the book, it does not matter to me, because my constituents want me to stand up for what is right. What is right is to support mainstream candidates for the judiciary and stand up to extremist nominees and those who are out of the mainstream. I have to do it. It is my job.

Do you want to come and talk about it for 30 hours when we could be doing other things? That is fine with me. I can talk about it for 630 hours. That is how strongly I feel in my heart about what we have done.

What does the Constitution say about our job? The Constitution says: The President—that means this one and every other one—must seek the Senate's advice and consent. It does not say ''sometimes.'' It does not say ''usually.'' It does not say ''when you feel like it.'' It says very clearly, the President must seek the Senate's advice and consent. That does not mean notifying Senators, ''This is who we are coming up with.'' It means sitting down with us. It means talking to us. I have to say, this administration falls short.

When Carolyn Kuhl was nominated, I said to Alberto Gonzales, the President's man on this, Give me some time. I wanted to support a woman for this judgeship. Members know my record. I said, Let me get back to you. Lo and behold, what did I find out? I want to tell you what I found out.

First I found out about this case. Think of yourself as the woman in this circumstance, perhaps as her husband or as a relative. A woman had a mastectomy. It is a brutal operation. She is frightened. She is sick. She is going to the doctor for a followup exam. She is in the office. The doctor has another person in the office, dressed in a white coat, and the exam takes place. This other gentleman is leaning over this woman in one of the most embarrassing moments, her most frightened moments, her most humiliating moments, and he is fanning her. He is involved in this. He is staring at her the whole time. When she leaves the doctor's office on the way out, something did not feel right to her. She asks the receptionist, ''What doctor was that in the office with me?'' The receptionist said, ''That was no doctor; that was a drug salesman.''

The woman was appalled. A drug salesman had been in this room with her without her permission, without her knowledge.

The bottom line of all of this, she sues. The case comes before Judge Kuhl, who is a new judge in the State. Judge Kuhl rules against this woman. The case is appealed and Carolyn Kuhl is overturned.

Is this someone you think should be rewarded with a lifetime appointment? I say not.

Let's see what the National Breast Cancer Coalition has written. This is a group that does not get involved in politics. This is a group that does not get involved. They were so upset, they said:

> We cannot afford to have Judge Kuhl on the court of appeals where she will have a greater effect on women with and at risk of breast cancer and our family and friends.

The National Breast Cancer Coalition getting involved in a judicial nomination. I will tell you, if I did not stand up for the women across this country—how many of us get breast cancer? About one in nine. If I did not stand up for them, I do not deserve to be here.

So if you want to talk about it for 30 hours, for 40 hours, for 50 hours, count me in—count me in—because if I were to roll over and allow someone such as that to get on the bench, someone who is hostile to women, someone who is hostile to civil rights, someone who is hostile to privacy rights, someone who is off the deep far right end of the spectrum, I do not deserve to be here because I promised my constituents I would support mainstream judges. I have supported many judges, 90 percent of the judges President Bush has brought forward. But once in a while you have to take a stand.

Let's look at the number of groups that are against Carolyn Kuhl's nomination, which is going to be brought up on Friday. I cannot even read all of these to you. It would take too long. But I will give you a few: the AFL–CIO, the American Association of University Women, the American Federation of School Administrators, the Asian Pacific American Labor Alliance, Breast Cancer Action, the Breast Cancer Fund, the Women's Law Center, Clean Water Action, Communication Workers, Defenders of Wildlife, the Feminist Majority, the Foundation for a Smoke-Free America, Friends of the Earth, the International Federation of Professional Technical Engineers, Los Angeles County Federation of Labor, NARAL, Moveon.org, National Breast Cancer Coalition, National Center for Lesbian Rights, National Council of Jewish Women, National Employment Lawyers Association.

It goes on and on and on, and there are reasons why these groups have gotten involved in this. Because all you have to do is see the record of this woman and you understand why these groups are against her.

Office and Professional Employees International Union——

Mrs. HUTCHISON. Mr. President, will the Senator yield?

Mrs. BOXER. No, I will not. People for the American Way, Physicians for Social Responsibility, Planned Parenthood, Pride at Work, Progressive Jewish Alliance, the Sierra Club, Smoke Free Educational Services—this goes on—Taxpayers Against Fraud, United American Nurses. It goes on and on.

There is more: the Wilderness Society, the Women's Leadership Alliance; the Members of the California delegation: the Honorable NANCY PELOSI, BARBARA LEE—all the women of California who are on the Democratic side in the Congress.

So you want to talk about it for 30 hours? We will talk. We will talk.

This is from 102 law professors from across the United States on Judge Kuhl:

> Judge Kuhl has spent her entire professional life—in the Government, in private practice, and on the State bench—aggressively promoting an extremist agenda that is hostile to women, minorities, injured workers, and the environment.

Judge Kuhl's record goes back to when she worked in the Reagan administration and tried to persuade the Reagan administration to say that it was OK that Bob Jones University get a tax deduction. She was called part of a band of zealots who did that.

So you want to talk about Judge Kuhl. I know her record inside out. I wanted to support a good woman from California. My whole life is spent promoting women but not women who would be hostile to other women and hostile to the guy who maybe needs to join an organization and perhaps get into a law suit. She does not even like the fact there are juries. She does not like the fact there are juries.

So here we are. It is a quarter to 12 at night. I am all perky now. The reason is, I feel deeply about this. This is a chance to stand here and say, ''What are you doing?'' to the other side of aisle. You have 168. You did not get four. You are whining and you are complaining and you are crying and you are marching into the Senate and you are stopping progress.

What about the millions of jobs that have been lost? Three million jobs lost, 2.6 million in manufacturing. Let's talk about that for 30 hours—instead of crying, crying about not getting 100 percent but only 98 percent of what you want.

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

Mrs. BOXER. I ask for 1 more minute, and then I will turn it over to my colleague from New York.

Mr. SCHUMER. I yield a minute to my colleague from California.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. So here we see the problems. We have lost jobs. You do not want to talk about that. I think right now I ought to ask unanimous consent that the Senate now return to legislative session and proceed to the consideration of Calendar No. 3, S. 224, the bill to increase the minimum wage, that the bill be read the third time and passed, and the motion to reconsider be laid upon the table.

Mrs. HUTCHISON. I object.

The PRESIDING OFFICER. Is there objection?

Mr. SANTORUM. Mr. President, reserving the right to object.

Mrs. BOXER. Was there an objection?

Mr. SANTORUM. Mr. President, reserving the right to object.

Mr. REID. Mr. President, there was either an objection or no objection.

Mr. SANTORUM. I object.

The PRESIDING OFFICER. Objection is heard.

Mrs. BOXER. Just finishing up my minute, this proves my point that they want to complain about four judges who already have jobs. But they do not want to deal with the people who are unemployed and this terrible economic situation we have in our country today.

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

Mrs. BOXER. I yield the floor.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. Thank you, Mr. President.

First, I thank my colleague from California. She is feisty any time of the day but, not only feisty, on target. I very much appreciate her great work, particularly in bringing to our caucus's attention the problems with Judge Kuhl.

Now, I would like to review the bidding so far. First, we have had a lot of talking, virtually none of it new. Second, there have been repeated refusals to go on to issues that we do not talk about, such as minimum wage, loss of jobs, health care. Third, we believe this debate is helping us because the rightwing radio and the rightwing groups have talked about their argument.

I mentioned the Wall Street Journal editorials that never mention this number, what anything fair would be. We are getting this number out: 168 to 4.

When I go to parades in upstate New York, conservative areas, they say: Why are you stopping the President's judges? I say: It is 168 to 4. They say: Never mind. Well, that is what this debate is doing. The American people are going to say: Never mind.

Finally, I think we have revealed how our colleagues' arguments are outcome-determinative. Lawyers will tell you they are the weakest arguments. You pick your outcome and then you determine it.

Are they against filibusters? No. Again, I will repeat my challenge: Let a Senator on the other side show me that they got up and demanded 30 hours or 3 hours or 5 hours when Members on their side attempted to filibuster Judge Barkett, Judge Sarokin, Judge Marsha Berzon, Judge Paez. Did anyone get up and complain? No.

So you are not against filibusters and you are not against blocking judges. Here they are. You have blocked a whole lot of judges. You did not use filibuster. You refused to give them a vote. But they were blocked—same effect. The only thing you seem to object to is a successful filibuster. Where is the logic there?

Finally, you want to have viewer-successful filibusters? Talk to us. Come and meet with us. Nominate judges who may be conservative but are not so far out of the mainstream, such as Justice Brown who believes that Government is evil. She is against all zoning laws, at least according to her speech to the Federalist Society. And she thinks the Lochner decision, one of the most discredited decisions which said the State government could not regulate the number of 60 hours—New York State said 60 hours is when a bakery worker could not work any longer. They can't do that.

So nominate some people who are conservative but not so far out that they want to make law, not interpret law. That is the bidding so far.

Now, one other point that was made since I last spoke. My good friend from Idaho, I love him. He is a fine guy. We even worked together on a gun control bill, so it shows you anything is possible around here. But he is saying Judge Abe Fortas was not filibustered? What is this argument? A cloture vote is not a filibuster? As my daughter would say: ''Hello.''

Why do we have a cloture vote? Because there is a filibuster. Here is the headline in the New York Times: ''Critics of Fortas Begin Filibuster. . . .'' Why is that not a filibuster? But the New York Times, they are one of those wacky, liberal publications, and this is one of these slanted liberal headlines.

So let's take the U.S. Senate Web site. What is the headline? October 1, 1968: ''Filibuster Derails Supreme Court Appointment.'' I am paraphrasing: In June 1968, Chief Justice Earl Warren informed President Lyndon Johnson that he planned to retire because of a filibuster.

Mr. President, I ask unanimous consent to have a document from the Senate's own Web page printed in the RECORD. I would ask all of my colleagues who believe that Abe Fortas was not filibustered to make a motion to correct the Web site.

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

FILIBUSTER DERAILS SUPREME COURT APPOINTMENT

In June 1968, Chief Justice Earl Warren informed President Lyndon Johnson that he planned to retire from the Supreme Court. Concern that Richard Nixon might win the presidency later that year and get to choose his successor dictated Warren's timing.

In the final months of his presidency, Johnson shared Warren's concerns about Nixon and welcomed the opportunity to add his third appointee to the Court. To replace Warren, he nominated Associate Justice Abe Fortas, his longtime confidant. Anticipating Senate concerns about the prospective chief justice's liberal opinions, Johnson simultaneously declared his intention to fill the vacancy created by Fortas' elevation with Appeals Court Judge Homer Thornberry. The president believed that Thornberry, a Texan, would mollify skeptical southern senators.

A seasoned Senate vote-counter, Johnson concluded that despite filibuster warnings he just barely had the support to confirm Fortas. The president took encouragement from indications that his former Senate

mentor, Richard Russell, and Republican Minority Leader Everett Dirksen would support Fortas, whose legal brilliance both men respected.

The president soon lost Russell's support, however, because of administration delays in nominating the senator's candidate to a Georgia federal judgeship. Johnson urged Senate leaders to waste no time in convening Fortas' confirmation hearings. Responding to staff assurances of Dirksen's continued support, Johnson told an aide, ''Just take my word for it. I know [Dirksen]. I know the Senate. If they get this thing drug out very long, we're going to get beat. Dirksen will leave us.''

Fortas became the first sitting associate justice, nominated for chief justice, to testify as his own confirmation hearing. Those hearings reinforced what some senators already knew about the nominee. As a sitting justice, he regularly attended White House staff meetings; he briefed the president on secret Court deliberations; and, on behalf of the president, he pressured senators who opposed the war in Vietnam. When the Judiciary Committee revealed that Fortas received a privately funded stipend, equivalent to 40 percent of his Court salary, to teach an American University summer course, Dirksen and others withdrew their support. Although the committee recommended confirmation, floor consideration sparked the first filibuster in Senate history on a Supreme Court nomination.

On October 1, 1968, the Senate failed to invoke cloture. Johnson then withdrew the nomination, privately observing that if he had another term, ''the Fortas appointment would have been different.''

Mr. SCHUMER. I thank you, Mr. President. So I guess I have caught a little of the feistiness of my friend from California.

Now, Senators, this is a serious issue. Many of my colleagues have done a great job of bringing up the issue of jobs and health care and all of that. I think we should do that because we have heard these arguments over and over and over and over again. We have not talked about the minimum wage once or for providing health care for the uninsured or many other issues. But so be it.

Let me again go over what our Constitution says. Does our Constitution say, ''Do not filibuster''? It does not say that. In fact, our Constitution says the Senate ought to be the cooling saucer.

We all know the story. James Madison was explaining, I believe it was to Thomas Jefferson, why there was a Senate. Jefferson thought it looked too much like the House of Lords. He had been over in Paris. And he had not written the Constitution.

He came back and he goes over to James Madison's house and Madison is pouring tea. He says: You see. He pours the boiling water into a cup, and he says: You see the boiling water in the cup? That is the House of Representatives, where the people's passion bubbles over. Then he poured some of the water into the saucer, and he said: The Senate is the cooling saucer.

Well, James Madison, we have been, by stopping these four nominees, a little bit of that cooling saucer. Our job, when the President goes too far, as he has with some of these nominees, is to be the cooling saucer.

Now, unfortunately, our being the cooling saucer gets some of the others on the other side very hot. But we are defending the Constitution. The idea that a successful filibuster is bad has nothing to do with the Constitution. That comes from a few of my colleagues' view that they want to get every nominee. So let's make an argument. Because if a successful filibuster is bad and an unsuccessful filibuster is OK—and we have been through that before—then you cannot make any argument about a filibuster.

Again, I would like my colleagues to read this over and over and over again. There is nothing in there that says: No filibuster. There is nothing in the Constitution that says: A majority will decide judges, a 51-to-49 majority. It says the President must seek the Senate's ''Advice and Consent.''

Constitutional scholars will tell us that the reason we have these rules in the Senate—unlimited debate, two-thirds to change the rules, the idea that 60 have to close off debate—is embodied in the spirit and rule of the Constitution.

Yes, my colleagues, we are the cooling saucer. When the President's passion for hot rightwing judges who might make law rather than interpret law gets overwhelming, we will cool the President's passion. That is what the Constitution is all about, and we all know it.

By the way, when, again, my colleagues thought President Clinton was nominating a few judges too far left, what did they do? What did you do over there? You filibustered. Paez and Berzon were very liberal, no question about it. But because President Clinton had, by and large, nominated moderate nominees, nominated moderate people, your filibuster could not last.

Let me say something to my colleagues. We did not want to undertake a filibuster. Many of us on the Judiciary pleaded with Chairman HATCH to go to the White House and say: Meet with us. No. Many of us pleaded with Counsel Gonzales to come meet us a little bit of the way. No.

So we had no choice. Either we could be a rubberstamp or we could use the only means we had at our disposal to stop the President from getting every nominee, and that was the filibuster. Again, it is in keeping with the Constitution. We believe we are fulfilling our constitutional obligation.

Again, I see my colleague from Pennsylvania brought up his chart: No successful filibusters. Did my colleague object to the unsuccessful filibusters of Barkett, Sarokin, Berzon, and Paez? Did my colleague say he wanted 30 hours on the floor because a filibuster was wrong?

Mr. WARNER. Will the Senator yield for a question?

Mr. SCHUMER. I am happy to yield. I want to finish my point and then I will yield to my friend from Virginia, who is one of the most respected and erudite Members of this body, and I consider him a friend of mine.

I would simply say that the argument that filibusters are OK but successful filibusters are not OK just melts under even the sunshine of a distant logic.

I yield to my colleague from Virginia.

Mr. WARNER. Mr. President, I have had the privilege of leaving the floor and talking with a number of visitors. It is remarkable how many people have come from all across the country to be here. They have asked me, in a very straightforward manner: Senator, we have followed this debate and we cannot understand how one side says there is no filibuster and the other side says there is a filibuster.

So, Mr. President, I would hope we could enter into a colloquy and allow the colleagues here—the former attorney general of Alabama, who is on the Judiciary Committee, and the distinguished Senator from Pennsylvania, who has taken such a leadership role—to see whether or not in colloquy we can provide some clarity to those trying to follow this very important debate on this highly technical use of the word ''filibuster.''

So I am just wondering if you would state what your understanding is, and then my colleagues on this side will state their understanding.

Mr. SCHUMER. I thank my colleague from Virginia for that excellent inter—I do not mean interruption—I mean it in the classical sense, trying to bring us together.

I will be happy to yield to either of my colleagues from Alabama or Pennsylvania and ask them, because I would like to have debate here instead of each of us getting up and making speeches. I asked a few times and my colleagues were not on the floor.

Mr. WARNER. So, Mr. President, you have your chance. So let's go.

Mr. SCHUMER. Well, this is a good interjection by my friend from Virginia.

Why is it that a successful filibuster is wrong but an unsuccessful filibuster is OK? Because we have had them before, and many on your side participated in them. We did not hear any of these arguments about the Constitution or anything else. I would be happy to yield to my colleague from either Alabama or Pennsylvania for an answer. Maybe we can come to some meeting of the minds.

Mr. SESSIONS. Mr. President, maybe I would suggest, as we go forward here, the time be counted to each side. We are now in the next hour anyway. Is that where we are?

The PRESIDING OFFICER. We are 15 seconds from the minority's time running out.

Mr. SESSIONS. All right. So in the next time block we set aside perhaps we can count the time against each side if we speak.

Let me explain what happened. The Senator from New York was not here—

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

Mr. SESSIONS. I thank the Chair.

Mr. SANTORUM. Mr. President, I ask unanimous consent that, during this colloquy, whatever time is consumed by whatever party member run off the time of that hour of that side of the aisle.

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

Mr. REID. So we make sure we understand, what we are saying is whoever is talking, time will be taken off their side; is that right?

Mr. SANTORUM. That is correct.

Mr. SESSIONS. The Senator from New York was not here during the Clinton years in the Senate; he was in the House.

Mr. SCHUMER. Will my colleague yield? I was here the last 2 years of the Clinton years. I was here for Berzon and Paez.

Mr. SESSIONS. Let's talk, then, about Berzon and Paez and get this straight. That is real good to remember. I just assumed the Senator couldn't have been here or he might have understood a little differently.

Holds are placed on legislation by Senators. Holds are placed on nominees by Senators. One way to break that hold is to file for cloture which guarantees an up-or-down vote. Holds were placed on Berzon and Paez. President Clinton was President of the United States. These were two of his most liberal nominations to the most liberal circuit in America; the one that struck down the death penalty, struck down the Pledge of Allegiance, struck down the ''three strikes and you're out'' law in California, and Berzon and Paez participated in all those opinions.

Anyway, when they were up for nomination, I strongly believed those were not good nominees and opposed them. We discussed these nominations within the Republican ranks. Somebody said: Why don't we filibuster? The chairman of the Judiciary Committee, Senator ORRIN HATCH, said: No, filibusters are not appropriate for judges. We should not enter a filibuster.

A Democrat said: We want a vote on Berzon and Paez. We have waited long enough. So we got to the point where TRENT LOTT, the Republican majority leader, the equivalent of TOM DASCHLE in this circumstance, filed for cloture. He said: Let's bring these two nominations up for a vote.

I and a whole lot of others did not support the Berzon and Paez nominations but did not believe in filibusters. The Senator from New York suggested we were unprincipled. He suggested that we are now opposing filibusters which we then favored. But when TRENT LOTT moved for cloture, I voted for cloture. Only half a dozen or so voted against cloture, and the nominees came up, and they got an up-or-down vote. TRENT LOTT voted against the nominees. I voted against the nominees. They had an up-or-down vote, and they were confirmed.

You can say that is a filibuster, but it is not the same thing as a filibuster organized by the Democratic leader and unified Democratic ranks to block now six nominees from even getting an up-or-down vote. It is not the same. I don't think there is any doubt about it, it is the first time a filibuster has been used systematically under these circumstances.

Mr. SCHUMER. If I might respond to my colleague from Alabama, let me say to everyone here, I have great respect for my colleague from Alabama. We work together on the Judiciary Committee quite well. We have had some legislation together. Let me make a few points.

First, I don't disagree that Paez and Berzon were very liberal. There could be made an argument—I didn't agree with it—that they may have been out of the mainstream and maybe should have been blocked. Certainly, that is what our former colleague, Mr. Smith from New Hampshire, believed.

In fact, I agree with the Senator from Alabama. I think the Ninth Circuit is a very liberal circuit. I voted for Jay Bybee, who is far to the right of me, because I thought the Ninth Circuit could use some balance. I don't have a problem with people saying Paez and Berzon were very liberal and we ought to try to block them.

Let me make two points in reference to what is a hold. A hold is saying ''I am going to filibuster.''

Mr. SESSIONS. No.

Mr. SCHUMER. If I might finish. That is why the hold is able to hold things. There is nothing in the rules about one Senator can hold things up, but the way things work around here, you say: If you bring this to the floor at this point, I am going to keep talking and you are going to need 60 votes. I don't know it to be any different than a filibuster. It is certainly not a difference that makes a difference. One may call it a hold rather than a filibuster, but it is a filibuster.

Second, I say, in all due respect to my colleague, again, let's not get semantical here. It is true that my good friend from Alabama opposed cloture. How many Senators voted for cloture? How many voted against? Thirty-one? I don't think there was a Democrat among them—maybe; maybe one. I don't recall if Senator Miller was here then. Thirteen voted against Judge Berzon.

But immediately after on the vote for Paez, my colleague from Alabama got up and made a motion to ''indefinitely postpone the nomination.''

Let's not get semantical here. If you are indefinitely postponing the nomination, you are seeking to do what we are seeking to do, which is block a nomination you thought was ideologically incompatible.

The bottom line is this: I will make this argument and then yield—I defer to our great whip here—we have divided up all our time and I am taking somebody else's time; maybe my friend from Minnesota, and I don't know who the other Senator was—Senator BOXER. So I don't want to take too much of it.

I simply say, again, these arguments sort of, a little bit, contain a bit of sophistry. Blocking a judge is the goal—successful filibuster, unsuccessful filibuster, a motion to indefinitely postpone, not allowing a judge to come to a vote. When either side has thought a judge out of the mainstream, they have used the device that was available to them to allow the Senate, I would argue, to do what the Founding Fathers wanted us to do, which is to be the cooling saucer. Sometimes it was successful, sometimes it wasn't, but it is not a difference that makes a difference, as the law professors used to say.

I yield the floor.

Mr. REID. Parliamentary inquiry, please: How much time remains on our side following the statement of the Senator from New York?

The PRESIDING OFFICER. Twenty-six and a half minutes.

Mrs. HUTCHISON. No, Mr. President, parliamentary inquiry: It is now the majority's time, as I understand it. The minority time has finished.

The PRESIDING OFFICER. The time that is used will be taken off the sides. It has been taken off when it was being used.

Mrs. HUTCHISON. That is right, but Senator SESSIONS and Senator SCHUMER took equal amounts of time. Wouldn't the majority time follow since the minority time——

Mr. REID. We know that.

The PRESIDING OFFICER. The majority has 26 minutes left and have a priority on that unless they wish to continue the agreement they had of having an open debate.

Mr. REID. Mr. President, we will go back to the original system we had.

Mr. SESSIONS. I object to the change, if he is making a point.

Mr. SCHUMER. If I might make a parliamentary inquiry.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, while the Senator from New York is here, and he is such a good advocate, as we say in Alabama, you make soup out of slop. A motion to postpone is not a filibuster. It is an up-or-down vote to delay.

I was in negotiations with the Senator from California and the White House to say we can let Berzon and Paez go but at least put more decent, more mainstream judges in California. We didn't get that agreement, and they moved forward with the vote. That was not a filibuster.

I want it to be clear that the leadership on this side, the chairman of the Judiciary Committee, the majority leader, and this Member of the Senate did not vote to maintain any kind of extended debate but voted for cloture which would have guaranteed a vote and did guarantee a vote for them. That is not a classic filibuster.

Mr. GRAHAM of South Carolina. Will the Senator yield for a question?

Mr. SESSIONS. Yes.

Mr. GRAHAM of South Carolina. The Senator from Virginia made a good point. There are a lot of people confused, and the Senator put me in that category. I sat here and listened to this debate.

Is it true that the main difference between the example they are using and our problem is that these two people are on the court?

Mr. SESSIONS. That is certainly a distinct and obvious difference. Both of these nominees were moved forward by the action of TRENT LOTT, the Republican leader, to move a Clinton nominee for an up-or-down vote. He got the up-or-down vote. Both those nominees were confirmed. That is exactly correct.

And you want to talk about consistency, I ask the Senator from New York if he still stands by his statement he made that the basic issue of holding up judgeships is the issue before us, not the qualifications, which we can always debate; it is an example of Government not fulfilling its constitutional mandate because the President nominates and we are charged with voting on the nominees?

And PATRICK LEAHY, the chairman of the Judiciary Committee——

Mrs. HUTCHISON. Will the Senator yield?

Mr. SESSIONS. I will for a question.

Mrs. HUTCHISON. I want to clarify a point because the Senator from New York tried to equate a filibuster with a hold. I was hoping the Senator from Alabama would show the difference between a hold and a filibuster. If we start calling a hold a filibuster, then we have really changed the rules around here because holds are used for a variety of purposes. They are used for negotiation, and they may or may not lead to a filibuster, and usually they don't.

To say that someone put a hold on someone and then there was an effort through extended debate to get those holds taken off is a filibuster is a misreading of the rules; would the Senator agree?

Mr. SESSIONS. I would certainly agree, and as the Senator from Georgia suggested, we do that a lot around here.

Mr. CHAMBLISS. Will the Senator yield for a question?

Mr. SESSIONS. I will.

Mr. CHAMBLISS. I noticed my friend, the Senator from New York, for whom I have great respect, made a comparison between a hold and a filibuster but yet at the same time he has shown this chart over and over again, showing where we have 168 approved and only 4 filibustered. But as the Senator well knows, the Senators from Michigan have had holds on numbers and numbers of judges for months and months. So his number four, instead of being four, should be about eight, if he really believes a hold was equivalent to a filibuster. So his argument simply doesn't hold water, if I may pose that in the form of a question to the Senator.

Mr. SESSIONS. I agree, if a hold is a filibuster, then there are a lot more Bush nominees now being filibustered than have been suggested. I think there are four being held by Senator LEVIN.

Mr. SESSIONS. I yield for a question from the Senator from Virginia.

Mr. WARNER. In the nature of a question, first, I ask the Presiding Officer to inquire of the Parliamentarian if the word ''filibuster'' appears in any of the rules of the Senate. My understanding is that it does not.

The PRESIDING OFFICER. The Senator from Virginia is correct.

Mr. WARNER. So the word ''filibuster'' is not in the rules. I want to clarify that. I have done a lot of study on this question, and I think I can work our way through it. It is not in the rules. Let's go to Webster's Dictionary. It is rather interesting, the word has been used throughout history in many ways.

Filibuster—the first definition: ''An irregular military adventurer; an American engaged in fomenting insurrections in Latin America in the mid-19th century.'' But then we get to the last definition, and herein I think is some guidance: ''a: the use of extreme dilatory tactics in an attempt to delay or prevent action, esp. in a legislative assembly. b: an instance of this practice.''

I think somewhere in between lies the truth. So perhaps with this background and the assurance it isn't in the rules, the Senator from Alabama can continue to educate the Senate as to his perspective, and the Senator from New York can continue to educate the Senate from his perspective, and let us hope we have brought some light on this issue.

Mr. SCHUMER. I thank the Senator.

Mr. WARNER. Mr. President, if I can add one more thing, there is a very fine book issued by the Library of Congress. I ask the Presiding Officer the title of that book. The Parliamentarian knows of it.

The PRESIDING OFFICER. The title would be ''The History of the Cloture Rule.''

Mr. WARNER. Yes, I have studied that, and it is issued by the Library of Congress; am I not correct in that?

The PRESIDING OFFICER. That is correct.

Mr. WARNER. For those who want to pursue this in great depth. I thank my colleague for this colloquy, and I hope perhaps we got some clarity to the issue.

Mr. SESSIONS. I thank the distinguished chairman of the Armed Services Committee, Senator WARNER. He has brought wisdom here and helped us to keep from going around in circles.

There is an argument that can be made by the Senator from New York that holds that were ended by cloture votes are filibusters, but they were not really filibusters in the sense we are facing them today. What we are seeing today is a sustained deliberate attempt by the leadership of the Democratic Party to block judges by having less than 50 votes to do so. They block judges by requiring through the procedural rules of the Senate that we have to have 60 votes to confirm a judge instead of 51.

We know that in each one of these nominees that have been held up that more than 50, usually as many as 55, 54, 53 votes are there to confirm the nomination, but they have been blocked by a sustained filibuster led by the Democratic leadership and TOM DASCHLE and his team. That is what has brought us to this point. I think we have clarified that issue.

I say on the question of are we changing our views on this side, I reject that point. This side was principled during the Clinton years. This side did not resort to the filibuster as a tool of the opposition, as the Democrats have. There can be no debate about that. Their nominees were moved forward. We did not adopt this policy.

I see the Senator from Texas is here. She has some thoughts she would like to share with us about a particular comment that was made about the nominee from California, Judge Kuhl. I yield time to her.

Mr. REID. Parliamentary inquiry: How much time is left on both sides?

The PRESIDING OFFICER. Seventeen minutes on the majority side; 25½ on the minority side.

Mr. REID. It would be, I think especially for the wee hours of the morning, better if we continue with what we started with so there is not a fight for who gets recognized. Does anybody have a problem with the way we have done it?

Mr. SESSIONS. I am not exactly sure of the way we have done it.

Mr. REID. What we have done since 6 o'clock; the majority would take the first half hour and we take the second half hour.

Mr. SESSIONS. En bloc.

Mr. REID. Yes. I hope we can go back to that arrangement. That is my request.

The PRESIDING OFFICER. I assume you mean during this hour the majority would get its 16 minutes——

Mr. REID. Absolutely, and we will get our 25.

The PRESIDING OFFICER. And the next hour would be half hour first for the majority and——

Mr. REID. Yes, starting at 1 a.m. going back to the regular system.

The PRESIDING OFFICER. Unless the Senator agrees to an alternate position, that would be the policy.

Mr. REID. That request is granted?

The PRESIDING OFFICER. That is the way the unanimous consent was set up to begin with.

Mr. REID. Thank you, Mr. President.

Mr. SESSIONS. I yield 5 minutes to the Senator from Texas.

Mrs. HUTCHISON. Mr. President, I wanted to tell the rest of the story on Judge Carolyn Kuhl because I think a misimpression was left by the Senator from California regarding the case of the woman who was having a breast exam, and when she left the office, she asked who the doctor was, and the receptionist said: That wasn't a doctor, that was a pharmaceutical company representative.

When I first heard about that, I definitely wanted to hear more because that did not sound like the kind of judge I would want on the bench, a judge who would dismiss the case against the pharmaceutical company for having a person in the room when the patient was not even told this person was not a doctor or who this person was. I, in fact, did look at the rest of the story and I found a very different story. In fact, the plaintiff sued both the pharmaceutical company and the doctor. The doctor was sued for negligence in not informing the patient and asking the patient's permission, or having the patient have the right to say, no, I do not want that person in the room. The plaintiff sued the doctor, the doctor's firm, and the pharmaceutical company.

Judge Kuhl allowed the case to stay open, which she dismissed against the pharmaceutical company, because the case against the pharmaceutical company was common law intrusion upon seclusion, which was not settled law in California at the time, but she kept the case against the doctor for his failure to consent. The judge allowed the cause of action, the trial, to go forward against the doctor and the medical partnership for failure to obtain consent, and the plaintiff did recover. The plaintiff should have recovered, and the plaintiff did recover. Judge Kuhl allowed that to happen by keeping the lawsuit open against the doctor who was the person negligent in this case.

I think it is very important that when we know the full story it shows Judge Kuhl, in fact, was very sensitive to this woman's claim and allowed it to go forward. She made sure it went forward, and, in fact, the woman did settle for a full recovery.

I just wanted to set the record straight because I thought there was a misimpression in the record about Judge Carolyn Kuhl, and I would hope we would acknowledge she did let this case go forward and there was a recovery.

I think Judge Kuhl is an outstanding judge. After looking at her record very fully, I am very pleased to support her. I am very aware she is supported in a bipartisan way by many people in California, and most certainly when we talk about needing some balance on the Ninth Circuit Court of Appeals I think Judge Carolyn Kuhl would be an excellent addition to bring some balance to this circuit that is the most reversed circuit in the entire United States of America. Of all the circuit courts of appeal in the United States of America, the Ninth Circuit is the most reversed by the Supreme Court. I think that would tend to show we need some balance on this court, and I would hope Judge Carolyn Kuhl would get a fair vote, because if she does, she will get the majority in this body. They will look at the facts in her record. They will see how qualified and balanced she is, and she will get confirmation if she has a fair shot.

I thank the Senator from Alabama for letting me bring out the rest of the story, as Paul Harvey would say, and make sure the record is complete on behalf of Judge Carolyn Kuhl.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, I thank the Senator from Texas so much for those comments. I remember when that came up in the Judiciary Committee. We heard these allegations that this woman, Carolyn Kuhl, was insensitive about the rights of women and she had made this big error in this case. What she said simply was, as the Senator mentioned, the doctor allowed this man to come into the room, and not the drug company who hired this gentleman. They did not even know about it, I am sure. The permission was given by him, and if anyone committed a wrong, it was that doctor. She allowed the case to go forward, and under California law, the full recovery can come out of any one defendant who is liable, and the full recovery did come in fact from the doctor. It is an important matter to note.

I will just share, since the issue was raised, about this side not being principled and I pointed out during the 8 years of President Clinton's administration, the leadership on this side of the aisle absolutely rejected filibusters. During that same time when President Clinton was seeking to get judges confirmed, the Democratic Senators also were attacking filibusters and used a lot of language that would make that clear.

For example, Senator BOXER on May 14 of 1997 said: It is not the role of the Senate to obstruct the process and prevent numbers of highly qualified nominees from even being given the opportunity for a vote on the floor.

Senator FEINSTEIN said: A nominee is entitled to a vote. Vote them up, vote them down.

Senator DASCHLE, now the Democratic leader, said: I find it simply baffling that a Senator would vote against even voting on a judicial nomination.

Senator LEAHY, the chairman of the Judiciary Committee during the time of the Democratic majority, said: I think the Senate is entitled to a vote in this matter. I think the President is entitled for the Senate to vote—he is talking about President Clinton—and I think the country is entitled for the Senate to vote.

Now Senator LEAHY is leading the filibuster. So is Senator DASCHLE. They are completely changing their position, and this side did not do that.

Senator HATCH explained to us why filibusters were bad, so this side rejected that and did not go forward.

Senator KENNEDY said: It is true that some Senators have voiced concerns about these nominations, but that should not prevent a rollcall vote which gives every Senator the opportunity to say yes or no.

Mr. CHAMBLISS. Will the Senator yield?

Mr. SESSIONS. I would be pleased to yield to the Senator from Georgia.

Mr. CHAMBLISS. Just like the Senator from Alabama, I was somewhat shocked by the comments of the Senator from California about the fact that if you get 98 percent you ought to be happy with what you get and go home. The fact of the matter is, never before in the history of the United States of America has any President gotten 98 percent. Every other President, prior to this President, prior to the obstructionism coming from the other side of the aisle on these judicial nominees, has gotten 100 percent. It is zero and four filibusters out there right now.

I remind the Senator from California of her comment made back on March 9, 2000, as per the CONGRESSIONAL RECORD: I make an appeal, if we vote to indefinitely postpone a vote on these two nominees or one of these two nominees, that is denying them an up-or-down vote, that would be such a twisting of what cloture really means in these cases. It has never been done before for a judge, as far as we know, ever.

So the Senator from California agreed with us back in March 9 of 2000. Again, it would be in line with what Senator LOTT said when he said these people deserve an up-or-down vote.

The thing about these votes is that if people disagree with them, if any Senator on the other side of the aisle or if any Senator on this side of the aisle disagrees any judicial nominee is qualified to serve on the Federal bench at the district level or on any circuit court, they should have the right to vote against them, but they are entitled to a vote.

I agree 100 percent with the Senator from California when she made her comment in March of 2000 that we ought to have an up-or-down vote; that it has never—and I repeat her statement—it has never been done before for a judge, as far as we know, ever. It has never been done.

When it comes to saying ''has there been a filibuster'' or ''has there not been a filibuster,'' I agree with the Senator from California; there has never been a filibuster before of a circuit court nominee. There ought not be a filibuster that continues on these judges. We ought to have an up-or-down vote.

I yield back to the Senator from Alabama.

Mr. SESSIONS. Mr. President, how much time remains on our side?

The PRESIDING OFFICER. The Senator from Alabama has 5 minutes 40 seconds.

Mr. SESSIONS. If the Senator from South Carolina wants to make a comment, I will yield to him.

Mr. GRAHAM of South Carolina. Just very briefly. I thank the Senator for yielding.

I never thought in a 30-hour debate you would have to fight to get something to say. We may want to extend this thing.

It has been good to hear everybody's perspective about what has gone on in the past. I am really more worried about the future. I am new to the Senate. This is my first year here. I do not know who shot John 5 years ago or 10 years ago, and who is still mad about what happened during Clinton, Bush 1, or George Washington. That is not my concern.

My concern is I am in the Senate at a time when I know that if this continues, we are going to destroy the judicial nominating process as I have understood it to be since law school. We are going to drive good men and women from wanting to serve because the nominees who are being filibustered—I have been on the Judiciary Committee—have had a hatchet job done on them. They have had an opinion here and a dissenting opinion there taken out of context. They are all well qualified by the American Bar Association. They all come highly recommended by the people who know them best.

For one of the nominees, they used a letter he and his wife wrote to his diocese about Christian marriage. Mr. Pryor from Arkansas was asked about whether or not he chose to take his kids to Disney World during Gay Pride Day. You are asking people questions I feel are unbelievably uncomfortable asking anybody as to whether they are qualified to be a judge.

This process is broken. The past has its abuses on both sides, but this process is broken. There is no precedent for what is going on here.

I may be wrong, and if I am wrong somebody correct me, but it is my understanding, in the history of this country, over 200 and something years of following the Constitution, we have never had an occasion where somebody came out of the Judiciary Committee, was voted out of the committee, and was unable to get a vote on the floor, until now.

If that is the case, then we are doing something different that is really bad, in my opinion, because it will be answered in kind down the road. If this is successful, to expect the Republican Party to sit on the sidelines if there is a Democratic President and not answer in kind is probably too optimistic.

If that happens, you are taking the Senate in a death spiral of where 40 people, 41 people, answering to special interest groups, are going to hijack the Constitution. This is a big deal. This is wrong and it needs to stop. It has never happened before. It should not happen now. Whatever problems we have had in the past with judges, you have taken it to a new level that will destroy the ability to follow the Constitution, and you will take politics to a level that it has never been before in a rule-of-law nation and we will all suffer greatly.

Mr. SESSIONS. Mr. President, how much time remains?

The PRESIDING OFFICER. The Senator from Alabama has 2½ minutes.

Mr. SESSIONS. Mr. President, I agree so strongly with the Senator from South Carolina that this has the real danger of undermining the independence of the judiciary and injecting politics into the judiciary in a way we do not want to do.

I had the opportunity to obtain information from one of our greatest understanders of Senate rules on holds. I think I would like to share that with the Presiding Officer, Senator ENZI, who is as skilled on the history of the Senate as anyone.

He just notes this: What is a hold? A hold is a request by a Senator to be notified so a unanimous consent request can be objected to. If somebody is going to move a bill, legislation, or a judge, and you want to talk more about it or so forth, you put a hold. They have to call you before they will do a unanimous consent without your knowledge and slip something through you want to talk about or debate. It is not a filibuster.

A filibuster would be a continuous success by less than a majority of the Senators to stop progress to a vote in an action or a matter. It is a success continually by a minority of the Senate to stop the majority from bringing a matter to a vote. A cloture, more than a majority, stopped by a minority, 55 votes for cloture to stop debate, can be defeated by 45 Senators who vote contrary to that, is a filibuster, as has been admitted by the Senators on the other side.

I think we have been playing some games with words, but the bottom line is what has occurred this year is unprecedented. It is a systematic, organized filibuster by the Democratic leader, TOM DASCHLE, and his team and the assistant leader and most of the Members on the other side—but not all—but on these now six nominees to date we have not had 60 votes to shut off debate.

That is what we are talking about. You can call a hold a filibuster if you choose. Maybe you could justify that. But I do not think it is.

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

Mr. REID. We will divide the time on this equally between the Senator from California and the Senator from Minnesota.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. Mr. President, how many minutes do I have?

The PRESIDING OFFICER. The Senator has 12 minutes 42 seconds.

Mrs. BOXER. Well, here we go, more of complaining and more upset from the other side. They just did not get 100 percent of what they wanted. They only got 98 percent. The score is 168 to 4. Other charts can be printed, but here is the truth. Do my colleagues want to see it another way? Here are the names of the people we have confirmed to the Federal bench for George Bush, 168 strong, and there are 4 we believe are out of the mainstream, who we believe would actually hurt the rights of our people to privacy, to dignity, to fairness, to justice, and we have stood up and we have said, no. The other side cannot believe they did not get 100 percent of what they wanted. Maybe in their life they get 100 percent of what they want. Most of us do not. Most of us work hard for what we believe and we are happy to get maybe close to what we want.

We have more complaining and more bickering, more upset, 30 hours taken away from other issues. This is where we are. We even had Senator GRAHAM stand up and throw out this fact: No one is going to apply for judgeships. No one is going to apply for lifetime judgeships that pay a lot of money because Democrats stood up and said 4 did not meet the test of fairness, 4 were outside the mainstream and, yes, 168 were fine. So now people are not going to apply for judgeships anymore? Well, if I spoke to someone who said, do you think I ought to apply for a judgeship, the first thing I would say is, well, your odds are pretty good, 168, and only 4 did not make it. So I would say your chances are pretty good.

Then we hear all this talk about we Democrats are doing something different, we have never filibustered, never, even though on the Senate Web site itself there is discussion that there have been filibusters, and CHUCK SCHUMER put that in the RECORD.

Let me read something much more recent than that one. This is just a couple of years ago, when we had the Berzon and the Paez nominations. The other side today is saying those were not filibusters. Well, let's hear what Republican Bob Smith said as he launched, yes, a filibuster.

I wish my colleagues would listen, but it is okay, their minds are made up. He said: It is no secret that I have been the person who has filibustered these two nominees.

Let me say that again. A couple of years ago, Bob Smith said: It is no secret that I have been the person who has filibustered these two nominees, Judge Berzon and Judge Paez.

The issue is, why are we here? What is the role of the Senate in judicial nominations? The Constitution gives the Senate the advise-and-consent role. We are supposed to advise the President and consent if we think the judge should be put on the court.

Republican Bob Smith, who led the filibuster against two Californians, goes on to say—do I remember it? It is etched in my mind forever. These were two terrific people who were held up, one for 4 years and one for 2 years, and then we finally got them to the floor and Bob Smith launched a filibuster

saying a filibuster in the Senate has a purpose. It is not simply to delay for the sake of delay. It is to take the time to debate, to find out about what judges' thoughts are, et cetera.

Can we please not have a debate over whether the other side ever launched a filibuster? They admitted it. I ask unanimous consent that this be printed in the RECORD at this time.

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

THE PAEZ FILIBUSTER

So that the record on this point, this dramatic reversal in positions, is clear, I feel constrained to mention that the 15 Senators who voted to continue to filibuster the Paez nomination and to, in fact, postpone it indefinitely, (voting both against cloture and for indefinite postponement) were Senators Frist, Bob Smith, Jessie Helms, Wayne Allard, Larry Craig, Michael Enzi, Phil Gramm, Asa Hutchinson, James Inhofe, Frank Murkowski, Sam Brownback, Jim Bunning, Mike DeWine, and Richard Shelby. How many of the current Senators among them have you seen on this Senate floor claiming that [President Bush's] judicial nominees are entitled to an up or down vote and that delaying or filibustering is wrong? I have seen some of them. It is their right to change their minds, but at least acknowledge their past efforts to block President Clinton's nominees, which kept many seats for this President to try to pack.

I will let the words of the Senators who filibustered Clinton nominees speak for themselves. For example, in 2000, just three years ago this month, Senator Smith noted during the filibuster of Judge Paez and Marsha Berzon, a Ninth Circuit nominee:

''[I]t is no secret that I have been the person who has filibustered these two nominees, Judge Berzon and Judge Paez. The issue is, why are we here? What is the role of the Senate in judicial nominations? The Constitution gave the Senate the advise-and-consent role. We are supposed to advise the President and consent if we think the judge should be put on the court. . . .

Filibuster in the Senate has a purpose. It is not simply to delay for the sake of delay. It is to get information.

It is to take the time to debate and to find out about what a judge's thoughts are and how he or she might act once they are placed on the court.''

So, those who came before the Senate and said no Republican ever filibustered a Clinton nominee were dead wrong. Senator Smith went on to explain:

''As far as the issue of going down a dangerous path and a dangerous precedent, that we somehow have never gone before, as I pointed out yesterday and I reiterate this morning, since 1968, 13 judges have been filibustered by both political parties appointed by Presidents of both political parties, starting in 1968 with Abe Fortas and coming all the way forth to these two judges today.

It is not a new path to argue and to discuss information about these judges. In fact, Mr. President . . . [w]hen William Rehnquist was nominated to the Court, he was filibustered twice.

Then, after he was on the Court, he was filibustered again when asked to become the chief Justice. In that filibuster, it is interesting to note, things that happened prior to him sitting on the Court were regurgitated and discussed. So I do not want to hear that I am going down some trail the Senate has gone down before by talking about these judges and delaying. It is simply not true.''

This straight-forward Republican from New Hampshire proclaimed:

''Don't pontificate on the floor and tell me that somehow I am violating the Constitution . . . by blocking a judge or filibustering a judge that I don't think deserves to be on the court. That is my responsibility. That is my advise-and-consent role, and I intend to exercise it.''

Thus, the Republicans' claim that Democrats are taking ''unprecedented'' action, like the White House claim that our request for Mr. Estrada's work while paid by taxpayers was ''unprecedented,'' is simply untrue. Republicans' desire to rewrite their own history, while understandable, is just wrong. They should come clean and tell the truth to the American people about their past practices on nominations.

They cannot change the plain facts to fit their current argument and purposes. It is also noteworthy that, before the debate on Bush nominations this year, the distinguished chairman of the Judiciary Committee, my good friend from Utah, admitted that the Republicans had filibustered Judge Paez's nomination in 2000. After cloture was invoked in Paez's nomination, Senator Sessions made a motion to indefinitely postpone a vote on the nomination; this motion failed by a vote of 31 to 67.

Senator Hatch then admitted there had been a filibuster: ''I have to say, I have served a number of years in the Senate, and I have never seen a 'motion to postpone indefinitely' that was brought to delay the consideration of a judicial nomination post-cloture. ''Indeed, I must confess to being somewhat baffled that, after a filibuster is cut off by cloture, the Senate could still delay a final vote on a nomination. A parliamentary ruling to this effect means that, after today, our cloture rule is further weakened.''

Mrs. BOXER. Let me quickly say about Judge Kuhl, Senator HUTCHISON said, in fact, that Judge Kuhl showed a lot of compassion to this victim who went into a doctor's office and was subjected to the humiliation of having a drug salesman witness her exam without her permission. Senator HUTCHISON said she was very, very kind to this victim.

Let's see what the victim says about Judge Kuhl.

My name is Azucena Sanchez-Scott. I am a survivor of breast cancer and Judge Kuhl's courtroom. I stand before you now because I want to tell my story so that other people will never have to relive it.

Nothing about my cancer is easy. Not the chemotherapy, not the fear, and certainly not the emotional pain of disfigurement. As a person battling cancer each visit to the doctor brings questions about my future and my health. That is where I was when my doctor and a stranger walked in. The doctor offered no introduction and proceeded to examine me and asked that I disrobe. It was only when I left the office and inquired with the receptionist that I learned that the stranger was a sales representative for a drug company with no medical reason for being there.

The bottom line, Carolyn Kuhl ruled against this woman, and when Senator HUTCHISON said she allowed the case of the doctor to go forward, that is what Judge Kuhl said. Then she retracted that and said: I made a mistake; I never had the doctor's case before me.

So let's get the facts straight here. Why do you think we have three major breast cancer organizations—Breast Cancer Action, Breast Cancer Fund, the National Breast Cancer Coalition—asking us to defeat Carolyn Kuhl? Not because Carolyn Kuhl was compassionate. But because of the opposite reason: She turned her back on a woman in need, on a sick woman. And Carolyn Kuhl was overturned in a unanimous vote by the court of appeals. For that, my friends want to promote her to this lifetime appointment.

I say if I caved in to that, again, I do not deserve to be here. Sometimes you have to stand up for people who need protection. Carolyn Kuhl had that chance. She took a hike. She ruled against this woman. This woman has been scarred in more ways than one from that experience.

Here we are. It is 12:45. We could be working on issues that really matter to people instead of rehashing these judgeships. They got almost everything they wanted. But they are going to pound their fists and say the same thing over and over, ''This has never happened before''—despite the fact it has and make it sound as if we are being unfair when we are not. We are just doing our job. But there we are.

Look at what we could be doing. We have lost almost 3 million jobs in this country. This President has the worst record of any President since Herbert Hoover on private-sector employment. Why don't we spend 30 hours talking about that? Why don't we pass the 6-year highway bill? We got it out of our committee thanks to Senator REID and Senator INHOFE today. Why not bring that bill down, I say to my friend, Senator REID? Let's vote on the 6-year highway bill. Do you know how many jobs we would create in this country? In my State, 80,000 jobs.

Let's pass a manufacturing jobs tax credit so that manufacturing stops leaving this country. Let's raise the minimum wage. I tried to do that by unanimous consent. The other side objected. They do not want to do that.

With our salary, we make the minimum wage for a year in just a couple of months here. But no, they are spending 30 hours talking about 4 people who already have jobs and they do not want to talk about the 3 million jobs that were lost. They do not want to protect overtime. As a matter of fact, they tried to take it away from workers. They do not want to extend unemployment insurance.

Nothing is getting done that really matters to people. That is a sad, sad situation.

Long-term unemployment: These are the people who have been out there and out there—2 million, plus. That is a terrible record. Long-term unemployment tripled since George Bush took over.

How about the tax cuts? Let's look at how fair they are. They are 80 times larger for millionaires than for middle

income households earning about $50,000 to $75,000.

The Bush economic record? The only administration going back to Eisenhower with a decline in manufacturing output—big manufacturing job losses.

No, we cannot talk about that. We cannot have an action plan to get people back to work. And I have not even talked about school construction, which would really employ a lot of people. I visit some of my schools and the tiles are falling off the ceiling. No, we cannot talk about that. We do not have time. But we have time to discuss, for 30 hours, judgeships that we have gone over and over. And they are winning. They got 168 through and they did not get 4. They are worried about 4 people; I am worried about 3 million people. I am worried about the unemployed in my State, the people without health insurance.

I will tell Members what else I am worried about. We have a President who has rolled back so many environmental laws—I have them on a scroll and I cannot show them because it is not allowed by the Senate rules. But I will hold this up. If I took this scroll and I rolled it across the Chamber, it would go from one end to the other. It goes on and on and on. It is small print. It shows all of the environmental rollbacks of this administration.

Just 2 weeks ago they came up with an incredible idea. When there are PCBs on your land—those are the most toxic chemicals there are; they are carcinogens—we always had a rule if you had PCBs on your land you had to have a plan to clean it up and EPA had to oversee it. No. Gone. Now you can sell your land and God help the people who buy it with PCBs on it.

Superfund under President Clinton, 80 sites a year we cleaned up—the most toxic sites. Now we are down to 40 a year.

How about arsenic and playground equipment? In the latest hit of the administration, they announced they will allow the use of arsenic-treated lumber for playground equipment. Wake me up when this environmental nightmare is over.

It is 12:35 in the morning and I can still feel it in my heart that we are doing the wrong thing tonight. Why not try to reverse this horrible record and protect our children and protect the health of our people and get our people working again? Instead, we are debating 168 to 4.

I close with this, and I will probably dream about these numbers all night—what is left of the night. They got 168, and they did not get 4. They cannot accept the fact that 98 percent is pretty good. I don't know what else we are supposed to do, but I will say, whatever it takes, I will not be intimidated into voting for nominees that are so far right they would roll back the hands of time. They will not protect the health of the people, the privacy of the people, the safety of the people. I am not going to do that.

I was sent here on a promise that I would stand up for the people of my State. That is what I intend to do. With 168 to 4, they ought to be smiling instead of whining.

I yield the floor.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. DAYTON. Mr. President, I have learned politicians' priorities can be measured by their passions. What do they care about most? What stirs their souls? For that reason, the exultation of my colleagues across the aisle about this session, their fervor, their apocalyptic predictions, their press announcements, other than tax cuts for the rich and the super-rich, I have not seen that much passion across the aisle in my 3 years in this Chamber. Frankly, it does not do that for me.

My passion tonight is what my colleague from California said: to work on other matters. We would be far more aroused talking about how to put Americans back to work, the over 3 million who have lost their jobs since this administration took office less than 3 years ago. And not just a return to any jobs, but jobs that are the same as, as good as or preferably better than the jobs they held before. Not minimum wage jobs with no benefits, no health coverage for spouses and children, no pensions, no protections, no real future.

I would like us to talk about how we replace the 2.6 million manufacturing jobs lost in this country in the last 3 years, jobs moved offshore to someplace other than America. Many of them, I fear, are not coming back to America.

The majority of the Republican caucus leadership has the authority to decide the Senate's agenda and has decided we will spend 30 hours on 4 jobs. We have not spent 30 minutes on jobs for the other 3 million Americans out of work who are looking for jobs. We have not spent 3 minutes on jobs and survival assistance for the over 2 million Americans who cannot find jobs for so long that they have exhausted their unemployment benefits. Many are completely broke. If we do not provide them with some support soon, more will be completely broke.

Every time we have tried to bring up a bipartisan bill to extend unemployment benefits for Americans out looking for work, except one time last year, someone has objected across the aisle and we cannot proceed. No one has objected to spending 30 hours on 4 people, but we do not spend 30 seconds on most people affected by unemployment in this Nation.

I will try again. I ask unanimous consent that the Senate proceed to legislative session and the Finance Committee be discharged from further consideration of S. 1853, a bill to extend unemployment insurance benefits for displaced workers; that the Senate proceed to its immediate consideration, the bill be read the third time and passed, and the motion to reconsider be laid on the table.

That would extend the basic program unemployment for 6 months. It would extend the long-term unemployment for an additional 13 weeks and would benefit 5 million Americans.

The PRESIDING OFFICER. Is there objection?

Mr. SESSIONS. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. DAYTON. As I said, you can tell the priorities and what arouses people's passions. I could get really compassionate about the Senate's whole last week and the disaster aid for Minnesota and elsewhere where crops have been devastated by the summer's drought. Many of Minnesota's farmers had their crops totally destroyed. I did not detect as much passion and priority or concern among Members of the caucus, combined, as in one of them tonight for the misfortune falling on thousands of Minnesotans.

I get passionate talking about prescription drug coverage for seniors on Medicare, which went to the Republican-controlled conference committee last July and has not come out since. That is only half as good as the resources committed to the Members of Congress, which is why I introduced my ''taste of their own medicine'' amendment which passed the Senate months ago by a vote of 93 to 3. It says that prescription drug benefits that Members of Congress receive can be no better than what we vote for seniors and others under Medicare.

Over 17,000 Minnesotans were compassionate enough about that principle that they signed a petition at the Minnesota State Fair in 12 days. That is what Minnesotans are passionate about.

I could get passionate about learning the truths about the present conditions in Iraq. After being told for weeks now how much they are improving and that things are getting better, I read today a CIA report disclosed by two people high up in the administration who cannot get their message through at that level any other way than going to the American people and saying, You do not know all the facts. You do not know even the right perspective on what is going on there.

We have sons and daughters and husbands and wives and children of Minnesotans who have given their lives, who are giving their bodies and well-being or giving their livelihoods, and we cannot find out the truth about when they are coming home or whether their stay of duty will be extended and for how long.

Those are things that Minnesotans can get very passionate about. That is real life or death.

What is important to people? If we do not manifest it here, people will not care about the institutions such as the Senate. I do not question my colleagues' right to their choice of priorities. I don't question their right to have different views on policies and judges or any other matter. That is the

nature of our process. That is the strength of our process. That is the wisdom of our process.

I have been, in less than 3 years, in the parity, even, 50–50 Senate, with the Vice President, the tiebreaker, but in committee and conference committees equal, and in the majority for a year and a half and this last year in the minority. The previous year and a half there were 69 cloture votes that the Democratic leader, the majority leader, then had to file to move to proceed to legislation, to consider legislation, voting on legislation, issues that were far more important and affected a far greater number of Minnesotans and other Americans than a particular judgeship: health care for senior citizens; benefits for our veterans; environmental protection. And now this year, the conditions have changed.

As somebody once said, how a minority reaching majority, seizing authority, hates the minority. So we have, as colleagues across the aisle noted, and I agree, seen a certain role reversal. But that is, in part, the different responsibilities of minority and majority caucuses, and it is particularly the difference of the responsibilities of those in the party other than the President and in the party the same as the President.

I don't question the right of my colleagues, one of them or all of them, to support the President, whether he is right, whether he is wrong, whether they believe he is right or wrong. Those are individual decisions of conscience and politics.

The Founders of this country—and this applies whether the President of the United States is Democrat or Republican, in which case the situation is reversed—understood that the incredible foresight and wisdom of the separation of powers, this coequal authority of the legislative branch, equal to that of the executive branch, was critical in every respect, critical to this country's genuine freedom and preservation of our democracy.

Judge Brandeis, almost 100 years ago, said the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction inherent in the distribution of governmental powers among the three branches, to save the people from autocracy, to save the people from despotism, from tyranny. That is what they were concerned about. That is the practice that has served us well in this Nation and in this institution of the Senate for 216 years.

So it concerns me, and I do not question anyone's right to take whatever position they wish, but it concerns me as I read my colleagues on the other side who were designing this debate, this forum, have a combined number of years of experience in the Senate that amounts to less than one half of 1 percent of the combined collective wisdom achieved by nearly 1,900 men and women who have served in this body in its 216-year history. Yet I hear Members of this body who have been here less than a year saying emphatically this system is broken and it should be radically overhauled and that somehow the process we are engaged in is one that illserves our country and is even, they say, a violation of our Constitutional responsibilities. That is one of the most serious charges that anyone can make against a fellow Senator, because when we take this office, we stand, each of us, and recite the same pledge——

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

Mr. DAYTON. To uphold the Constitution of the United States.

Mr. President, I ask unanimous consent for 1 minute to complete my thought.

The PRESIDING OFFICER. Under the time agreement——

Mr. REID. What was being asked?

Mr. DAYTON. A unanimous consent request for 1 minute to complete my thought.

Mr. REID. Well, we will just take that out of our time from the next half hour.

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

Mr. DAYTON. Thank you, Mr. President.

That is the most solemn oath I have ever taken, to uphold the Constitution of the United States. I do not question the commitment of anybody in this body to upholding that oath and carrying it out as he or she believes is right, which is the reason we are elected independently, to exercise that independent authority.

But when people put out releases saying these matters we are engaged in are dangerous and irresponsible, that we have no right to be doing this, that it is a dangerous dereliction of our constitutional duty, those are very serious accusations.

If anyone in this body believes what we are doing is unconstitutional, they should take that question to the proper court. If anyone believes what we are doing in this body is a violation of Senate rules and procedures, they should take that question to the Parliamentarian.

I was told earlier today that the Parliamentarian has not been asked. I believe the Parliamentarian, based on all the rules and precedents of the Senate—this book of 1,400 pages of precedents that have been adopted over 216 years—would find we are acting responsibly and within that authority which is our responsibility and our right.

Thank you, Mr. President. I yield the floor.

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

The Senator from South Carolina.

Mr. GRAHAM of South Carolina. Thank you, Mr. President.

As we go into the 1 o'clock hour, Jimmy Buffett says it is 5 o'clock somewhere. But it is 1 o'clock here. We will try to reorient ourselves as to what was going on in the last hour. It is kind of an update, a CNN headline update.

The last hour was pretty interesting, I thought. We had examples used by our friends on the Democratic side to say basically that what we Republicans have done in the past we complain about now. I reiterate, as far as I am concerned, the past is the past, and I am more worried about the future. I have been here a year and all I have known since I have been here is fussing and fighting about everything, particularly judges. It has not been too pleasant to be on the Judiciary Committee because a lot of good men and women have had a hatchet job done on their professional qualifications and who they are as people, to not be allowed to be voted on. There have been a lot of manufactured reasons.

But as I understand, from having listened to the debate the last hour, the idea of holding a judge has been used as an example of an abuse, that holds have been put on judges, which is apparently a process in the Senate to deny somebody from going through the committee process, or to go forward.

The example Senator SCHUMER used was two judges: Paez and Berzon. I hope I have their names right. They were two judges who were appointed by President Clinton, and I think Senator Smith from New Hampshire tried to block their nominations, put a hold on it. There was a real contention about what was going on with those two judges. But the curious thing to me was there was an intervention in those cases, in those two nominations by the Republican leadership, as I understand it, that basically brought to a close the process of blocking those judges from having a vote after they came out of committee.

To me, that illustrates that in the past, when efforts were tried or were being used to basically hijack the constitutional requirement of a majority vote, once the nominee was presented to the Senate, there has been intervention to right the ship.

Since I have been here, the only intervention I have seen is to shut down what has been going on for 200-some years. Now, it is like a cricket match. It is 168 to 4. It is 168 to 16. Cricket goes on for 3 days. It is pretty interesting for the first hour or 2, but 3 days later I kind of get blurry-eyed watching cricket—the same way here with these numbers.

The point is, there never has been in the history of the country a situation where somebody was reported out of the Judiciary Committee to come to the floor of the Senate to be voted on as a judicial nominee, that they were not eventually voted on—until now. There have been cloture motions made, but they were always made to bring about a vote.

There has been a concerted effort by the Democratic leadership to block judicial nominees in an unprecedented

way. That is why we are all here tonight. Not only is it unprecedented, it is very dangerous. The reason I think it is dangerous is because it effectively changes the constitutional standard.

I am going to read, since we have 30 minutes here, where the Constitution talks about a supermajority vote: The ''Concurrence of two thirds'' of either the House or the Senate is required to ''expel a Member'' of Congress.

That is kind of self-serving. But we do not want to throw each other out until we get two-thirds of our colleagues to agree we should be thrown out. So that is a real check on us keeping our jobs.

Also: ''And no Person shall be convicted'' by the Senate in an impeachment trial ''without the Concurrence of two-thirds of the Members present,'' according to article I, section 3.

I have a little experience with that article. That is a very high standard to achieve. And it should be a high standard to achieve. Can you imagine what would happen if, by Senate rule, we changed the impeachment standards so the President of the United States could be impeached by a majority vote?

I am sure the Supreme Court would not allow that to happen. I am sure there would be a great outcry by the public if we, in a partisan fashion, changed the way you impeach a President because we did not like that person or their agenda. There would be a huge outcry in the country because we would have subverted the Constitution.

That is exactly what is going on here in reverse. Instead of a two-thirds requirement to confirm a judge, like we have to throw somebody out of the House or the Senate, or to impeach the President, or to ratify a treaty—why two-thirds to ratify a treaty? The Founding Fathers were worried about a President making a deal with some foreign power that was not in the best interests of the country, so you had a high standard to ratify. You had a check over Presidential power.

They give the power in the Constitution for the President to veto legislation coming out of these bodies, to make sure we do not get off track. The only way we can override a Presidential veto is the two-thirds vote.

There was a lot of thought going into supermajority votes. It was not just by accident that the Constitution has six or seven provisions that require a majority vote, and I would argue strongly it is not by accident that the majority vote requirement applying to judges was put there on purpose.

Our job, as I see it, is not to say what we would do if we were President. Our job, as the Constitution lays out for us, is to advise and consent by a majority vote to make sure the President—whoever he or she might be—is not sending over their brother-in-law or sister-in-law or unqualified people.

What we have done this year, different from other years, is we have taken our political differences and our desire to make the court go one way versus the other and we have hijacked the Constitution for political reasons.

Our friends on the other side of the aisle lost badly in 2002. There was an article right after the election where the conference came together and started inventorying: Why did we lose? There was a strain of thought on the Democratic side that they lost because they were too accommodating to the President, and the Democratic base was deflated; that you are working with them too much on taxes, you are helping him with homeland security, that you are doing this and that with President Bush. One thing you might want to do to fight back—and this is in the article; and I do not have it with me—is to go after his judges.

Well, that certainly gets people fired up. Republican and Democratic base voters very much follow issues such as this: who the President may pick for the Supreme Court, who the President may pick for the Federal bench.

I am asking, in all sincerity, that somehow we find a way out of the box that we are in. Because I have been in the Senate for a year—I do not know how much longer I will be here but I do understand what is going to happen down the road.

If this is successful—and why they pick people, I really do not know. I have been on the Judiciary Committee. They do not do this to everyone. But they pick certain people for court of appeals jobs right below the Supreme Court and they will pick a few out of the herd, and they will start saying awful things about them—I will talk about that in a moment—and they will wind up, after they come out of committee, not getting an up-or-down vote in the Senate—for the first time in history. I will talk about this later when I have more time.

There are dozens of quotes by Democratic Senators saying it is really an abuse of the Senate's power not to allow somebody to be voted on up or down. They were right then. They were talking about a situation in President Clinton's term where they thought the Republicans were denying people a chance to go through committee and they were latching on to the constitutional provision of a majority vote, the advise and consent vote, saying: The high road for the Senate to take is if you do not like these people, if you do not like their philosophy, and if you do not think they are qualified, vote against them, but do not change the constitutional standard because it would be bad for the country.

That way of thinking has been replaced. I think the reason it has been replaced is because the political moment is so hot. We are a divided nation. The year 2000 was a very close election. In 2002, there was a change in the Senate's makeup. It is 51 to 49. And we are being consumed by the political moment.

I can tell my colleagues on the other side of the aisle, and my Republican colleagues, that if we keep up this practice, it will do long-term damage to this country.

The one thing I like most about America is it is a rule-of-law nation. Instead of having to go in the parking lot and fight people, you have a court to go to. There is a way in this country for the weak to make the strong answer; and that is called the courtroom. The people you put in the courtroom are important. We have constitutionally, in the Federal system, given that power to the President. We, by majority vote, say yes or no to that nominee.

What we have done is politicize this process in an unprecedented way, in a dangerous way. If you don't think down the road it will be answered in kind by the Republican Party, I think you are very naive. I hope I will have the courage not to go down that road as an individual Senator.

But the animosity being generated by this practice is red hot among both bases, and it will be almost impossible, in my opinion, for this not to become the norm. Payback is hell. That is a phrase with which we are all familiar. Payback, when you are messing with the Constitution, is dangerous. Political payback has to have boundaries. When you are messing with the constitutional standard about judges, I think you have gone too far.

The question is, is this really a filibuster?

It is obvious that it is a filibuster in terms of these nominees because they have come out of committee and they cannot get a vote because our Democratic colleagues, behind their leadership, have united, with a few breaking away, to deny a vote. We have had hours of debate on all these nominees. They cannot come to the floor for an up-or-down vote. The Democratic Party has changed its whole opinion about whether that is a good or bad idea, and they have adopted a practice that no one has done before in the history of the country.

But we are having a hard time. It is 1:15 in the morning and we cannot get the other side to admit that their filibuster going on here is different than anything that has happened before.

I used to be a prosecutor, and the old saying was: Follow the money. If you want to know what happened in the criminal enterprise, follow the money.

Well, let me tell you about an e-mail that was sent by a good friend of mine. Senator CORZINE is a very nice person. His job is to retake the majority for the Democratic Party. He is in charge of the Democratic Senatorial Committee. Senator ALLEN, who sits right next to me, is in charge of the Republican Senatorial Committee. Their jobs are to go out and recruit candidates and raise money so the party will be effective in taking over the majority, if you are a Democrat, or retaining it, if you are a Republican.

Here is what an e-mail said about what is going on right now:

Senate Democrats have launched an unprecedented effort. By mounting filibusters against the Bush administration's most radical nominees, Senate Democrats have led the effort to save our courts.

November 3, 2003, it was an e-mail to donors from Senator CORZINE. I would argue that when he said they are engaging in ''an unprecedented effort . . . mounting filibusters against the Bush administration's most radical nominees'' that he was not tricking people, that he was telling them: We are up here fighting by using the filibuster.

One of two things are true: The e-mail is accurate, which I think it is, and it is designed to get people to send in money; or he is tricking people and he ought to give their money back. Because if you listen to our Democratic friends on the other side, this e-mail is wrong, and these people deserve a refund. They are raising money on the idea that they are filibustering Bush's nominees. That is the best evidence of what has gone on here. They are trying to get people to open up their wallets to give their money because they are doing something that is unprecedented. What is that something? We are ''filibuster[ing] against the Bush administration's most radical nominees.''

There are a bunch of quotes out there. Senator BOXER:

Frankly, from my perspective, if people are off the charts on the right wing, I am not going to vote for them. I will not filibuster them.

February 26, 2003.

One of the people being filibustered comes from California, Justice Brown.

Let me tell you a little bit about her, and then I will yield to my friend from Georgia.

Justice Brown sits on the California Supreme Court. She has been there since May of 1996. In California, people get to vote on who they want to be on the court. She received 76 percent of the vote in her last election.

Now, the last time I checked, California is not a hotbed of Republican conservatives. I do not know why we lose so badly; and we do. We have lost almost every national election in California since Ronald Reagan. But she received 76 percent of the vote from people who live in her State.

A little more about her: She is the daughter of a sharecropper, born in Greenville, AL. She attended segregated schools. I grew up in South Carolina. The first African American I ever went to school with, I was in the 6th grade—not something to be proud of but a fact. She preceded me.

She has an academic record that if she were your daughter you would be unbelievably proud. She received a BA in economics from California State, her JD from the UCLA School of Law. She received an honorary degree from Pepperdine University. She has authored more majority opinions for the California Supreme Court than any other justice.

This is how nasty this has gotten. This is a cartoon from something called ''The Black Commentator,'' September 4, 2003. This person is a racial stereotype. Your eyes can tell you better than I can. It says: ''Welcome to the Federal bench, Ms. Clarence . . . I mean, Ms. Rogers Brown. You'll fit right in.'' And the people clapping are a caricature of Justice Thomas, Colin Powell, and Condoleezza Rice.

This is what people are having to go through. This is the way they are being characterized and being attacked. I think it is a low for the Senate. I am very sorry that she had to go through it, but she is being filibustered after having come out of committee.

If you don't like Justice Brown, then you can vote against Justice Brown, but you don't have the right to take the Constitution and turn it upside down for petty politics, and that is exactly what is going on here.

I can tell my friends on the other side, if they think we are not going to fight back, they are dead wrong. They are going to have a fight on their hands as long as this goes on, and at the end of the day, the loser is going to be the American people if we don't find a way out of this mess because 40 people are a lot easier to gather up than 50 when it comes to politics. Sixty is really hard to get.

What is going to happen if this continues is that we are going to have special interest groups, whether it is environmentally driven, abortion driven, gun driven—there is a group for everything out there—that is going to be upset with a particular nominee, and they are going to try to get 40 Senators to jump on their side.

The people being empowered from this practice are special interest groups, and the big loser is the average, everyday American. The big loser is the 76 percent of the people who voted for Justice Brown.

I yield to my friend and colleague from Georgia to talk about another abuse that exists in California.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. CHAMBLISS. Mr. President, I thank my friend from South Carolina. He and I served together for 8 years in the House of Representatives. We were both elected in 1994 and came in with a bunch of revolutionaries who came to Washington to change the world. We were staying up all night on the House side on a regular basis. He and I looked over at the Senate, and said: The decorum is great; they go to bed at a reasonable hour. What do you know, here we are.

I am sorry the Senator from California has left the floor because she made the point over and over that President Bush had his nominees confirmed 98 percent of the time. The fact is, the Constitution of the United States must be complied with 100 percent of the time. Ninety-eight percent of the time is not good in that particular instance.

There are some other situations where 98 percent of the time isn't that great, and that is why I am really sorry she is not here. If I told my wife that I was faithful 98 percent of the time——

(Disturbance in the Galleries.)

She wouldn't be all that happy with me. I wouldn't be happy if my food was 98 percent free of E. coli bacteria. I would not be happy if my car started 98 percent of the time.

The PRESIDING OFFICER. The Senator will suspend. The Galleries are not allowed to react to any statement on the floor. The Senator will resume.

Mr. CHAMBLISS. I would not be happy if my soap was only 98-percent pure. I would not be happy if our voting machines had a 98-percent accuracy rate.

I would not be happy if the power worked only 98 percent of the time. And I would be awfully nervous if the airplane that I was flying on had a track record of landing safely 98 percent of the time.

So the Senator's reference to this President getting 98 percent of his judicial nominees confirmed simply does not hold water.

I wish to talk for a minute about Carolyn Kuhl. Again, she was referenced by the Senator from California about her qualifications and her abilities to serve on the Ninth Circuit Court of Appeals.

Carolyn Kuhl is a very special lady. She has been a judge in California since 1995. But prior to that, Carolyn Kuhl had an exemplary record that includes service both as a committed advocate as well as an impartial jurist. She has outstanding qualifications and bipartisan support.

Her qualifications include having graduated cum laude from one of those liberal universities—excuse me, one of those conservative universities called Princeton University and having graduated Order of the Coif at Duke University Law School. The Senator from South Carolina and I graduated from the University of South Carolina and the University of Tennessee, respectively.

Order of the Coif means you were in the top one or two, not percent, the top one or two in your class. Neither one of us was there. That is something special. She was a law clerk to then-Judge Anthony Kennedy of the Ninth Circuit. She then worked in the Department of Justice as a Special Assistant to the Attorney General, Deputy Assistant to the Attorney General, and Deputy Solicitor General.

She was a partner in the very prestigious law firm of Munger, Tolles & Olson. She was the first female supervising judge of the civil department of the Los Angeles County Superior Court. Carolyn Kuhl brings excellent, outstanding educational credentials to the bench.

There are a number of individuals who have registered their support for Judge Kuhl. There has been some indication that maybe some female members of the bar are upset with her over some of her decisions, and one decision in particular.

Let me show you what 23 members of the Los Angeles Superior Court, 23 women judges on the Los Angeles Superior Court bench said about Judge Kuhl, and this was a bipartisan group:

Judge Kuhl approaches her job with respect for the law and not a political agenda. Judge Kuhl has been a mentor to new women judges. . . . She has helped promote the careers of women, both Republican and Democrat. . . . As sitting judges, we more than anyone appreciate the importance of an independent, fairminded and principled judiciary. We believe that Carolyn Kuhl represents the best values of such a judiciary.

There was a case that, if you listened to the Senator from California, you would have thought that Judge Kuhl was the doctor in the office who was being sued, not the judge on the bench who was reviewing the case.

Let me tell you what the appellate court judge who wrote the opinion in the case, referenced by the Senator from California, said about Judge Kuhl and about that specific opinion that he reviewed:

On appeal, I was the author of the Sanchez-Scott opinion. . . . Judge Kuhl's order sustaining the demurer without leave to amend was not an act of bias or insensitivity. . . . In fact, a strong argument can be made that she correctly assessed the competing societal interests the California Supreme Court requires of all jurists in this State to weigh in determining whether the tort of intrusion has occurred. With respect to those who have criticized Judge Kuhl as being insensitive or biased because of my opinion in Sanchez-Scott, they are simply incorrect.

Judge Kuhl brings impeccable credentials to the bench. She brings impeccable educational credentials, as well as jurist credentials, to the bench. She brings bipartisan support from the women, from the men, from the Republicans, and the Democrats in the State of California who know her best.

For us to have to go through the exercise here of, once again, contending with a filibuster from the folks on the other side of the aisle with respect to the nomination of Carolyn Kuhl, is truly an injustice and is one of those injustices that, as my friend from South Carolina has said, there will be a payback on. That is not the way we want to operate. It is not the way this body has operated for well over 200 years since we have been approving judges, and it is not the way we should operate in the future.

There is still time to correct the process that we are going through, and based upon what we are doing here tonight, I hope the profile of this issue is going to be brought home to the household of every American and every voter, and that they will understand there is a group in the Senate who wants to move forward to make sure their lives are made better because good judges are going to be put on the bench, and good judges ought to be confirmed by the Senate; and that there is another group in the Senate who is being obstructionist and is doing everything within their power to prevent the President of the United States from having the judges that he thinks are the best qualified from being put on the Federal bench all across America.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. REID. Thank you, Mr. President. On this half hour to which we are entitled, the two Senators from Arkansas are going to split the time, with Senator LINCOLN taking the first time, whatever time she may consume, leaving the remainder to the junior Senator from Arkansas.

The PRESIDING OFFICER. The senior Senator from Arkansas.

Mrs. LINCOLN. I thank the Chair. Mr. President, I am proud to be here this morning to see that this age-old institution is acting as it should. We are looking at, reviewing, and exercising our constitutional responsibilities.

I am not, however, proud of the fingerpointing that is going on—as we say to young children, I hope no one's eyes get put out—and all the fingerpointing that goes on in these 30 hours of discussion and debate, the warnings we have just heard: There's a payback; there's a payback.

I do rise this morning, however, to express my extreme disappointment and dismay that we are expending such a large portion of our remaining time and energy on this unnecessary debate. We probably have only a few days left in this session to deal with important issues on which we have not yet completed action this year. How many seniors have my colleagues talked with in their travels back home to their States about the need for prescription drug coverage for our elderly?

How many of them have they talked with as they traveled with Meals on Wheels and other programs and talked with these seniors who are telling you that they are cutting their medications in half, that they are not going to be able to afford their heating bill this winter and their prescription drugs?

I implore my colleagues, how many have you talked with in your travels back home?

Looking at education funding, how many teachers have my colleagues spoken with as they traveled back home—teachers who are telling them they are going to have to spend their own money on supplies come February because they don't have enough glue and construction paper for their children or that they are having to spend an undue amount of time meeting demands that we have put on these school districts and yet have been unwilling to provide the resources for them to meet those demands?

How many of those single mothers who are working day and night to pull themselves up by their bootstraps, to leave the welfare rolls and bring dignity to their children and to put bread on the table—how many of those have my colleagues spoken with as they have traveled home to their States when we could be doing the welfare reauthorization bill and making it bigger and better than we did before?

The highway bill: How many people have they talked with when they go home to their States? I had a group come to me the other day who said: We come to you all in Congress begging every year for a few million dollars to try to create the infrastructure that we need in rural States, such as Arkansas, to improve our economy, and all of a sudden $87 billion falls out of the sky? What about us at home? Are you all going to talk about us? Are you going to bring us up? Are you going to do something about the things we need to make our lives stronger, to make our families better, to strengthen the fabric of this Nation?

Those are the issues about which we should be talking, Mr. President, and I wish we were. We have not yet completed action on all the appropriations bills. We have an Energy bill that should have been finished in 2002 to bring our country into the 21st century. For the last 25 years, we have needed a new energy policy in this country. Other countries are leaving us behind in the new and innovative ways they are looking to provide renewable fuels to improve not only their economy and their environment but to lessen their dependence on foreign oil.

These are the issues about which we should be talking, and genuine concern about what we want to do to strengthen our Nation.

We are still waiting. We are still waiting for these to be completed, time tonight that could be spent in dealing with those very important issues.

Faced with these and many other pressing issues and faced with a tight schedule, what does the leadership propose? They propose to spend 30 hours of our time, and far more time in preparation and staff hours, overtime for police officers and multitudes of others who are here for these 30 hours, debating four or five judicial nominees, all of whom have been debated, generated significant opposition where they live and work. All have been given adequate review time, and all of whom, in my judgment, should not be promoted to a lifetime appointment on the Federal bench.

Instead of focusing so much time and attention trying to promote a lifetime position for these individuals who already have very good jobs, my wish would be that President Bush and the Republican leadership would focus more of our time on issues that truly impact the lives of all of our constituents, and particularly the lives of the Arkansans I represent—issues such as creating good paying jobs in Arkansas, improving public education and expanding access to affordable health care and prescription drugs for our seniors, and, yes, providing something we all have agreed would make a big difference in people's lives: a refundable child tax credit, something that got overwhelming support in the Senate but is buried in a couple of conferences

and here, there, and yonder because it is not a priority.

Those people in this country who make between $10,500 and $26,650 are not important enough for us to deal with. Somehow they don't work hard enough, although they have to work, they have to bring home a paycheck, and they have to be raising children to be eligible for a refundable child tax credit. But for some reason, they are not a priority here anymore.

We could have done that months ago, but we didn't. Here we approach the holidays, people have been in school, a multitude of needs that families across this country have, and we fail once more to even look at the small ways we can be helpful.

There are any number of issues that merit careful and lengthy consideration in the Senate, but filling a handful of judgeships should not be given a priority given the backlog of pressing issues the Senate has yet to complete this year.

Unfortunately, this is a manufactured crisis to distract the American people from the very real crises that we are going through; the ones that we are facing, such as the fact that in the next 15 to 20 years, we are going to go from 41 million Americans over the age of 65 to over 70 million Americans over the age of 65. We as a nation are so completely underprepared for that crisis.

We have 126 medical schools in this country. Only three of them have a department in geriatrics. We are training less geriatricians, and we are training even less academic geriatricians who will teach those geriatricians who might be there to take care of me, and I am the youngest in this body.

We are so underprepared with health care, a reform in Medicare, and a prescription drug package to meet these unbelievable numbers that will cause a crisis in this country.

We are here tonight, tomorrow, until midnight tomorrow talking about four people who did not get a job they wanted. It is unbelievable.

What about our children? What about educating our children to be prepared in the 21st century, to be competitive in a global economy, teaching our children the skills they are going to need to be competitive? They are the future of this country. They are our future workers. They are our future leaders.

We came up with a great bipartisan bill to educate our kids, and we do not have the guts to pay for it. Out of the $8 billion for the education plan for our kids, we are only funding $2 billion of it from the President's budget, a quarter. I have to say, that is a misspent priority there.

We have record deficits that are going to be heaped on the shoulders of our children. Sixty-six percent of that debt comes due in 4 years. What happens to our constituents if all of a sudden somebody comes up and says, ''Guess what, your debt is due and I want it on demand. No, you cannot refinance, no way. I am going to call that debt on you''?

These are serious crises we should be addressing and we are spending our time pointing fingers and not addressing the issues of the American people.

We have a conflict in Iraq that is taking the lives of American soldiers every day, and there is no end in sight. These are crises, not the fact that four people who wanted a job did not have the support of enough Senators and that is what we are spending all this time on.

Today, 95 percent of Federal judicial seats are filled. This is the lowest number of judicial vacancies in 13 years. This 5 percent vacancy rate is lower than the U.S. unemployment rate and the poverty rate, and I know because I represent a State that is very high in poverty. I come from one of the 20 highest poverty counties in the country.

Today there are more lifetime-appointed Federal judges serving than at any time in our Nation's history. Furthermore, since President Bush was elected, the Senate has confirmed 168 Federal judges and rejected only 4—2 percent of his nominees.

By comparison, when Republicans controlled the Senate during President Clinton's administration, more than 60, or 20 percent, of his nominees never received a vote in the Senate.

Sadly, I think the Senate's record on this matter truly speaks for itself. I believe all executive and judicial nominations that come before the Senate are entitled to courtesy and respect, but I also believe the Senate's role of advice and consent is a very important check and balance our forefathers designed and instituted. It is an obligation I do not take lightly.

Senators are not elected to play a ceremonial role in the nomination process. This is not an issue of whether one likes the President or does not like the President. This is not an issue of whether one thinks these nominees are good people. They are all good people. Ours is not a ceremonial role in this nomination process. Instead, we have an obligation to carefully consider each nominee individually, to help ensure the judiciary is fair and balanced and to ensure the American public maintains faith in our judicial branch of Government. We have a responsibility to make sure these judicial nominees will not be partisan in their decisionmaking, that they will not be biased or partial to their own personal beliefs, but will institute the rule of law, the Constitution, and the precedent of the higher courts.

Given the undue attention that has been lavished on these four nominees, I certainly believe it is worth revisiting a bit of their cases just to reconsider why they have not been confirmed. In each case, it is clear each of the nominees who has not been confirmed has shortcomings that in my opinion disqualify these individuals for the important positions to which they have been nominated. This does not mean I do not think they are good people. It does not mean I do not like the President. It simply means I am doing the job the people of Arkansas sent me here to do, to evaluate these people.

When we look at Ms. Owen, after reviewing the record and meeting with Judge Owen, discussing her tenure with members of the bar who practice in Texas and in Arkansas, I was not satisfied this nominee could set aside her personal views and give each side a fair hearing. She had not in the past. In some instances, it is not just me. Judge Owen's own colleagues have criticized her failing to understand and abide by the plain meaning of statutory provisions before her as a judge on the Texas Supreme Court.

Likewise, we look at the case of Alabama's Attorney General William Pryor. He is one of the most strident and outspoken nominees we have seen. After reviewing some of the statements General Pryor has made about sitting Supreme Court Justices and the decisions of that Court, I am concerned that he does not possess the necessary judgment and temperament to be a Federal judge, to oversee that element of the judiciary.

Judge Pickering of Mississippi, who I do think is a good man, has also been invoked in this debate and his record does bring me concern. His record raises serious questions about his ethical conduct on the bench. His repeated contacts with the Justice Department in an attempt to obtain a lesser prison sentence for a convicted defendant, and his solicitations of letters of recommendation from lawyers in Mississippi who had cases before him are well-known examples.

Finally, consider the case of Miguel Estrada, who withdrew himself from consideration earlier this year. By many accounts, Mr. Estrada was a distinguished attorney with a very talented legal mind. However, when we in the Senate attempted to verify this assessment by asking Mr. Estrada to come before the Judiciary Committee to answer additional questions and submit all of the relevant information that was necessary, and the burden of proof was in his court—we asked the same of President Clinton's nominees—Mr. Estrada indicated he would rather not. To me, and many of my colleagues, Mr. Estrada's response simply was not acceptable.

It is important to note there are good, solid reasons as to why these people were not confirmed. These reasons had nothing to do with any personal beliefs or characteristics. They had nothing to do with partisanship. They had nothing to do with working against the President. I opposed these nominees because I am not convinced they meet the requirements of what is expected of those who receive a lifetime appointment to the Federal bench. That is my job.

Again, these are 4 nominees. Out of 172, 4 have not been confirmed. Do 4

nominees constitute any sort of judicial crisis? Of course not. Of course they do not. If we do math, the Senate has confirmed 98 percent of President Bush's nominees. I do not know about you, but you are right in that we do not want our automobile to work at 98 percent, but let me tell you 98 percent is pretty good. It is not 100 percent, but that makes me think about my kids. If they come home from school after they make 98 on their test, am I going to send them to their room? Am I going to punish them for that? Am I going to say, well, I cannot believe you did not do 100? No.

What I am going to do for my children is what we should be doing. I am going to sit down with them and I am going to help them reach 100 percent. I am going to work with them. That last 2 percent may be the most difficult, but the most difficult is worth working towards. When we work together, we can get there. In working together, we could reach that. But the administration does not want to do that. No, telling them they had not done good enough is not what I would do. I would work hard with them to get to where we needed to be.

It is my sincere belief if President Bush would make a good-faith effort to work with Democrats in a spirit of cooperation, all of his nominees would be confirmed, with little or no controversy or opposition. Unfortunately, it has become apparent the President is more interested in staging a fight and casting blame, which is really a recipe for gridlock. In gridlock, the only ones who get hurt are the American people.

It is disappointing the President and the Senate leadership are expending so much time and energy to secure jobs for four people who already have good jobs, particularly considering the millions of people who are out of work and finding it increasingly difficult to make ends meet. The people who lose out in this fictional crisis are the American people. Tying up the Senate for 30 hours on 4 judicial nominees means we are not talking about the issues that matter most to the people we represent. It means we are not talking about how we are going to finish that prescription drug bill in order to help seniors cope with the rapidly rising cost of those prescription drugs. It means we are not spending our time focused on improving our schools and educating our children, so they can get the best possible start towards competing in that global marketplace. It means we are not doing all we can to create jobs and move our economy forward. It means we are not building that infrastructure that is so necessary in rural America and elsewhere across this country.

Just this week, I learned Arkansas has experienced its highest rate of unemployment in a decade. While my colleagues on the other side of the aisle point to the improving economic indicators as evidence that the doldrums are behind us, I can assure them that for most people in Arkansas those numbers are just abstractions. They want to see jobs, and they want to see real action in the Senate to get things done on behalf of the voters who sent us here.

Unfortunately, I think we have taken this time and used it most unproductively. Many Members have come to the floor tonight to talk about the past. I have heard some very eloquent speeches about their times as pages and debates they have heard, many quoting history from centuries ago. I think the most important thing we can talk about tonight is the future. I think we must talk about the future. I think we must talk about all of these crisis issues we are faced with, and I think we must come back to our children and let that be our focal point.

All of us in this body are so blessed. I started out speaking about how blessed I feel to even be in this body, to be in this place tonight, to be a part of an institution that is so incredible that it has lasted over 200 years. We are all blessed in many things, and for whatever faults some people may find in our Government, I believe, and I think the American people believe, we still live in the greatest country on the face of this Earth.

Tonight I looked at one of my greatest blessings, my children. I put them in bed before I came over. I tucked them in. I thought about what we were going to talk about tonight. I thought about this great country we live in. I thought about the conflict in Iraq. There were mothers who were putting their children to bed tonight whose husbands may be stationed abroad. There were children who were being put in bed tonight tucked in by their grandparents because their mothers had been called up and were in a strange and dangerous land. I thought about the fact my children are so blessed to live in this country under a rule of law that separates us from the rest, a rule of law that, when it is administered without bias, without the interjection of political issues or personal views, can create security and safety. It creates freedom. It creates a life I want my children to have.

I look in the eyes of mothers across the globe who do not put their children to bed in a nice, warm home, who have not been fed. They live in violence and terrorism. They live in a land that is stricken with famine because there is no rule of law, or what law exists is implemented through a political regime. That is what separates us from them, that we have a system designed specifically to separate the political from the rule of law.

I am proud to be here. I do not have the background many of my colleagues do, having been Governors and attorneys general, having served in this body for a long period of time, but I challenge any of them to match my pride, my pride of this country and in what that rule of law represents to me, not only as an American but as a mother and as a Senator.

I have no qualms in doing my job the people of Arkansas sent me here to do, to make sure these individuals we send to the Federal bench to implement the rule of law in this Nation, the Constitution, and the precedent of the higher courts do not interject their political views, their bias, or their personal views because we know that through these years a nonbiased judicial branch of government has served us well. It is what has separated us from those countries that right now we work so hard to change.

I yield time to my colleague who I am extremely proud to serve with, the other Senator from Arkansas.

The PRESIDING OFFICER. The Senator from Arkansas.

Mr. PRYOR. Mr. President, how much time do we have remaining?

The PRESIDING OFFICER. Two and one-half minutes.

Mr. PRYOR. Mr. President, in this 2½ minutes, I would like to thank some people for tonight. I would like to thank the staffers who are here on both sides. I would like to thank the Senate staff, the Sergeant at Arms staff, the doorkeepers, the cloakroom staff, all the various people who make the trains run on time around here, because I certainly understand they have families to go home to, that they have lives outside of these halls. I know the sacrifice they are making tonight to be here.

I also want to thank my colleagues on the other side of the aisle for their viewpoints. We may differ on some of these issues, but I appreciate their opinions and respect their viewpoints and the zealousness by which they approach the subject at hand.

I want to thank colleagues on my side who are here in the wee hours of the night and will be here throughout the day tomorrow to talk about these issues that are very important to the people of this country. I know members of the Senate on our side of the aisle are equally passionate about these issues. Some of this is a matter of opinion. Some of it is a matter of fact and history and tradition. Certainly people on this side of the aisle are very passionate about this.

In the couple of minutes I have remaining, I want to acknowledge some of the hard work the people in this institution and around this institution have put into this 30-hour filibuster or marathon debate, whatever one wants to call it, because it has come at quite a sacrifice to the members of the staff in this body.

Do I have any time remaining?

The PRESIDING OFFICER. Twenty seconds.

Mr. PRYOR. I would again thank my colleague from Arkansas. We have a great tradition in our State of sending strong Senators to Washington, and certainly Senator LINCOLN is one of those. She shows great leadership not just for the State but for the Nation. I want to thank her for her contribution tonight.

The PRESIDING OFFICER. The time of the minority has expired.

The Senator from Georgia.

Mr. CHAMBLISS. Mr. President, I am very proud of the State I represent. The State of Georgia is, in my opinion, the greatest State in our country because that is where I come from, and I am very blessed to represent that State. A number of great individuals from our State have served in this very august body. We have had a tradition of strong leadership in the Senate from Georgia, the Walter Georges, the Richard Russells, the Sam Nunns, the Paul Coverdells.

Outside of the Senate, we also have had a history of strong leadership coming from our State. For the past 30 years the man who has epitomized political leadership and strength in our State is now our senior Senator. It has been a great privilege and pleasure for me to have the opportunity, No. 1, to know this man over the past 35 years or so, but to have an opportunity to serve with him in the Senate and for him to be my senior Senator has truly been a great honor to me.

It is with great pride, and I consider it a great privilege, to be able to yield such time as he may consume to the Senator from Young Harris, GA, senior Senator from Georgia, Mr. MILLER.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. MILLER. Mr. President, I stand here proudly next to a copy of the U.S. Constitution. It is a document that has stood the test of time. It is a document that is revered throughout the world. As a history professor, I have read it many times. But I need to know tonight where in the U.S. Constitution does it say the President's nominees for the judiciary must have a supermajority to be confirmed? Where does it say that? I have searched high and low for that clause and that provision. I cannot find it. Maybe these old 71-year-old eyes are getting kind of dim. Perhaps I need a magnifying glass.

I seek. I search. I hunt in vain. For is it not there. Even if I had the eye of an eagle I could not find it because it is simply not there.

No, the U.S. Constitution says only the Senate is to advise and consent on the President's nominees. Somehow that has been twisted and perverted into this unmitigated mess we have today where 59 votes out of 100 cannot pass anything because 41 votes out of 100 can defeat anything. Explain that to Joe Sixpack in the Wal-Mart parking lot.

Explain that to this man, James Madison, who wrote that Constitution. He predicted and he feared some day someone would try to finagle this system, that they would try to plot and conspire and pervert the process in just the way they have. James Madison warned about this in Federalist Paper 58. He said: If that should happen, ''The fundamental principle of free government would be reversed. It would be no longer the majority that would rule. The power would be transferred to the minority.''

But don't just take my word for it. Look at others who are far smarter, far wiser than I will ever be and how they have expressed the kinds of things that are going on around here.

On June 1, 1950, a brave woman who was then the Senator from the State of Maine, Margaret Chase Smith, gave one of the most courageous speeches ever given on the floor of this Senate. It has been called the ''declaration of conscience'' speech. Senator Smith questioned what was happening at that time in the Senate. It was not about filibusters but, make no mistake, it was about intrigue, and it was about character assassination.

Let me give you a few excerpts from Senator Smith:

> The United States Senate has long enjoyed worldwide respect as the greatest deliberative body in the world. But recently that deliberative character has too often been debased to the level of a forum of hate and character assassination sheltered by the shield of congressional immunity.

She went on:

> It is ironic that we senators can during debate in the Senate [and in committee], directly or indirectly, by any form of words, impute to any American who is not a Senator any conduct or any motive unworthy or becoming an American—and without that nonsenator American having any legal redress against us.

She went on:

> It is strange that we can verbally attack anyone without restraint and with full protection, and yet we hold ourselves above the same type of criticism here on the Senate floor. Surely, the United States Senate is big enough to take self-criticism and self-appraisal. Surely we should be able to take the same kind of character attacks we dish out to others.

She continued:

> I think it is high time for the United States Senate and its members to do some real soul searching and to weigh our consciences as to the manner in which we are performing our duty for the people of America and the manner in which we are using or abusing our individual powers and privileges.
>
> I think it is high time we remembered that we have sworn to uphold and defend the Constitution. I think it is high time that we remembered that the Constitution, as amended, speaks not only of the freedom of speech but also of trial by jury instead of trial by accusation.

So said Margaret Chase Smith in 1950.

Let me tell you what Thomas Sowell, in his recent book ''The Quest for Cosmic Justice'' writes about the role of a judge:

> The traditional conception of the role of judges was expressed thousands of years ago by Aristotle, who said that a judge should ''be allowed to decide as few things as possible.'' His discretion should be limited to ''such points as the lawgiver has not already defined for him.''
>
> A judge cannot ''do justice'' directly in the cases before him. This view was strongly expressed in a small episode in the life of Justice Oliver Wendell Holmes. After having lunch [one day] with Judge Learned Hand, Holmes entered his carriage to be driven away. As he left, Judge Hand's parting salute was: ''Do justice, sir, do justice.'' Holmes ordered the carriage stopped. ''That is not my job,'' Holmes said to Judge Hand. ''It is my job to apply the law.''
>
> Elsewhere Holmes wrote that his primary responsibility as a judge was ''to see that the game is played according to the rules whether I like them or not.''

Lastly, I want to quote a Georgian named Phil Kent. In his book ''The Dark Side of Liberalism,'' he takes the liberal argument in this controversy and states it. He says:

> The United States [according to the liberals, according to the Democrats in this debate we are in today] comprises diverse people and cultures. As such, judges should have the power to change laws when circumstances dictate. The U.S. Constitution is a document in flux, and is many times irrelevant in modern society. Therefore, federal judges should be chosen on the basis of their views or the positions of their issues and should be tested on their ideologies.

That is what the Democrats have been saying to us in all this debate. Then Kent answered that premise:

> We are a nation of laws, not of men. Our government is constitutional, not political. Our highest court is the arbiter of constitutional controversies, and the protector of unalienable rights. As former President Ronald Reagan underscored, ''Freedom is indivisible—there is no ''s'' on the end of it. You can erode freedom, diminish it, but you cannot divide it and choose to keep some freedoms while giving up others.''
>
> Ignoring the law, whether seen as politically expedient or ideologically sound, suggests that the courts are merely devices to be used to change policy.
>
> The courts, however, are partners with specific duties separate and apart from lawmaking and law execution. We've missed that point as a nation for too long, to our great peril.

That brings me to this map of the United States. I ask you to look at the faces on this map. They are the faces of America. These are the faces of America. There is Miguel Estrada, who spoke little English when he came to this country as a teenage immigrant from Honduras. But a few years later, this immigrant graduated magna cum laude from Columbia College in New York and from Harvard Law School. He clerked for Justice Anthony Kennedy on the highest court in this land, the U.S. Supreme Court. He continued to soar with a very distinguished law career. Yet the Democrats in this Chamber have decided this man could not even have an up-or-down vote. It is a shame, and it is a disgrace.

There is Bill Pryor, a devout Catholic and a southerner who grew up in a house where both John F. Kennedy and Ronald Reagan were revered. He graduated magna cum laude from Northeast Louisiana University and Tulane University Law School. He also has had a very distinguished law career, including winning statewide election twice as Alabama's attorney general. Yet the Democrats in this Senate will not give him an up-or-down vote.

Then there is Charles Pickering, another southerner, a grandfather, a courageous and a deeply religious man. He graduated at the top of his law school

class at the University of Mississippi, served in elective office for 12 years, practiced law for 30 years, and has served this country ably on the U.S. District Court since 1990. Yet the Democrats in this Senate refuse to give Judge Pickering an up-or-down vote.

There is Priscilla Owen, who grew up on a farm in rural Texas and later rose to win election to the Supreme Court of Texas. Along the way she graduated in the top of her class at Baylor University Law School and practiced law for 17 years. In her successful reelection bid to the Supreme Court in 2000, every major newspaper in Texas endorsed her. Yet in this Senate, this woman cannot get an up-or-down vote.

Finally, there is Janice Rogers Brown. I have spent a lot of time with this woman. I have read dozens of her speeches. I love and admire her. The daughter of an Alabama sharecropper who rose to serve on the California Supreme Court, she attended segregated schools until she was in high school and decided to become a lawyer after seeing African-American attorneys in the civil rights movement praised for their courage. In 1998, 76 percent of Californians voted to retain Justice Brown, an approval rating most of us can only dream of. Yet this African-American woman will not be given an up-or-down vote because the Democrats in this Chamber refuse to let her do it. They are standing in the doorway and they have a sign: Conservative African-American women need not apply, and if you have the temerity to do so, your reputation will be shattered and your dignity will be shredded. Gal, you will be lynched.

These are the faces of America, men and women who pulled themselves up, who worked hard, who played by the rules, and excelled in the field of law, and now all of their hard work and success has landed them in the doorway of the Senate, and each one of them is having that door slammed in their faces. The very least they deserve, the very least they deserve is an up-or-down vote. Surely, in the name of all that is fair and reasonable, surely, in the name of James Madison, surely in the United States of America in 2003, that is not too much to ask, just an up-or-down vote, just an up-or-down vote, just an up-or-down vote.

The majority of this Senate deserves to have its voice heard.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. CHAMBLISS. Mr. President, I thank my colleague from Georgia for his always direct, forthright, from-the-heart statement. He knows he and I share an awful lot with respect to this issue and so many others. Again, it has been a pleasure for me to serve with him.

I want to talk about one of the men he just mentioned who is one of the faces on that map and is one of the individuals who is being filibustered. That is Judge Charles Pickering.

What an injustice to an individual is being carried out with respect to the filibuster of the nomination of Judge Charles Pickering to the Fifth Circuit Court of Appeals. I feel a very special relationship to the Fifth Circuit because when I began practicing law in 1969, I was a member of the Fifth Circuit. At that point in time, all of Georgia was a part of the Fifth Circuit.

Then I believe it was 1979 or 1980, we split off. We became the Eleventh Circuit and the Fifth Circuit became the circuit that handled cases from Texas, Louisiana, and Mississippi.

This man, Charles Pickering, grew up in Mississippi. It has been said by his critics on the other side of the aisle—and I quote because I was in the chair presiding Monday when this statement was made by one of the individuals from the other side of the aisle on the floor, in talking about his record on race, ''He has a bad record.''

Nothing could be further from the truth. Judge Pickering has been a strong advocate of the civil rights movement since the very early days of his career. Judge Pickering was one who came through a very difficult time in the history of our country, particularly coming from the South. Those of us who grew up in that same South, particularly in the rural South during those days, know the difficult times we faced and how far we have come since then. We are still not where we need to be. But boy, what strides we have made. It is only because of men like Judge Charles Pickering that we have made those strides.

So for anybody to say this man has a bad record on race is simply not just incorrect, but it does a grave injustice to a man who worked so hard to make sure civil rights did come to his part of Mississippi.

Judge Pickering, in 1967—you have to think back. In rural Mississippi, a part of Mississippi where the Ku Klux Klan, which today we would brand as terrorists—at that point in time, they were very active in that part of Mississippi. Judge Pickering stood face to face, eye to eye with the Ku Klux Klan. He went to court and testified against the Imperial Wizard of the Ku Klux Klan in Mississippi. For those who had not lived through that time, you cannot have a real appreciation for what he did, how brave, courageous, and how much integrity this man showed by doing this. He testified against the Imperial Wizard in a criminal action, in which the Imperial Wizard of the Ku Klux Klan was charged with the murder of a man named Vernon Dahmer.

Unfortunately, although Judge Pickering did that, now on the floor of this Senate it is said he has a bad record when it comes to civil rights. Judge Pickering is a strong, religious man. He has a very strong faith. He believed there ought to be equality among children in schools. For that reason, he made sure his children went to integrated schools from the very first day they were eligible to go to school.

Again, for those of us who grew up in the South during those days when integration began, this was not a very popular thing to do in the white community, to say the least. But Judge Pickering, again, stared racial injustice in the eye and he said we have to do the right thing and we have to make sure all of our children have an equal opportunity, so he sent his children to the same schools as the African-American community sent their children to during, again, this very difficult time.

The list goes on and on about what Judge Pickering has done with respect to race relationships, from organizing local committees, to organizing statewide committees dealing with the issue of racial justice in the State of Mississippi.

Judge Pickering served on the Federal bench in the district court where he lived for several years. He has been criticized for having a bad judicial record. Well, let me tell you about his judicial record. Some 99.5 percent of his cases have either been affirmed or not appealed—99.5 percent. They have either been affirmed or not appealed. Of those appealed, Judge Pickering has only had a reversal rate of 7.9 percent, which is 20 percent lower than the U.S. Department of Justice's national average of 9.1 percent, and 2 times lower than the average district court judge under the Fifth Circuit Court of Appeals.

Judge Charles Pickering is not just a good man, Judge Charles Pickering is an outstanding judge. This is the kind of man the folks on the other side of the aisle are being obstructionist about and are not allowing an up-or-down vote with respect to his confirmation on the floor of the Senate. It is wrong, it is unjust, and it ought not to continue.

I want to talk to you about one other individual very quickly, and that is Miguel Estrada. Miguel Estrada has withdrawn his nomination, after being under consideration for years. He decided he was not going to put his family through this any longer and he decided the best thing to do was withdraw his nomination and move on.

Miguel Estrada came to the United States as a teen from Honduras. He spoke very little English. He made sure he learned English quickly enough to enter school and he graduated cum laude from undergraduate school and went to Harvard Law School, where he graduated with honors and was a member of the Harvard Law Review. He has given his life to public service. Most recently, his public service included being in the office of the Solicitor General of the United States of America under both a Republican President, President George Herbert Walker Bush, and a Democratic President, Bill Clinton. In both instances, he served under a Solicitor General who has now come forward and said this man is a good man, an outstanding lawyer, and this man deserves to be confirmed to the DC Circuit Court of Appeals.

Obstruction came from the other side of the aisle, and they would not even

give Miguel Estrada an up-or-down vote to confirm his nomination to the DC Circuit Court of Appeals.

I want to spend the last part of my time here talking about this issue of cloture. The Senate has operated under various different rules on cloture, which is the ability of the Senate body to terminate debate on a pending matter. From 1789 until 1806, the Senate cloture rule allowed debate to be shut off by a simple majority vote. For 17 years after the country began operating under the U.S. Constitution, the Senate rules provided a simple majority vote was all that was needed to cut off debate.

In 1806, the Senate eliminated its first cloture rule which, in effect, put the Senate under a system where unanimous consent was required to end debate. This unanimous consent system lasted for over 100 years and survived 3 unsuccessful attempts to bring back some sort of cloture rule.

In 1917, the Senate filibustered a proposal supported by President Woodrow Wilson to arm American ships against German submarines, prior to America's entry into World War I. This filibuster was rather controversial and led to support for the Senate approving the first version of today's cloture rule, which is rule XXII. That required a vote of two-thirds present and voting to end debate on ''pending measures.''

Rule XXII was again amended in 1949 to extend cloture to any measure, motion, or other matter, but cloture became inapplicable to any rule change, making it more difficult to change the rules again. Part of this 1949 rule change raised the required number of Senators for cloture from two-thirds of those present and voting to two-thirds of all Senators.

Ten years later, in 1959, rule XXII was extended to rule changes, but the number of required Senators was moved back to two-thirds of those present and voting. In 1975, our esteemed senior Senator from West Virginia, Senator BYRD, championed another amendment to rule XXII that changed the required number of Senators for cloture to three-fifths of Senators duly sworn and chosen—in other words, a hard 60 Senators, without regard to how many are present and voting. The 1975 rule change left the cloture requirement for rule changes at two-thirds of Senators present and voting.

In 1979, Senator BYRD again proposed another amendment to rule XXII. This time, the amendment imposed a 100-hour limit on post-cloture debate. This was reduced to 30 hours in 1986.

We started off in 1789 with the cloture rule that closed off debate by a simple majority vote. The original rule was clearly constitutional because it didn't impose more than a simple majority to end debate and proceed to the question of an up-or-down vote on the President's nominees. Now it is interesting, and I think very telling, that the Framers of the Constitution set out only five instances where they thought the Senate needed more than a simple majority vote to act. That is what is referred to as a supermajority, such as three-fifths, two-thirds, and such—anything but a simple majority.

Those five instances requiring a supermajority are: impeachment, expulsion of a Senator, the override of a Presidential veto, ratification of a treaty, and adoption of a constitutional amendment.

I ask unanimous consent that I be allowed to continue and that my time be taken off of the next hour, same as we have been doing.

The PRESIDING OFFICER. Is there objection?

Mr. DASCHLE. I have no objection.

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

Mr. CHAMBLISS. I thank the minority leader.

In contrast, the approval of Federal judges should occur frequently. I would go so far as to say 100 percent of all qualified nominees should be approved by the Senate. This is why there is no requirement in the Constitution for more than a simple majority to confirm these nominees. The Constitution charges this body with the responsibility of advice and consent on the President's nominations.

With this in mind, when the Senate began operations, it required only a simple majority vote to end a filibuster. We have come a long way in the last 214 years. As you have just heard, we have tinkered with the cloture rule on a number of occasions. I am of a mind that the number of cloture rules we have had since the original rule were, or are, unconstitutional, including the present rule XXII, where they are applied to prevent a majority of Senators from confirming the President's judicial nominees. But that has never happened before this year. We have never in our Nation's history had a minority of Senators try to prevent a vote on the President's nominees under the guise of rule XXII.

By acting in this way, a minority of Senators has found a way to make the cloture rule unconstitutional in practice. The Framers of the Constitution knew the situations where they wanted more than a simple majority for the Senate to act. Confirmation of the President's nominees was not one of these instances.

If you look at the text of article II, section 2, in the second paragraph, you see in the very same sentence where the Framers require two-thirds of Senators present to ratify a treaty, they charge the Senate with responsibility for advice and consent without a word said about a supermajority requirement; just a simple majority is clearly all they thought was needed to advise the President.

With respect to the Senate's consideration of nominees, I think the only constitutional cloture rule we have ever had was the first one, which stood for the first 17 years the Senate was in operation. We have tolerated a number of different accommodations over the years, including the absence of any cloture rule for over 100 years, where we could only end debate by unanimous consent and a lot of other compromise cloture rules along the way. Ultimately, what decides whether a rule is constitutional is whether 51 Senators say it is constitutional.

We have another proposal offered this year to resolve the impasse that has prevented the Senate from discharging its constitutional duty to advise the President on nominations of the individuals we are here talking about.

Senate Resolution 138, of which I am a cosponsor, was introduced by Majority Leader FRIST and has bipartisan support from the senior Senator from my State, Senator MILLER, who is an original cosponsor of the resolution.

S. Res. 138 is a reasonable compromise to break the impasse we now face. Instead of setting a fixed supermajority requirement of 60 votes to end debate and bring a nominee to a vote, S. Res. 138 starts with a 60-vote requirement and gradually reduces the number of necessary votes until ultimately a simple majority of Senators present on the floor can decide whether to consent to the President's nominee. While respecting that the filibuster has a historic role in the Senate, this bill assures that, ultimately, the will of the majority will prevail. Over the past few years, measures similar to S. Res. 138 have received bipartisan support at various times.

We have a history of support of this concept from people on both sides of the aisle for a needed change to the cloture rule. Now is the time to come together and make it happen. We can end this filibuster by cooperation in a bipartisan fashion, or we will have to decide other options that might work.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The minority leader is recognized.

Mr. DASCHLE. Mr. President, when will the Democratic allotment of time expire?

The PRESIDING OFFICER. At 3:05.

Mr. DASCHLE. I thank the Chair for the information.

Mr. President, the distinguished Senator from Arkansas has been a stalwart participant during the wee hours here. I want to publicly acknowledge his presence and laud him for his willingness to not only be on the floor, but to stay on the floor. I asked if he would mind if I would take a couple of minutes, and then I will relegate the balance of time for this allotment to him. He has some important remarks to make and I, like others, would like to hear him.

Let me respond briefly to the comments made by the distinguished Senator from Georgia. He noted, of course, that the Constitution provides the authority to the Senate to write its rules. That, in essence, is what we have done, as he has also noted. There have been various ways with which the Senate

addressed the issue of unlimited debate, which is the essence of this institution. Having unlimited debate means an opportunity for Senators to be heard for whatever length of time, but it also means an opportunity to protect the minority—the minority being whatever the case may be, whether it is a political minority, ethnic minority, minority on a given issue, regardless. That was really the essence of what the Founding Fathers saw with regard to the delegation of this authority to the Senate to write its rules with an expectation that filibusters, this extended debate, would be part of the deliberative spirit and soul of this body.

But my colleague from Georgia fails to recognize, and certainly others have ignored the number of times our Republican friends have used the rules of the Senate, the filibuster, to advance their position. There have been a number of occasions over the course of the last three decades where filibusters and cloture votes have been cast. There were 63 occasions where nominees from the Clinton administration did not even reach the floor because of an effective filibuster within the committee. One Senator would say: I will not allow this nominee to go forward. That assertion was respected and, ultimately, 63 of the Clinton nominees never got out of committee because of a Republican filibuster. That has not happened, of course, during this Congress. The Republicans have moved their nominees at will, and the only option we have available to us, of course, is to vote either against or for the nominee in committee, and then on cloture as some of these nominees with whom we have grave concern come to the Senate floor.

No. 1, this is not unprecedented. No. 2, it was used to a far greater degree by our Republican colleagues during the 8 years of the Clinton administration—as I said, on 63 occasions.

That issue should not be debated. It is not even arguable. I don't think this debate should be about 4 jobs, which, by the way, are generating incomes of over $100,000. It is our view that the debate tonight should be about the 3 million jobs that have been lost under this administration and the 9 million jobs which are lost and for whom people are attempting to find some way to survive financially and economically.

Those 3 million jobs have been lost, in our view, because of a mismanaged economy that needs to be addressed if indeed we are going to bring this economy back. All one has to do is look at the comparison between the Clinton and Bush administrations to gain some understanding of the degree of difference between the Democratic approach and the Republican approach to the economy. The Clinton administration created 22 million jobs in 8 years. The Bush administration has lost 3 million jobs in 3 years. Our view is, if we are ever going to turn this around, it is important we do three things.

First and foremost, we address the concerns of those who are unemployed today by providing unemployment compensation beyond the limits that have now been put in place. There are too many people who have, through no fault of their own, been unable to get employment and who have run out of unemployment benefits. We need to address that. I hope the Senate will do so before we leave this year.

The second thing we need to do is to ensure those who are employed have the kind of incomes they deserve. That means, in some cases, increasing the minimum wage for the first time in now almost 7 years and addressing the fact that at minimum wage we are at the lowest purchasing power in the history of minimum wage.

It also means we protect people's overtime. Contrary to what the administration would like to do, we need to ensure those 8 million people who could see their overtime lost are provided the confidence and the knowledge they will not lose the overtime and will be compensated as we have done now for almost 70 years, for time they have worked over a 40-hour work week.

Finally, I think it is critical we understand we must provide some relief for the extraordinary costs our working people especially are facing with regard to health care. Health insurance costs have skyrocketed—some 15 percent a year.

There are a number of ways with which to create jobs—the highway bill, the manufacturing job tax credit. We offered tonight unanimous consent requests with the hope our colleagues might join us in at least allowing this legislation to go forward. Obviously they have objected. But that is the first thing we need to do—create the jobs for those 3 million people who have lost their jobs in this administration.

Second, we need to ensure the incomes of those who are working are protected.

Third, I hope we can recognize that, even with incomes, they can't afford their health insurance today unless we help them to find ways in which to bring its cost down.

There is a lot more to talk about with regard to jobs and this economy, but as I said, the distinguished Senator from Arkansas has been waiting. He has done an extraordinary job of representing this caucus on the Senate floor and I yield the floor now for his remarks.

The PRESIDING OFFICER (Mr. CHAFEE). The Senator from Arkansas.

Mr. PRYOR. Mr. President, I would like to acknowledge and thank my colleague from South Dakota, who has done such an outstanding job tonight, and always.

Tonight I would like to read a portion of a book that won the Pulitzer Prize recently. It is called ''Master of the Senate.'' It is about Lyndon Baines Johnson as a Senator, not as President. It was written by Robert Caro. It is 1,040 pages. I assure you I am not going to read all thousand pages tonight. I am just going to read a few excerpts from chapter one. Chapter one is entitled ''The Desks of the Senate.'' I am only going to read a small portion of chapter one. I will be starting on page 3. But I think it is important for us to all put this in context and remember what the Senate is all about and how it works and how it is designed to function within our constitutional system. So, if I may start midway down, on page 3.

When a person stood on the floor of the Senate Chamber, however—in the well below the dais—the dais was, suddenly, not plain at all. Up close, its marble was a deep, dark red lushly veined with grays and greens . . .

In fact, on this pilaster behind me you can see those colors Mr. Caro is referring to here.

. . . and set into it, almost invisible from the galleries—

We have a number of people in the gallery tonight.

. . . almost invisible from the galleries, but, up close, richly glinting, were two bronze laurel wreaths like the wreaths that the Senate of Rome bestowed on generals with whom it was pleased, when Rome ruled the known world—and the Senate ruled Rome.

From the well, the columns and pilasters behind the dais were, suddenly, tall and stately and topped with scrolls, like the columns of the Roman Senate's chamber, the columns before which Cato spoke and Caesar fell, and above the columns, carved in cream-colored marble, were eagles, for Rome's legions marched behind eagles. From the well, there was, embroidered onto each pale damask panel, an ornament in the same pale color and all but invisible from above—a shield—and there were cream-colored marble shields, and swords and arrows, above the doors. And the doors—those seven pairs of double doors, each flanked by its tall columns and pilasters—were tall, too, and their grillwork, hardly noticeable from above, was intricate and made of beaten bronze, and it was framed by heavy, squared bronze coils. The vice presidential busts were, all at once, very high above you; set into deep, arched niches, flanked by massive bronze sconces, their marble faces, thoughtful, stern, encircled the Chamber like a somber evocation of the Republic's glorious past. And, rising from the well, there were the desks.

Let me pause here because these desks have a lot of history. In fact, I think it is safe to say almost all of American history in some way or another has flowed through the Senate. I don't think that is an overstatement.

The desks of the Senate rise in four shallow tiers, one above the other, in a deep half circle. Small and spindly individually, from the well they blend together so that with their smooth, burnished mahogany tops reflecting even the dim lights in the ceiling so far above them, they form four sweeping, glowing arcs. To stand in the well of the Senate is to stand among these four long arcs that rise around and above you, that stretch away from you, gleaming richly in the gloom: powerful, majestic. To someone standing in the well, the Chamber, in all its cavernous drabness, is only a setting for those desks—for those desks, and for the history that was made at them.

The first forty-eight of those desks—they are of a simple, federal design—were carved in 1819 to replace the desks the British had

burned five years before. When, in 1859, the Senate moved into this Chamber, those desks moved with them, and when, as the Union grew, more desks were added, they were carved to the same design. And for decades—for most of the first century of the Republic's existence in fact; for the century in which it was transformed from a collection of ragged colonies into an empire—much of its history was hammered out among those desks.

Daniel Webster's hand rested on one of those desks when, on January 26, 1830, he rose to reply again to Robert Hayne.

I am not going to go into that story because it should be known by most people who follow Senate history, one of the more famous exchanges in the history of the Senate. Let me skip on to page 7 and talk about what I really think is important for us to consider this morning:

The long struggle of the colonies that were now become states against a King and the King's representatives—the royal governors and proprietary officials in each colony—had made the colonists distrust and fear the possibilities for tyranny inherent in executive authority. And so, in creating the new nation, its Founding Fathers, the Framers of its Constitution, gave its legislature or Congress not only its own powers, specified and sweeping, powers of the purse (''To lay and collect Taxes . . . To borrow Money on the credit of the United States . . . To coin Money'') and powers of the sword (''To declare War, grant Letters of Marque and Reprisal . . . To raise and support Armies . . . To provide and maintain a Navy . . .'') but also powers designed to make the Congress independent of the President and to restrain and act as a check on his authority: power to approve his appointments, even the appointments he made within his own Administration, even appointments he made to his own Cabinet; power to remove his appointees through impeachment—to remove *him* through impeachment, should it prove necessary; power to override his vetoes of their Acts. And the most potent of these restraining powers the Framers gave to the Senate. While the House of Representatives was given the ''sole power of Impeachment,'' the Senate was given the ''sole power to try all Impeachments'' (''And no person shall be convicted without the Concurrence of Two Thirds of the Members present''). The House could accuse; only the Senate could judge, only the Senate convict. The power to approve presidential appointments was given to the Senate alone; a President could nominate and appoint ambassadors, Supreme Court justices, and all other officers of the United States, but only ''by and with the Advice and Consent of the Senate.'' Determined to deny the President the prerogative most European monarchs enjoyed of declaring war, the Framers gave the power to Congress as a whole, to House as well as Senate, but the legislative portion of the power of ending war by treaties, of preventing war by treaties—the power to do everything that can be done by treaties between nations—was vested in the Senate alone; while most European rulers could enter into a treaty on their own authority, an American President could make one only ''by and with the Advice and Consent of the Senate, provided two thirds of the Senators present concur.''

I will skip to page 8. It is a discussion of James Madison, the primary designer of our constitutional system of government. Certainly it was a committee effort, but James Madison has been historically credited with playing the major role in its creation, in its design:

How, Madison asked, is ''the future danger''—the danger of ''a leveling a spirit''—''to be guarded against on republican principles? How is the danger in all cases of interested coalitions to oppress the minority to be guarded against? Among other means by the establishment of a body in the government sufficiently respectable for its wisdom and virtue, to aid on such emergencies, the preponderance of justice by throwing its weight into that scale.'' This body, Madison said, was to be the Senate. Summarizing in the Constitutional Convention the ends that would be served by this proposed upper house of Congress, Madison said they were ''first to protect the people against their rulers; secondly to protect the people against the transient impressions into which they themselves might be led.''

''The use of the Senate,'' Madison said, ''is to consist in its proceeding with more coolness, with more system, and with more wisdom, than the popular branch.'' It should, he said, be ''an anchor against popular fluctuations.'' He drew for parallels on classical history, which, he said, ''informs us of no long-lived republic which had not a Senate.'' In two of the three ''long-lived'' republics of antiquity, Sparta and Rome, and probably in the third—Carthage (about whose governmental institutions less was known)—senators served for life. ''These examples . . . when compared with the fugitive and turbulent existence of other ancient republics, [are] very instructive proofs of the necessity of some institution that will blend stability with liberty.'' Thomas Jefferson had been in Paris during the Convention, serving as minister to France. When he returned, he asked George Washington over breakfast why the President had agreed to a two-house Congress. According to a story that may be apocryphal, Washington replied with his own question: ''Why did you pour your tea into that saucer?'' And when Jefferson answered, ''To cool it,'' Washington said, ''Just so. We pour House legislation into the senatorial saucer to cool it.'' The resolution providing for a two-house Congress was agreed to by the Constitutional Convention with almost no debate or dissent.

And to ensure that the Senate could protect the people against themselves, the Framers armored the Senate against the people.

One layer of armor was bolted on to allay the fears of the states with fewer people, that the more populous states would combine to gain a commercial advantage or to control presidential appointments and national policies; the small states were determined that all states should have an equal voice in the Congress, so, in what became known as the ''Great Compromise,'' it was agreed that while representation in the House would be by population, in the Senate it would be by states; as a result of that provision, a majority of the people could not pass a law; a majority of the states was required as well. But there were other, even stronger, layers. One was size. ''Numerous assemblies,'' Madison explained, have a propensity ''to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions.'' so the Senate would, in Madison's phrase, be ''less numerous.'' Each state, the Farmers decided, would be represented by only two senators; the first Senate of the United States consisted of just twenty-six men.

Now I am going to skip to page 10.

Senators would also be armored against the popular will by the length of their terms, the Framers decided. Frequent elections mean frequent changes in the membership of a body, and, Madison said, from a ''change of men must proceed a change of opinions; and from a change of opinions, a change of measures. But a continual change even of good measures is inconsistent with every rule of prudence and every prospect of success.'' What good is the rule of law if ''no man . . . can guess what the [law] will be tomorrow?'' Guarding against ''mutable policy,'' he pointed out, requires ''the necessity of some stable institution in the government.'' Edmund Randolph, as usual, was more blunt. ''The object of this second branch is to control the democratic branch,'' he said. ''It it not be a firm body, the other branch being more numerous and coming immediately from the people, will overwhelm it.'' Senators, he said, should ''hold their offices for a term sufficient to insure their independency.'' The term sufficient, the Farmers decided, would be six years. Senators would hold office three times as long as the members of the ''democratic branch.'' They would hold office longer than the President held office. And around the Senate as a whole there would be an additional, even stronger, layer of armor. Elections for senators would be held every two years, but only for a third of the senators. The other two-thirds would not be required to submit their record to the voters (or, to be more accurate, to their legislatures) at that time. This last piece of armor made the Senate a ''stable institution'' indeed. As a chronicler of the Senate was to write almost two centuries after its creation: ''It was so arranged that while the House of Representative would be subject to total overturn every two years, and the Presidency every four, the Senate, as a Senate, could never by repudiated. It was fixed, through the staggered-term principle, so that only a third of the total membership would be up for re-election every two years. It is therefore literally not possible for the voters ever to get at anything approaching a majority of the members of the Institution at any one time.''

Now I'm going to skip to page 11.

The coat of constitutional mail bolted around the Senate was sturdy indeed—by design. Under the new Constitution, the power of the executive and the power of the people would be very strong. So to enable the Senate to stand against these powers—to stand against them for centuries to come—the framers of the Constitution made the Senate very strong. Wanting it to protect not only the people against their rulers but the people against themselves, they bolted around it armor so thick they hoped nothing could ever pierce it.

And for many years the Senate made use of its great powers. It created much of the federal Judiciary—the Constitution established only the Supreme Court; it was left to Congress to ''constitute tribunals inferior,'' and it was a three-man Senate committee that wrote the Judiciary Act of 1789, an Act that has been called ''almost an appendage to the Constitution.'' The Judiciary Act established the system of federal and district courts, and the jurisdictional lines between them, that endure to this day, and established as well the principle, not mentioned in the Constitution, that state laws were subject to review by federal courts. And when, sixteen years later, this new creation was threatened by a concatenation of the very forces the Framers had feared—presidential power and public opinion—the Senate saved the Judiciary.

By the way, Mr. President, the Senate has a history of saving the judiciary in critical times. That should be a discussion for a later time. But there is no question that the Senate has served

as protector of the judiciary in our system of government.

The desks (there were thirty-four of them by 1805) had been removed for this occasion, and the Old Senate Chamber had been arranged as if it were a tribunal. In the center of one wall stood the chair of the presiding officer, Vice President Aaron Burr, as if he were the chief judge, and extending on his right and left were high-backed, crimson-covered benches, on which the senators sat, in a long row, judges in a court from which there was no appeal.

Mr. Caro goes on to explain the impeachment trial of Supreme Court Justice Samuel Chase; here again, the rule of law and the fact we are a nation of laws and not men built up by the Senate. It is the Senate's tradition to stand up for our liberty and for our law.

I wanted to bring this to the Senate's attention. I know my time is drawing to an end. At this point, I yield the remainder of my time.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SANTORUM. Mr. President, thank you.

The Democratic leader came to the floor and spoke, as many have on that side of the aisle, attempting to change the subject on the issue of jobs.

The number keeps coming up about 3 million jobs being lost in this administration since this administration took office. I want to share with you a chart that looks at the survey of the U.S. employment level. This includes everybody. The numbers that the Democratic leader referred to do not include everyone. It was a different survey of jobs. This is the most comprehensive one. You can see from this comprehensive survey, here we are: the most jobs in the history of the United States.

If these include all the jobs, whose jobs does the Democratic leader say don't count? What jobs don't count, according to the Democrats? If you are self-employed, if you are an individual doing work, you don't count. The Democratic leader is not going to count you as someone who is working. If you are a domestic worker or you work for a private household, you don't count—you are not a worker; you don't have a job. If you are self-employed, if you are a domestic worker for a private household, you don't count. If you work on a farm, you don't count. If you are someone who works—it is probably some of the hardest work that is done in this country—on a farm, according to the Democratic leader, your job doesn't count. If you work in a family-run business part time, you don't count. In fact, there are 8 million workers on farms, family businesses, households and self-employed, under the Democratic leader's survey, who don't count. We believe you do.

By the way, when it comes to paying taxes, the Democratic leader counts your job. He makes sure we collect your taxes. But, as far as being employed or not, for political purposes, you don't count. It is 138 million, a record and growing.

Why are they coming up here and talking about this? Because they want to criticize the President's plan for turning this economy around. It probably says they do not have a plan.

Mr. COLEMAN. Mr. President, will the distinguished Senator from the Commonwealth of Pennsylvania yield for a question? I want to talk about judges in a second.

Mr. SANTORUM. I am happy to yield.

Mr. COLEMAN. Is the distinguished Senator familiar with some of the statistics that came out recently regarding jobs and growth in the economy?

Mr. SANTORUM. I have seen some of them. In fact, they were revised a couple of months prior to the most recent report—I believe it was August and September—the net new jobs created on the original projection was 16,000. They have revised them up to almost I think 150,000.

Mr. COLEMAN. I believe about 50,000 double to over 100,000. As the distinguished Senator from the Commonwealth of Pennsylvania is aware, that payroll employment increased by 126,000 jobs in October.

Mr. SANTORUM. If you look at the last 3 months, almost 300,000 new jobs, net new jobs were created in this economy.

Mr. COLEMAN. Is the distinguished Senator from the Commonwealth of Pennsylvania aware that the gross domestic product—by the way, the gross domestic product is the way we measure growth in this economy—increased at a 7.2-percent annual rate?

Mr. SANTORUM. I believe that is the highest rate of growth in almost 20 years.

Mr. COLEMAN. Is the Senator from Pennsylvania aware of the actions that this Senate has tried to take to grow jobs? One of the things we attempted to do was to pass a bill regarding class action reform. Does the distinguished Senator from the Commonwealth of Pennsylvania believe that class action reform, if it were passed, would help grow jobs?

Mr. SANTORUM. I don't think there is any question that the drain on this economy is one of the major impediments to creating jobs, increasing the standard of living in America and giving a better quality of life for the average American.

Mr. COLEMAN. I ask the Senator from Pennsylvania, on the issue of malpractice litigation regarding doctors and the impact that has on the cost of health care, and the impact the cost of health care has on small business and growing jobs, does he see a correlation between the increased litigation costs and the impact it has on the condition of the economy?

Mr. SANTORUM. The No. 1 crisis in my State with regard to health care is medical lawsuit abuses.

Mr. COLEMAN. Would it be fair to say that our friends on the other side of the aisle have obstructed our efforts to pass malpractice reform?

Mr. SANTORUM. They have blocked every form of reasonable and balanced litigation reform that balances the interests of those who rightfully have a plea before a court for compensation and the right of society not to have outrageous awards, which make us unproductive, which raises the cost of health care, and which limits the availability of health care to millions of Americans.

Mr. COLEMAN. If the Senator will yield the floor—and I would very respectfully disagree with his last assertion that our colleagues on the other side of the aisle have no plan; they have a plan. The plan is to roll back the President's tax cuts. Listen to the candidates. They want to roll back that tax cut. The lowering of the tax rates has generated more income in the pockets of Americans.

Mr. SANTORUM. They want to roll back the reductions that the President put in place. They do not like the dividend proposal. The stock market has added $2 trillion in value. What does that mean to the millions of Americans who now participate in the market? You are talking about real wealth. You are talking about retirement security for millions of Americans because of the economic plan of this administration passed by the Senate. And they would like to roll that back. I guess they do not like markets going up. I guess they do not like employment going up. I guess they do not like economic activity and job creation.

Mr. COLEMAN. Has my colleague from the Commonwealth of Pennsylvania talked to small business owners about the impact of accelerated depreciation?

Mr. SANTORUM. We saw in just the last few quarters the business community—which has really been lagging, and which is an indicator in all of the economy—as a result of the accelerated depreciation expensing provision in the tax package that we passed, is finally beginning to invest, and by doing so they are increasing productivity which means higher wages for workers. It is a little bit of a challenge. If productivity goes up, that means higher quality jobs, higher paying jobs, and more productive jobs. As growth continues, so will the employment.

Mr. COLEMAN. Is the distinguished Senator aware that business investment increased in the last quarter about 15 percent? Does that have a relationship to growing jobs?

Mr. SANTORUM. Absolutely. The fact is that incentives for businesses to invest in capital and equipment and purchasing capital equipment for manufacturers here in this country means they are improving their productivity. They are being more competitive internationally. We are not losing those jobs. We are keeping those jobs here. They are more productive jobs and higher paying jobs. It is a win-win all across.

Mr. COLEMAN. Mr. President, I would respectfully suggest again that

our friends on the other side of the aisle have a plan. The plan is to roll back the tax cuts. Again, look at the statistics. Look at what is happening in the economy. Any American being out of work is a terrible thing. I am a former mayor. I always understood the best welfare program, the best housing program, and the best health care is jobs. But you have to plan a vision. The Bible said people without a vision will perish.

This President has a vision, and that vision is producing results. We are seeing it. There is an increase in consumer spending as a result of tax cuts.

Mr. SANTORUM. I thank the Senator from Minnesota for his questions. I think we settled this issue pretty clearly as to the importance that we have put on jobs and the response of the Republicans in the Senate and this President to grow the economy as a result of a recession which started in the Clinton administration and which was exacerbated by 9/11. The President responded with certainty and with a dynamic plan, with an innovative plan, and it is working in our economy.

Now we turn to another area where the Democrats have obstructed; the issue of Federal judges we are spending the evening here tonight on. I have said throughout the time I was going to be on the floor that we are going to ask for votes. We should be able to get votes—up-or-down votes.

UNANIMOUS CONSENT REQUEST

I ask unanimous consent that the Senate now proceed to consideration of Calendar No. 455, the nomination of Janice R. Brown to be a United States Circuit Judge for the District of Columbia Circuit; provided further that there then be 20 hours of debate equally divided for the consideration of the nomination; provided further that following the debate the Senate proceed to the vote on the nomination, and that there be no further intervening action or debate.

Mr. PRYOR. I object, Mr. President.

The PRESIDING OFFICER. Objection is heard.

Mr. SANTORUM. I have just asked that a justice who was elected in the State of California by 76 percent of the vote—no elected official from California in this Chamber can make that claim—76 percent of the vote in the State of California and we can't get a vote on her nomination, up or down; a judge who wrote more majority opinions than any other member of that court, who is a qualified African-American woman; we cannot get a vote on the floor of the Senate after 20 hours of debate. I will agree to 30 hours. I amend it to 30 hours of debate. I ask unanimous consent that the previous unanimous consent that I read be modified to allow for 30 hours of debate.

Mr. PRYOR. I object, Mr. President.

The PRESIDING OFFICER. Objection is heard.

Mr. SANTORUM. This is not a matter of debate. This is not a matter of due consideration. This is a matter of not allowing a qualified judge, a justice of the supreme court of the largest State in this country, who was elected by 76 percent of the people in the State of California, who is now being assailed as not being within the mainstream. How small is the stream? How small is the stream that 24 percent of Californians are in compared to the rest of America? That is not mainstream? That is extreme. We are not talking about the mainstream judges. We are talking about fighting to only put on extreme judges. This is a travesty. If this woman were nominated 10 years ago, we wouldn't even have had a vote on the floor of the Senate; or 5 years ago, she wouldn't have even been voted on. We would have confirmed her with a voice vote, and everybody in this Chamber knows it.

This body was once a place where sense of history and duty and responsibility meant something, to be a steward of this incredible body, this famed institution. It used to mean something to be a Senator to uphold the tradition of this body.

That is why for 214 years no one put their partisan whim, their short-term political gain in front of the process that kept this institution whole. But tonight in this session of Congress we are throwing that all away. What is so important? What is so sacred to those who would contort the rules of the Senate as never done in the history of this Senate? Senators have a chance to do it. But there is some higher calling not to give in, not to give in to that notion, You know, I really do not like this judge—not to give in because of the consequences for the long-term future of this country is just too dire. What caused so many to be so willing to give up and give in and thereby fail the Senate and cause this body to become so rancorous?

I ask my colleagues, as someone who never voted against a cloture motion—I have never voted against a cloture motion for a judge, judges who I thought would be the worst judges who are against everything I believe in. Paez and Berzon are two examples. I lost sleep because I knew the damage they could do with the Ninth Circuit and are doing. By the way ''under God,'' Paez and Berzon, stricken from our Pledge of Allegiance.

These are radical activist judges. I knew it. They will destroy the very fabric of our Constitution. I knew it. I gave them an up-or-down vote because this body, this Constitution, the process by which we do business here is more important.

No more. The puppeteers of the special interest groups around Washington, DC now carry much more weight than the Constitution. This is a sad time. People ask why we are doing this. Because we have a right to tell the public what is going on. This is ugly. This is the worst of our nature. I plead, as someone who wanted to do what you are doing worse than you could possibly imagine but didn't because there are bigger things than the next election.

I yield the floor.

The PRESIDING OFFICER (Mr. ALLARD). The Senator from Minnesota.

Mr. COLEMAN. Mr. President, I have the greatest respect and compassion for my colleague from the Commonwealth of Pennsylvania and for his commitment to what this institution is all about.

I don't know if I can find the words to describe the feeling that I have, elected just this year to the Senate, to these hallowed halls. I listened to the reading from my friend and colleague from Arkansas from Caro's ''The Master of the Senate.'' It is a humbling honor to be part of this body, to be part of the flow of history, a flow that has helped develop the greatest nation in the world. We got there due to divinely inspired guidance from the Founders of this great Republic who gave us a Constitution which provides a sense of clarity of our roles and responsibility. If we decide to only abide by it 98 percent of the time and the folks who follow us decide to abide by it 98 percent of the time, we are in trouble. My colleagues across the aisle have a sign that says 168 to 4. They are proud of that. I am stunned. I am absolutely stunned. If the airline I flew back and forth to Minneapolis would advertise 98 percent of the time they would get me there safely, I wouldn't fly.

Think about the Constitution. I could walk you through it. First amendment of the Constitution; Congress shall make no law respecting establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech or of the press. If there were 172 newspapers in the United States and I said 168 of them are going to have freedom of the press, but not the other 4, where would we be?

Second amendment to the Constitution: Right to bear arms.

In Minnesota, we bear arms. A lot of folks were out deer hunting last weekend there. If I were to tell a group of 172 Minnesotans that 168 of you have the right to bear arms, but not 4, 98 percent, I don't think they would be happy Americans.

I could go through every amendment. Third amendment: no soldier shall in a time of peace be quartered in any house without the consent of owner, nor in time of war but in a manner prescribed by law, the third amendment to the Constitution. If I went to a group of homeowners and said, you are going to quarter soldiers, 2 percent of you are, they wouldn't be very happy, and they shouldn't be.

We took a solemn oath to preserve and defend and abide by the Constitution of the United States. That is how we got here. That is our obligation once we got here. It wasn't a partial thing. It wasn't an almost thing. It wasn't a but-for thing, and it wasn't a 98 percent thing. It was to preserve the Constitution.

The fifth amendment to the Constitution: Individuals cannot be compelled to testify against themselves. Can you imagine if we said that applies 98 percent of the time? It doesn't work that way. It should not work that way. There is a reason why. You have to think about this. Again my colleague read the history of the Senate. It is a magnificent history. But the public out there has to ask the question: Why in the over 200 years of this Republic has there never been up until now a partisan filibuster that has stopped judges from being confirmed.

Yes, we have the right to advise and consent. The Constitution gives the President the opportunity to appoint judges. We are then to advise and consent. He nominates. We advise and consent. But we do it by a simple majority. We cast our vote. If you don't agree, you vote them down. If you agree, you vote them up. But for the history of this Republic, we have a process which we abide by, the Constitution. That was reflected in the readings from my colleague from Arkansas. Treaties, as he noted in his comments, require in the Constitution a supermajority, but not judges.

Mr. TALENT. I wonder if the Senator from Minnesota will yield for a question.

Mr. COLEMAN. I yield.

Mr. TALENT. I wonder if the Senator knows how many court of appeals appointments Presidents on average have gotten over a 4-year term since Jimmy Carter? It is 40. There were 10 per year. I went back and looked. Does the Senator know how many court of appeals judges the other side has filibustered or will filibuster by Friday? It is six. I11Does the Senator know how many more they have threatened to filibuster? It is another six. I wonder if the Senator is aware of the fact that out of 40 court of appeals judges President Bush figures to get in a 4-year term, the other side has filibustered or threatened 12. So it is not four out of 168. It is 12 out of 40, or 30 percent. I don't know how the Senator feels about that. I wonder if he doesn't think that is a more relevant figure that maybe we should be using.

Mr. COLEMAN. Even if it was 2 percent, we don't disregard the Constitution. Certainly if you are looking at 30 percent, that is outrageous. That is outrageous. One of the things that troubles me as a new Senator, as is my colleague from Missouri, as is my colleague from Arkansas—I think we still have this great kind of sense of awe, but one of the things that troubles me—and I haven't been here, but I have heard so much of the debate—they say, they did it to us in the past.

Let the record be very clear. Of the past 11 Presidents' judicial nominees, there were 2,372 confirmed. None were stopped by a filibuster. This whole thing about what you did to us in the past, of course, now we are doing to you. Then what will those who follow us do? What are the consequences of that?

I will tell you, I will stand on the floor of the Senate and say I will apply the same standard to judges with a Republican President that I will if there were ever to be a Democratic President and I am serving in this institution. Are they competent? Are they committed to preserving and upholding the Constitution? That is what the judges we are talking about all have said.

You have to get right to it. They are being opposed because there are special interest groups who don't like their position on a particular issue, most probably abortion. Judge Pickering, by way of example, is somebody. When I ran for the Senate, I had a debate with the former Vice President of the United States, Walter Mondale, a magnificent American, a great public servant, who I simply disagreed with on certain issues. But in the debate that came up, I talked about it at that time, saying: We can't obstruct.

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

Who seeks recognition? The Senator from New Jersey.

Mr. CORZINE. Mr. President, I would like to start with a little bit of perspective on the judiciary, and I would like to respond a bit to the economic arguments I heard discussed over the last 30 minutes which are sort of not in touch with reality, certainly not in touch with the reality of those folks who live and work in New Jersey and those across the country.

Let's start with a simple proposition that there are 172 nominations before the Senate. The commonsense reality is, 168 have been confirmed, 4 have been held up. I hear this view that people should not have the ability to express their point of view about judicial philosophy, temperament, the perspective of the individual judges. But I don't know what we are here for if we are not supposed to exercise our judgment and work within the rules as established. One hundred sixty-eight to four seems to be a pretty favorable ratio by most human standards anywhere across America, when you look at judgments about the quality of folks you would interview for a job. It is sort of common sense.

In my own State of New Jersey, we are six for six, including a circuit court judge. We worked very carefully with the folks at the White House about background, worked in a cooperative sense. That has not happened across all of America. That is what people are arguing is now the case with the four who are on this board. There is a legitimate right to debate one's judicial philosophy. The rules of the Senate are very clear and have been used many other times.

This idea that there have been no filibusters is blatantly false. We can go back to the Abe Fortas situation, and there are other situations where it may not have been the end game but it was certainly the starting point for holding back, going forward with judicial nominations. There are a number of them. I am sure these have been identified here on the floor, whether it was the Fortas nomination for chief justice; Rosemary Barkett, a judicial nominee, had a similar situation; Supreme Court Justice Steven Breyer, Judge Paez, Lee Sarokin, and Marsha Berzon.

It has been argued and researched that 63 judicial nominees of the committee and 6 judicial nominees on the floor have been filibustered in the past. It is not something that is new. But what is really hypocritical, in my view, is we are focused on a technique that has been used to stop four judges many of us on this side of the aisle find extreme, when 55 Clinton nominees were not given hearings to be even discussed, 55. I could read the list of them. That is about, if my mathematics are correct, relative to the number, 30 percent stopped, cold dead stopped, without even having an opportunity to be reviewed, 55 Clinton nominees against 4 Bush nominees.

I don't know that it serves a useful purpose to say, we did this and we did that. The fact is we need to have a serious review of judges, and people ought to be able to express their opinions within the rules about whether they think they are qualified on the basis of standards that are generally accepted: Judicial philosophy, whether they will uphold the Constitution, settled law, all those kinds of issues.

The fact is in another time or another place, people primarily used the committee process to keep judicial nominees from even being reviewed.

What is the result? I want to reconfirm that 98 percent of those nominees President Bush has put forward have been confirmed. Only 2 percent have not. Again, that is an overwhelming commitment to moving judges through this process and significantly better than has occurred in previous administrations.

Again, the filibuster has been used as well. I just don't think we are reciting facts properly and history right.

There is another very fundamental situation here. Contrary to the claims we hear, we think there is some kind of vacancy crisis in our Federal courts. I would like to have 100 percent myself, but 95 percent of Federal judicial appointments are now filled. When we had a change of administration, because of that 55 and the process that went through, it was only 75 percent. There was a distinct process of holding back, pushing back with regard to what the folks on the other side were prepared to do when working with another President. That is why when people talk about 168 to 4, that perspective is not being brought to the discussion.

It is very simple: 55 folks stopped in the last 4 years, and there has been 4. People can argue that somehow from their perspective those 55 were outside the mainstream. Some were not brought up for discussion in the committee. But the process we are using here is to make sure the debate on the

floor brings out these extreme views, operating within the rules. I think we have facilitated a significant improvement in the ability of the courts to fulfill their function. That is what is the practical element. Those 168 are real because they are dealing with the issues the American public has to deal with. Our court system is actually functioning better than it has because we have been very facile in making sure judicial appointments have gone through. It is just a matter of perspective.

Mr. TALENT. Will my friend from New Jersey yield for a question?

Mr. CORZINE. Certainly.

Mr. TALENT. Are you aware with regard to any of those committee actions or inactions to which you refer, was there ever a case where a majority of the committee expressed a desire to vote up or down on those nominees?

Mr. CORZINE. The Senator from Missouri maybe has reviewed all of the transcripts from those committees. I have not. I do know the President of the United States sent nominations here and in most instances they were. The 55 that I have, and there are a number of them I haven't reviewed, there was an attempt to try to get a number of those before the committee, and they were not allowed to be debated. It never got started. I can't speak to all 55. I have not reviewed all of the transcripts.

Mr. TALENT. I am not going to intrude on the Senator's time. He referred to a lack of respect. I think the reason is because I don't believe there has been a situation where a majority of the committee or body wanted to vote up or down on a nominee when they didn't have that chance. I thank the Senator for yielding.

Mr. CORZINE. I appreciate the discussion with the Senator from Missouri.

What we have here, in my view, at 20 minutes of 4 on a Thursday morning, is a view that there were different techniques used by the folks on the other side of the aisle to restrict a President from having the kinds of judges and the number of judges they wanted to put into the courts which actually led to something that wasn't good for the American people; that is, a much higher vacancy rate in the Federal district courts than is the case today. I know in my own case and in the State of New Jersey, we are five for five on district judges and one for one on circuit judges, because we are working in a cooperative manner to try to get to a result that will allow the courts to have the judges to be able to deal with the cases. I think 168 is showing that happened across this country. So because there are three or four judges people believe are outside the mainstream—the special-interest stuff I have a hard time understanding. I am not a lawyer, but I read some of these cases where people don't believe in the incorporation of businesses and want to take away fundamental purposes of how that works in this world. That is outside the mainstream. That is difficult for me to understand. Therefore, I think it is perfectly reasonable to question whether that is an appropriate appointment to one of our most important appeals courts.

So, again, one of those four—or maybe it will be six, as the Senator talks about, by the time we get to whatever hour in the morning we vote on this stuff on Friday; maybe that will be the case. But I think it is important we as Senators review the record and, within the rules, use our judgment to decide whether someone is in the mainstream of judicial philosophy. Apparently, that was happening in previous administrations for 55 folks; they were just using a different technique as opposed to this particular one.

Again, I go back to the fundamental issue. It left a gaping hole in the ability of our courts to deal with the American public's needs in the Federal courts—the 75 percent fill ratio, or 25 percent vacancy ratio. Now we have a 4.8 percent vacancy ratio. I think, ultimately, somebody is going to say what is going on here? Are we actually dealing with the issues the American people need, which is having the judicial system that actually works.

I have to talk a little bit about the economy because I heard some other questions, and we talked about payroll employment versus other measures. Frankly, I don't know a single serious economist in America who doesn't say we measure the standard job performance of this economy, this country, by looking at payroll employment. It is accepted as the base standard by economists across the country. The kinds of comparisons to other standards, those are all well and good. I think they reflect, frankly, the growth in the population.

We are not creating jobs rapidly enough to actually reduce the level of unemployment. That is why payrolls have always been used as a basic issue, because it takes into account the growth of the population as well, which, by the way, we are at about the lowest—I think we had a little uptick, a minor uptick in the last 2 months in the percentage of Americans who are working out of the total population. The fact is we have lost something approaching 3 million payroll jobs under this administration. What is more important is to get to the basic fact, which is 9 million Americans are unemployed. That is the real deal. It is not whether it is growing—certainly, it is a painful experience for those who lost jobs, but there are 9 million Americans who want to work and cannot do it. It is up by 3 million since this administration took hold. Nobody is pulling that number out of the air. That is why we are trying to talk about those jobs versus the four judicial jobs within the perspective I tried to relate.

When you have 95 percent of the positions filled in the judiciary, I think somebody is doing their job filling those holes. But we are not doing the right things about creating jobs for Americans. That is just fact. It is not hyperventilation. Nine million Americans are looking for work and they don't have it. By the way, 2 million of them have been unemployed longer than 6 months. One could ask what are we doing about that. You know, we have not passed a minimum wage, we have not extended unemployment insurance for people who are now coming on the rolls of the long-term unemployed. We are not really creating a jobs program in a serious sense. We have certainly cut taxes and I guess—to go back to Econ 101, at some point if you throw enough money into the system, we will create some jobs. We have about a $300 billion budget deficit and a 1 percent interest rate, and we have had them for a very long period of time, at these stimulative levels. At some point, you are going to get job growth. Was it an efficient way to do it? I wonder, when we have created about $5,000 in debt for every individual in America. That doesn't seem to jibe with an efficient use of resources. It certainly is not a rampage of growth or a booming economy that we have for most Americans.

The latest economic statistics came out and everybody said how wonderful they were. They weren't too good in New Jersey. We lost another 11,800 jobs—11,800 manufacturing jobs in the month of August. We have a little bit of lag between when the State numbers come out and the Federal numbers. We are about to close our last two auto plants in New Jersey. We are closing the Ford plant for sure, in Edison, and we have the GM plant, which they are going to extend at about half production for the next 2 years, and they are going to look at shutting it down.

Every week, we get another major employer laying off manufacturing jobs in the State of New Jersey. New Jersey probably has had as strong an economy as anyplace because we have the pharmaceutical industry, which is growing. But our manufacturing base is out the window.

We don't talk about those 9 million jobs. We are talking about four jobs here, and I don't get it. I don't see what our priorities are. We are trying to talk about minimum wage and about transportation and we are trying to talk about a whole host of things that would allow us to have the opportunity to get this economy going and create jobs for those 9 million people—not these 4 folks, where we have already approved 98 percent of those interviewing for those jobs.

I don't know. I am sort of simple, but I think a 98 percent positive conclusion out of 172 folks interviewing for these jobs is pretty good. We have actually filled in the holes in the Federal judiciary, and we have a major problem with 9 million Americans who are looking for work. We don't spend any time talking about how we are going to create jobs here, except we are going to

have tax cuts every hour on the hour between now and the next decade, which will put debt on my kids and then their kids to follow. We may get some job growth as a function of doing this, but was it efficiently provided to the American people? I think that is very hard to say.

UNANIMOUS CONSENT REQUEST—S. 224

Mr. President, I ask unanimous consent that the Senate return to legislative session and proceed to the consideration of calendar No. 3, S. 224, a bill to increase the minimum wage, that it be read a third time and passed, and the motion to reconsider be laid upon the table.

The PRESIDING OFFICER. Is there objection?

Mr. COLEMAN. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. CORZINE. Again, I think we have our priorities mixed up here. There are a whole bunch of folks in this country who benefit enormously from the minimum wage. When they go out and buy things, that will stimulate the economy. One of the great opportunities for us is to deal with some of these economic issues that we have, instead of haranguing. I think, unfortunately, about these four folks, about whom I think there is legitimate reason to have a debate—where they stand on judicial philosophy, and how their history is, or how their writings fit with settled law and from a constitutional perspective.

Again, we have put 98 percent of the nominees to work. We have not done anything about the 9 million Americans who don't have a job, who want to work. There are a whole bunch more who have dropped out of the system—I think about 4 million, if memory serves me correctly. It strikes me we have our priorities mixed up. I don't understand it. By the way, I will go through some other statistics. It is actually mind-boggling to me that we are spending so much time on four people, when the unemployment rate is 6 percent, and 9 million folks are without jobs. That is up from 4.1 percent 3 years ago. The poverty rate is up from 11.3 percent to 12.1 percent; I think that is 4 million people. The percentage of uninsured has gone up from 14.2 percent to 15.2 percent. About 2 million people have lost their health insurance in the last 3 years. The deficit has gone from a $236 billion surplus to a $304 billion deficit.

If somebody was running my company and they had a negative cash flow of 500 some odd billion dollars, I think I would find a new CEO. The national debt went from $5.6 trillion to $6.8 trillion. I guess that is for my grandkids to worry about, and it will be explosive. And judicial vacancies have gone down from about 10 percent to 4.6 percent. What is this picture? I just don't know where our priorities are in the scheme of things. We are talking about four people and we have 9 million Americans and a whole bunch who haven't had an increase in the minimum wage in 7 years. We cannot even get a vote on it and haven't been able to get a vote on it. They are not interested. Does that make any sense? I don't get it.

This is not the right priority where I come from, or for most Americans. I would rather fight like crazy for the 9 million people who want to work than just four judicial nominees out of the 168 judges who have already been approved. It is very important, in my view, that we have a proper prioritization and perspective on what is going on here, particularly when you look at it in the context of other techniques being used to hold up a whole bunch of judges at another period of time. We are talking about four here. I am no great legal constitutional scholar, but 168 to 4 is a pretty real number, and 55 folks left out by the other side is a real number.

I see my very good friend from Arkansas. It looks like he is chomping to go to work here. I would very much appreciate it if he has a comment on either of the things I have said, or I am sure he has more brilliant remarks to make.

I yield the floor to my friend from Arkansas.

Mr. PRYOR. Mr. President, I am not sure we have anybody in this Chamber or in this body who is more knowledgeable about the economy and economic principles than our colleague from New Jersey. He has proven himself on the field of battle on these economic issues.

How much time do I have left?

The PRESIDING OFFICER. Seven minutes 15 seconds.

Mr. PRYOR. I want to spend the next few minutes talking about a man who was one of President Bush's nominees for a judicial post in the Eastern District of Arkansas. He is from Arkansas. While I was not consulted on his nomination, I do support his confirmation. Actually, this ties in a little with Senator TALENT's question of a few moments ago. I notice Senator TALENT did not accuse the Democrats of being obstructionists. Some have, of course, but I know he did not do that tonight.

This is, as Paul Harvey might say, the rest of the story, or at least a part of the rest of the story. Leon Holmes is a very distinguished lawyer in Little Rock. His academic accomplishments and his love of academia are more than evident when you look at his background and qualifications for office. He has been a clerk for the Arkansas Supreme Court. He has worked for some very prestigious, very well known Little Rock law firms. He has been appointed judge on a couple of occasions for the Arkansas Supreme Court. In fact, I had the privilege of practicing with Leon Holmes in Little Rock in a law firm called Wright Lindsay & Jennings, which is truly a wonderful place to practice law. I got to know Leon well there and saw his legal acumen up close.

I understand Leon's qualifications for office. He has won different awards. The American Bar Association gave him a well qualified/qualified stamp. He and I may differ on some issues; nonetheless, he is very broadly supported by members of the Arkansas bar, and I support him.

Let me tell you a little bit about the nomination. He was nominated by President Bush on January 29 of this year. He went to the Judiciary Committee. He got out of Judiciary on May 1—over 6 months ago. He got out of Judiciary and he has been languishing on the Executive Calendar ever since. In fact, today I sent a letter to the Senate majority leader, BILL FRIST, and the Judiciary chairman, ORRIN HATCH, inquiring about the status of Leon Holmes' nomination, asking them to bring his nomination forward. If I may, I would like to read a portion of this letter into the RECORD. It says:

> I am writing to express my concerns regarding the nomination of Leon Holmes to the U.S. District Court for the Eastern District of Arkansas.
>
> Mr. Holmes has garnered overwhelming support from the Arkansas State Bar, of which I am a member, and received the rating of Qualified/Well Qualified from the American Bar Association. He possesses the skill, ability, and experience to enable him to serve as a member of the judiciary. While Mr. Holmes and I may differ on some issues, I believe he is well able to carry out his duties according to the Constitution and that he will apply established precedent as judicial canons require.

The letter goes on basically asking the majority leader and chairman of the Judiciary Committee to bring his nomination to an up-or-down vote. There is no effort on the Democratic side to filibuster Mr. Holmes' nomination, even though I have no doubt a number of my Democratic colleagues will vote against him. I remain perplexed as to why he has not come to the floor yet.

I am puzzled why the Republican leadership has yet to bring up his nomination. I hope I will receive a response to the letter soon. So as Paul Harvey says, that is the rest of the story.

One reason I wanted to tell this story is because I receive phone calls in our office from Arkansas and around the country asking me to vote for certain of President Bush's nominations. Our staff will tell them: Senator PRYOR already voted for 67 of President Bush's judicial nominations, and their response is, ''no, he hasn't.''

Well, sure I have. See, the rest of the story is not being told. I think a lot of people around the country perceive we are blocking every single judicial nomination that comes down the pike, but that is not true. As Senator CORZINE mentioned a few minutes ago, the 168 nominations is a historically high number, just like the 98 percentage number is a historically high percentage for approved judicial nominations. I don't think you will find that repeated in American history.

We need to keep this in context. Here I am from Arkansas, and I support one

of the President's nominees, but I cannot get him to the floor. There is no obstruction on Mr. Holmes, and there is not going to be a filibuster. I have talked to many Senators on our side and on the Republican side. Yet he has not come up for a vote yet.

There is one other thing I want to mention in the time I have remaining, and that is, back in April, I signed a letter with a number of my Republican colleagues, freshman colleagues, about this judicial nomination process. I asked the leadership, Senator FRIST and Senator DASCHLE, to try to work together with the White House to try to make sure we don't get to this point where we are this morning—that is, gridlock over some of these nominations.

There is enough blame to go around, and the last thing I want is a 30-hour blame-a-thon. I don't want to participate in that. But I do think we need to revisit what we are doing. I think we need to put things in the past and leave them there and move forward on these nominations. If it is payback upon payback, we are never going to get anything done. Both sides have some responsibility there.

Also, I say I believe a big portion of the responsibility rests with the White House. After all, the White House starts this process. The President is the one, under the Constitution, who does the nominating, and I know many of my Democratic colleagues feel they have not been consulted—I know I have not been. They feel they have not been consulted and, in fact, they have been deliberately shut out of the process. I think we need to work with the White House to try to make this better.

I think the White House has a responsibility. We all have some responsibility. I think if we work hard, we can make this process work much better.

How much time do we have on our side?

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

Mr. TALENT. Mr. President, I wish I could say it is a pleasure to be here with you at 4 o'clock in the morning. It is certainly always enjoyable to see you. This is a subject that is certainly worth discussing and it is extremely important. I have not been all that involved in it before. There are a number of other issues on which I have been working.

I am here this evening because, when I look at the qualifications of the four nominees we are considering, Judge Owen, General Pryor, Judge Kuhl, and Justice Brown, those qualifications to me seem so outstanding that it seems that, had these nominees come up in the past, they would not only have been voted on but they would have been approved, and not only approved but approved by an overwhelming majority; as the Senator from Pennsylvania said a little while ago, approved by a voice vote. Now they are being filibustered.

For the first time in the Nation's history, court of appeals nominations by the President of the United States are being stopped on the Senate floor by a minority using the filibuster. It never happened before. They filibustered four to this point. I hope that the minority will not filibuster two more on Friday.

I understand there are six other nominations the President has made to the court of appeals for whom there is a threat of a filibuster. So it is quite possible that by the end of the year a minority of this body will have filibustered and stopped on the Senate floor, 12 court of appeals nominations, and that has never happened, not even once, in the history of the United States.

Then there are some who stand here and say this is nothing new. It is not only new, it is unprecedented. It is not only unprecedented, it is action on a scale that nobody even contemplated before. You cannot look at the total number of nominations; you have to look at the nominations for the courts of appeals. You have to compare apples to apples and oranges to oranges if you want these figures to mean anything.

The President of the United States has nominated 46 people for the court of appeals so far; 29 of them have been confirmed, 6 of them have been filibustered or very probably will be filibustered by Friday; another 6 are threatened to be filibustered. I certainly invite my friends who have been part of this filibustering minority to stand here and tell us tonight if they don't intend to filibuster any more besides the six we are talking about. I don't think they are going to do that. That will make a total of 12 filibustered or threatened to be filibustered, 12 out of the 46 nominations the President has made to the court of appeals.

One-quarter of the nominations the President has made to the court of appeals have been or are threatened to be filibustered. In the past 200 years, not one was successfully filibustered. It is an unprecedented usurpation or attempt to usurp the President's power from the Constitution, and the traditions of this body, to nominate people and get them appointed to the court of appeals.

I heard the senior Senator from New York speak. He is my friend and I work with him on a number of issues. I find him to be delightful—well maybe not delightful, but he is my friend. He is a delight.

He said the problem is, if they just come to me, I am the ranking member of the courts subcommittee, if the White House will just come to me before they make these nominations and consult with me. What he was saying is that together we could come up with good nominees. I think this is what the minority here is aiming to do. When I say the minority, I mean the group of people who are filibustering. They want a co-Presidency, as far as this is concerned; they hope the President will consult with them before making the nominations.

I love my friend, the senior Senator from New York. Nobody from Missouri had a chance to vote for him. We have one President. He makes the nominations. The Senate's job is to vote to confirm. How has that job been conducted in the past, and exercised in the past? It is worth looking at. I say this not as a person who has been a Member of this body before this year, but as a citizen of the United States. I have looked at what happened in the past when we had these vacancies.

When the President nominates, what do Presidents traditionally look at? What do you think? They look, first, at personal integrity. They want to nominate people who have integrity and a reputation for integrity. They look for people who they know or people who they know, know. In other words, if you want to be nominated to a judgeship, you try to talk to people in the administration you know or talk to people who know people in the administration. So you contact your Senator or you contact somebody in the Department of Justice, just like applying for any other job. If you know somebody, you contact him.

And, of course, Presidents look at qualifications. They look at the achievements of prospective nominees in particular fields and then they look at relevant biographical information that may be specific to that appointment. Perhaps they are looking for a particular ethnic diversity or geographic consideration. Then the President and Department of Justice put all that together and they nominate somebody and send him down here. And then the Senate votes to confirm.

How has the Senate done that in the past? The Senate has acted as a kind of check. The Senate looks at these nominees to make certain they have the positive qualifications that the President has said they have. The Senate looks at nominees to make certain they have minimum achievements and experience so that a lawyer, looking at a nominee, would say, yes, that is what a person ought to have to be on the Federal court bench.

The nominee may have been a law professor. They may have been a practicing lawyer or a public official. Have they been out of law school long enough, received awards, published in their fields, litigated enough cases? The Senate looks at that for a minimum. We don't want to confirm somebody where the bench and bar around the country would look at that person and say, no, they haven't been out of law school long enough to serve on the Federal bench.

Then, of course, the Senate looks at integrity. That is really a negative check: to make certain what they don't have. To make certain that they don't have stains on their record such that they should not serve on the Federal bench. They didn't cheat in law school. They have not been found guilty of ethics violations in the practice of law. There are not any notorious examples of incompetence in their background.

That is what the Senate has looked at in the past: where nominees have met those qualifications; had that minimum that the Senate looks for; have not had the negative things the Senate wants to make certain they have not had. In the past, those nominees got a hearing. They were voted out of committee. They not only were put on the floor, but they got a vote on the floor. They not only got a vote on the floor, but they were confirmed, and they were not only confirmed, they were typically confirmed by overwhelming majorities, even by Senators who were of a different party, who disagreed with their jurisprudence. That is what has happened in the past and we have had a tremendous break from that precedent and that tradition in this Senate.

Of that action in the past—some here have said that the Senate should not be a rubberstamp. Was the Senate a rubberstamp for 200 years? No, it was not. What the Senate did was show a respect for the constitutional separation of powers, which a minority of this Senate now refuses to show.

Let's suppose families have, in their own way, constitutional arrangements just as this country does. Let's suppose that in some family the husband and wife have talked about who is going to handle the finances. They have decided that because the wife is maybe better at those things, or better able to handle those things, that the wife is going to handle the finances. If this is beginning to sound like my family, the analogy is pretty apt. So the wife in this specific family makes decisions regarding investments, and then goes to the husband and says: What do you think, I would like to put some money in this? Or I would like to invest in this thing.

The wife gives him the benefit of the doubt. Is that a rubberstamp? That is a recognition, then, of the tradition of that family. The wife in that case has traditionally done this because that is how it is set up. It is not a rubberstamp; it is giving the benefit of the doubt, when appropriate, according to the arrangements that have traditionally prevailed in that family. That is what the Senate did for 200 years and that is what the minority is not doing now. That is why we are losing perspective about it.

I will say this to my good friend from New Jersey, who is accusing us of losing perspective: Yes, we are losing perspective because about a quarter of the President's nominees to the court of appeals have been filibustered or threatened to be filibustered; because the Members who are filibustering want to be consulted. They want to be the ones who make the nominations when nobody had a chance to vote for them for President. That is enough to cause us to lose perspective.

Why has it changed? What is causing this to happen?

My friend from Pennsylvania asked that: Why? Why are we doing this? It's disrupting this body, it's dividing us, and it's an injustice to these people. I am going to get to that at the end if I have time. The worst thing about it is these people, who should be confirmed, or would have been confirmed 10 years ago, deserve to serve. They worked hard and millions of people around the country are going to wonder what is wrong with them because we can't even get a vote. It is not right. Why has it happened?

I hear different things. I don't know. I talked to some people. I hear things that maybe Members on the other side at some point went to a retreat and a bunch of law professors met with them and told them if they didn't do something like this there would be an imbalance in the Federal courts. If that is true—I hear this, I don't know—I can immediately see a basic part of the problem, because we have law professors giving advice about something besides the law. I have a rule that when law professors give advice about something besides the law, it is almost always wrong. I say this as a person who used to be a kind of law professor. I never actually made it. I was a fellow, an adjunct professor. And they are brilliant and you get them out of their field and it is risky to take their advice about anything.

Let's go back to imbalance. Going back through the Carter Presidency, which is back about 26 years—the last generation in the modern era. In the last 26 years, there has been a Republican President 14 years, a Democratic President 12 years. By the way, I am going to give overall figures for district court and court of appeals numbers but they don't vary. If you break them out and separate them, they don't vary that much.

President Carter had confirmed 265 nominees to the bench; President Clinton, 377, for a total of 644, which is about 53 confirmed per year. President Reagan had 384. He was there for 8 years. The first President Bush had 195. Up to this point the current President Bush has had 168, for 747 over 14 years which is, Mr. President, about 53 per year.

Where is the imbalance? That a Republican President for 14 years, Democrat President for 12 years, they each got about 53 per year and it is the same basically whether you break it out for court of appeals. They each got basically 10 court of appeals judges per year. There is no imbalance.

We have had balance for the last 200 years, and the reason it has worked pretty well, is that the people have elected Presidents from different philosophies and different parties. That is how you get balance. The only way you get imbalance is if you have Presidents of one particular philosophy or one particular party elected year after year, term after term after term, and that has happened and there is a technical term for that. It is called representative government.

Yes, if you lose a lot of Presidential elections in a row, there is going to be an imbalance on the Federal bench. That is the way it happens. The only time it has happened in the 20th century, by the way, is when the Democrats had the White House more than 20 years in a row, through President Roosevelt, and then through the only President ever from Missouri, our great Harry Truman. I don't recall hearing Republicans filibustering and claiming imbalance at that time.

How much time do I have left?

The PRESIDING OFFICER. The Senator has 16 minutes.

Mr. TALENT. I have 16 minutes.

What is the other argument I hear over and over? This is why I think it is really working, and I respect this because it reflects a sincere philosophical conviction. I respect that. One of the things I tell people as I travel around and talk about the Senate and about the Congress is that I am not an institution guy. I don't stand up and wax on and on about how great the Senate is, although it is a great honor to be here.

But I will say about my colleagues, that most people who believe out there that people in the Senate don't have convictions are wrong. That is why we are here at 4 in the morning. That is the one thing that unites us. We are here because we have convictions. We all have other places we could be—in bed. We are here because we have convictions.

The other reason, which is what I really think is working here, is out of conviction, the sense that these nominees they are filibustering or threatening to filibuster are somehow too extreme. We all know what they mean when they say that. We use codes here. It means they are too extreme on social issues. Those who are filibustering disagree with these nominees on the social issues, and particularly, let's say it, that one big social issue: abortion. They disagree with them on that. So they are too extreme to be confirmed, too extreme to vote for, too extreme even to have a vote because they disagree with them on the social issues.

I have to say, because I have convictions on this, too, that we ought to look at what a definition of extreme is here. A lot of folks who are saying this voted against the ban on partial-birth abortion. I respect their conviction an awful lot but that is a pretty heinous procedure and I think America is entitled to ask: Who is extreme?

The truth is, for this process, for the purpose of confirming Federal judges, that is not the kind of analysis either side should be using. Because the truth is, if we are honest about it, on the social issues, there is not a mainstream. There are tens of millions of Americans who are on both sides of those social issues and they are good people, they are honest people, and their views deserve respect. People who hold those views deserve not to be disqualified, held as unfit for office under the Constitution of the United States, just because we disagree with them.

My wife and her law firm visited Washington over the weekend so I

stayed in town with her. Normally I go home every weekend. There is a reason for this digression. Members of her firm visited around town, had a great time, and visited the Supreme Court. Justice Breyer was kind enough to speak for a few minutes to them. And wasn't it great of him, Mr. President, to take his time to do that? He is an able jurist, one of the smartest people on the Federal bench.

He wrote the opinion of the Supreme Court striking down a partial-birth abortion ban. I couldn't disagree with him more on his jurisprudence on that issue. It wouldn't occur to me not to vote to confirm him for the Supreme Court. It would not occur to me to say his view is extreme on that, because his view is shared by millions and millions of people who are part of this political community, too.

This is one of the reasons why I feel so motivated to be here. Can the Senate contain the disagreements that we conscientiously have on issues such as this or will those disagreements blow up this process that has allowed us all to live together and legislate together for 200 years? That is the question. It will do that, unless we start treating these people we disagree with, with respect.

We can't force people to come around to our view on these issues, as passionately as we may feel. We have to persuade them. You can't persuade people unless you can talk to them and listen. And that means you can't treat them as if they are pariahs. You can't say to Janice Rogers Brown, who served for years as a justice on the California Supreme Court, and has overcome obstacles in her life that would have stopped 99 percent of other people—and you can't say to her: We disagree with you about this so you don't even get a vote. We don't respect you enough even to give you a vote. Let's not do that.

In the past, this body has debated a whole lot of difficult issues, issues that were tearing at the fabric of the country. But we have to continue as one body and we can't do that unless we treat people with respect. We have to understand there is not a mainstream on this.

We may wish everybody would agree with us, but they do not. We can't make that a litmus test. That is what is happening here. That is I think what is underlying a lot of things.

I want to focus on the human element a little bit.

How much time do I have left?

The PRESIDING OFFICER. Ten minutes.

Mr. TALENT. Ten minutes left to inflict myself on the Senate at 4:20 a.m. I think I will talk a little bit about Judge Kuhl. I have gone over her background. It is really extraordinary. I am a lawyer. I actually clerked on the court of appeals for a great judge, a good man, Richard Posner of the Seventh Circuit. I know something about Federal judges and how they get there. I don't mean any disrespect. I am trained well enough as a lawyer not to do that. I guess we are protected by the speech and debate clause here. They couldn't come after me if I didn't respect that. I respect Federal judges. I wish they all had the qualifications these people have.

There are some of them who got on the court of appeals because they knew somebody; in some cases, because they knew somebody in this body.

Judge Kuhl has been nominated to the Ninth Circuit. She has been a judge since 1995; before that, for 9 years she was a partner in a prestigious Los Angeles law firm. She was a litigator. We can forgive her that. From 1981 to 1986, she served in the Department of Justice as Deputy Solicitor Attorney, as Deputy Assistant Attorney General, and as Special Assistant to Attorney General William French Smith. She argued cases before the Supreme Court and supervised work of other attorneys. She clerked for Judge Anthony Kennedy, then a judge in the Ninth Circuit and now a member of the Supreme Court. In 1977, she graduated from Duke Law School. She has extraordinary bipartisan support. Listen to what people say about her.

Vilm Martinez, former Director of the Mexican American Legal Defense and Educational Fund, said:

> I'm a lifelong Democrat. . . . Even though we don't share the same political views, necessarily, I consider her mainstream. . . . She's careful and she's thoughtful. She's been an excellent [state court] judge, and I think she will be an excellent 9th Circuit judge, one who will approach that job the way I think that job should be approached: with great care and deference.

I wish everybody in this body had the broadmindedness of Vilma Martinez. Congratulations, Ms. Martinez.

Twenty-three women judges on the Superior Court of Los Angeles say:

> Judge Kuhl is seen by us and by members of the Bar who appear before her as a fair, careful and thoughtful judge who applies the law without bias.

She can't get a vote. Don't tell me the Senate has operated this way. It hasn't operated this way in the past. They have filibustered, or they are threatening to filibuster, about a quarter of President Bush's nominees to the circuit court of appeals. Not one ever before successfully filibustered on this floor; not one ever before filibustered with the support of the leader of either party. It isn't right.

Mr. SANTORUM. Will the Senator yield?

Mr. TALENT. I will yield, and the Senator is probably doing the Senate a favor by getting me to yield.

Mr. SANTORUM. I want to review what the Senator talked about. See this chart: 168, but that 168 includes district court judges.

Mr. TALENT. Absolutely.

Mr. SANTORUM. Explain the difference between a district court judge and a circuit court judge when it comes to matters of law and the impact of those decisions.

Mr. TALENT. I am happy to comment on that. Everybody knows what is going on here. They are filibustering the court of appeals judges because, yes, they are appellate judges. They are the more important ones. They are letting the little fish go. They are filibustering, or threatening to filibuster, about a quarter of the court of appeals judges. Another reason is they think some of these people might get nominated to the Supreme Court.

Mr. SANTORUM. At the District of Columbia level are trial court judges who basically preside over trials and the circuit court or appeals courts decide matters of law that apply across the circuit, and it can have an influence in other circuits. Is that correct?

Mr. TALENT. That is absolutely correct.

Mr. SANTORUM. Most decisions that are appealed from the trial court go to the appellate court, or the circuit court, but very few go up to the Supreme Court. Is it not true the appellate court makes the final decision in a lot of these cases?

Mr. TALENT. I have read about a group of law professors concerned about an imbalance on the court of appeals. That imbalance just doesn't exist. The same statistics I read before show Presidents back through Jimmy Carter have had each around 10 court of appeals appointments per year. It is a little bit more for the Republican Presidents; a little over 10, and a little under 10 for the Democrats, but there is no real difference. That is why it is very balanced, and we are just coming off two terms of a Democrat President. We are now in one term of a Republican. The next election is probably going to be close. I think that is probably what is working here. I hope my friends on the other side of the aisle who are filibustering don't continue to compare apples to oranges. Let us at least be fair. If you want to talk about how many were filibustered, it isn't 4 out of 168. If they follow through on this threat, it will be 12 out of 46, which is about a quarter. That was not a high point, even though that is just about a quarter. That means that only around 75 percent of them are going to be given an up-or-down vote.

My friend from Arkansas and I work on a lot of things together. She is a great Senator. She was saying if her kids brought home 98 percent in math, she would be pretty pleased about it. I would, too, if my kids brought that grade home. I have three kids. If they brought home 75 percent in math, I would be a little bit concerned, particularly when in the past it has been 100 percent.

Mr. SANTORUM. I think the analogy of the Senator from Minnesota—the Senator from Minnesota says if we are forcing what the Constitution requires 98 percent of the time, or much worse, 75 percent of the time, I think the American public would have a right to throw us out on our ears. I think they expect the Senate to enforce the Constitution 100 percent of the time. Anything less than 100 percent is an abdication of that oath we walked over

there right there on those steps before the Vice President and took. The oath has something to do with defending the Constitution—not 98 percent of the time, not 75 percent of the time, 100 percent of the time. That is not what is going on.

Mr. TALENT. I certainly thank the Senator from Pennsylvania.

How much time do I have left, if any?

The PRESIDING OFFICER (Mr. BURNS). The Senator has 2 minutes 22 seconds.

Mr. TALENT. I thank the Senator for his clarification. I think that it is very important.

In the remaining time, I will just close by reading a little bit more about Judge Kuhl. These are real people who are getting unjustly treated in this body which is supposed to be about justice.

Here is what Gretchen Nelson said. She is the officer of the Litigation Section of the Los Angeles County Bar Association and a prominent plaintiff's attorney. She probably gave money to my opponent in the last election. Here is what she said:

> I am a life-long Democrat. I am also a plaintiff's attorney. My political views are and always have been liberal. I firmly agree with U.S. Supreme Court's opinion in Roe v. Wade, and I trust that the decision will remain viable. I am opposed to the appointment of any judicial nominee who is incapable of ruling based upon a considered and impartial analysis of all the facts and legal issues presented in any matter. Judge Kuhl is not such a nominee and she is well-deserving of appointment to the Ninth Circuit.

That is what Senators would have said 5 years ago on this floor. Don't say it hasn't changed.

Anne Egerton, former law partner of Judge Kuhl:

> I understand some have raised concerns about Judge Kuhl's commitment to gender equality and reproductive rights. I don't share those concerns.

Anne Egerton goes through her background with the Arizona Women's Political Caucus.

> I have been a registered Democrat for 30 years, and I have supported [Democratic legislators]. I have no reservations in recommending Judge Carolyn Kuhl for appointment to the Ninth Circuit. I know her to be committed to the rule of law and the application of governing precedents in the area of reproductive freedom; that precedent, of course, includes Roe v. Wade and the many cases which have applied.

I don't think there is anything more to be said. I wish we could get consent to vote on these nominees and then we could go on to other business of the Senate. This is important.

What is happening to these people is wrong. What is happening to the Senate is unfortunate and bad for the country. That is why I am here and that is why we are all here at 4:30 in the morning.

I yield the floor.

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

The Senator from Rhode Island.

Mr. REED. Mr. President, we are here this morning to discuss the status of judges. My colleagues on the other side of the aisle have been rather adamant in claiming they may have been mistreated. I think there is a contradiction in their argument. Frankly, what I witnessed here as a Member of this body over the last several years in the Clinton administration was a process of systematically denying the nominees of President Clinton—qualified, indeed, very qualified nominees in their positions on the Federal bench—doing it not on the floor as we are doing here openly, but using what I would describe as a pocket filibuster. We are all aware of the notion of a pocket veto. The Constitution allows the President a certain number of days to exercise his veto, but at the end of a session he doesn't have to exercise that. He simply has to put the bill in his pocket and it will not become law. That is essentially what the Republican majority did here to so many of President Clinton's nominees. They refused to give these individuals hearings. They refused to take up the nominations or to seriously allow a process for the committee to deliberate and to consider and to recommend them for an up or down vote.

Today, for the majority to come and claim they are being mistreated and that the Constitution is being violated is to me a profound contradiction because they have very determinedly and consistently denied even a hearing to so many well-qualified individuals who were nominated by President Clinton.

That is not to suggest we are in any way trying to match their conduct. The fact we are here on the floor exercising our rights under the rules of the Senate and the Constitution of the United States to make a statement about judges, to make a statement about individuals who we feel for many reasons lack either the qualifications or the judicial temperament to serve successfully on the Federal bench, makes the record quite clear. That is in contrast to the pocket filibusters.

We have been very active and cooperative in moving 168 judges through the committee process to the floor of the Senate and to ultimate confirmation by the Senate. It is a remarkable record.

In the last year alone, I believe we have confirmed more judges than were confirmed under President Reagan's tenure with a Republican Senate at the time. This is not a record of evasion of our constitutional responsibilities. This is a record of meeting our constitutional responsibilities, one of which is to exercise our individual judgment as Senators as to the qualification of anyone to serve on the Federal bench. But as I mentioned before, what we saw so consistently and so persistently under the previous President was a Republican strategy of blocking judges by a pocket filibuster; not here on the floor, but off the floor, denying them right to a hearing.

Let me suggest this has a very pernicious effect on so many women who were nominated by President Clinton. This is a report of some of the judges nominated by President Clinton for consideration by this Senate:

Kathleen McCree-Lewis for the Sixth Circuit—again, my colleagues have been going on and on about the importance of the circuit judges. They are important. What happened when President Clinton nominated Kathleen McCree-Lewis to the Sixth Circuit? She never got a vote; never got around to the process of hearings, a debate in committee, a recommendation to the floor of the Senate; never got through to us for a vote. Helene White to the Sixth Circuit, never got a vote; Elena Kagan to the D.C. Circuit, never got a vote.

By the way, Ms. Kagan is today dean of the Harvard Law School. Is there anyone who would suggest she was not qualified to be a Federal judge? I think that would be quite an extreme statement. She was more than qualified to be a Federal judge, but she never got a vote.

Elizabeth Gibson to the Fourth Circuit, never got a vote; Christine Arguello to the Tenth Circuit, never got a vote; Bonnie Campbell to the Eighth Circuit, never got a vote; Patricia Coan to the District of Colorado, never got a vote; Valerie Couch to the District of Oklahoma, never got a vote; Rhonda Fields to the District Court for the District of Columbia, never got a vote; Dolly Gee to the Central District of California, never got a vote; Marian Johnston to the Eastern District of California, never got a vote; Sue Myerscough to the Central District of Illinois, never got a vote; Lynette Norton to the Western District of Pennsylvania, never got a vote; Linda Riegle to the District of Nevada, never got a vote; Cheryle Wattley to the Northern District of Texas, never got a vote; Lynee Lasry to the Southern District of California, never got a vote; Wenona Whitfield to the Southern District of Illinois, never got a vote; and Anabelle Rodriguez to the District of Puerto Rico, never got a vote.

That is the record of the pocket filibuster; nominated by the President of the United States; qualified; and, indeed one of these individuals I point out is now the dean of the Harvard Law School, but they never got a vote of any kind.

That is what we saw: The rules of the Senate being used by the majority to frustrate the nominees of the President of the United States. Then to come to this floor and claim this is now unprecedented and a usurpation of the Constitution of the United States when we are simply exercising our rights on the floor under the rules of the Senate to express our opinion as to the quality and qualifications of nominees to the Federal bench is I think certainly a contradiction.

With respect to some of these judges, I think the key issue here is judicial temperament. Indeed, there is a certain degree of sensitivity about judicial

temperament as one goes from the district court to the court of appeals. It is often the case that a district court judge is younger and the thought is that person will mature on the bench and maybe in future days will be of such experience and demonstrated judicial temperament that she or he would be promoted to the circuit court of appeals, and then there are direct nominees to the circuit court. But again, you have to look at someone's breadth of experience, maturity, and intellect, and again their judicial temperament.

The nominees who have been identified and have been questioned by Democrats are individuals by and large whose judicial temperament is quite questionable.

Priscilla Owen has had a long history of putting her own personal opinion above the law, of injecting political ideology into the law, rather than following precedent.

One of the things about a circuit court judge is you have to follow precedent. The Supreme Court can try to create law, but a circuit court must follow precedents of the Supreme Court. In case after case after case, there were such situations in which she just defied precedent. There is a case of medical malpractice, Weiner v. Watson, when one of our colleagues, the junior Senator from Texas, was on the Texas Supreme Court Justice, and he unequivocally rejected Judge Owen's argument, stating it was contrary to the Texas State Constitution.

Are we going to put people on courts of the United States who have a predilection to not follow the Constitution? I think not. That is one example.

You can see the same with Justice Brown who is a justice of the California courts. She has been criticized on the bench for injecting her own personal views and not following precedent. On a number of occasions, Republican colleagues have criticized her dissenting opinions for their judicial activism. In one case, Brown was ''chastized for imposing a personal theory of political economy on the bench contrary to established precedent.''

In another, she was chastized for refusing to accept acknowledged previous judicial precedent. That charge is extremely serious when you are dealing with a judge who is charged with following the precedent, following the Constitution, and following the law.

The same may be said about Judge Kuhl; again, ideology rather than legal temperament and legal reasoning seems to be her forte.

There is case after case after case. There are reasons, solid reasons to question these nominees. Our job as Senators is to raise those questions.

There have been 168 judges confirmed by the Senate for President Bush, a record number, a remarkable number. In fact, vacancies on the Federal judiciary are the lowest they have been in recent memory. It is because we have been working together. But that does not mean we surrender our obligation to question and challenge those judges who do not meet the test of judicial temperament, nonpartisan application of the law, and nonideological application of the law. And there are those whose nominations have failed.

That is what the Founding Fathers envisioned when they created a system of advise and consent. It is not advise and approve. It is advise and consent. The Senate plays an active role. There is no group of people who played a more active role in considering the nominees, certainly of President Clinton, than the Republican majority today. They did it persistently. They did it deliberately. They did it consciously. We are exercising constitutional powers.

One of the examples that was used and one of the judges who was an eminent jurist in California, nominated for the Ninth Circuit, is Judge Richard Paez. He was subject to cloture votes. He was subject to situations in which he was challenged. That is the rule. You get to do that. In fact, Judge Paez waited 1,500 days even to get a vote. That is not the case with these nominees. There were 1,500 days in which he was nominated to the Ninth Circuit. His nomination was in limbo. Finally, there was a vote and people rose up. Some supported a motion for cloture; others rejected it. So this notion that it is unprecedented to challenge a nominee for the Federal judiciary through the cloture process is fanciful. It has happened very recently. It happened with Judge Paez.

He is not the only one. Sixty-four of President Clinton's nominees never received a floor vote. One nominee, Ronnie White, was defeated on a floor vote.

We have a situation where the deeds and actions are not wrapped in the dim mist of history. These nominations were before the Senate 2 or 3 years ago. The deeds don't match the words we are hearing today. All of the outrage about the constitutional challenge and crisis. That outrage was certainly not manifested a few years ago when Judge Paez was waiting 1,500 days for a hearing and then was subject to a cloture vote just as these nominees are being subject to cloture votes.

That is one point. But there is a larger point. We are spending hours and hours and hours to demonstrate a supposed crisis, the fact that 4 individuals out of 172 have not been confirmed by this Senate, when in fact there are much greater problems facing this Nation. We have an unemployment rate that continues to hover around 6 percent, a budget deficit that is exploding and inhibiting appropriate action by this Senate on so many important issues—education reform, worker training, dealing with issues both large and small.

We have a crisis internationally that is costing us the lives of our soldiers and military personnel and billions of dollars from our Treasury. We are spending all night, long, precious hours conducting a demonstration, when we should be working on appropriations bills and we should be dealing with the issues that confront the families of America. I think it is really a demonstration of listen to what I say, don't watch what I do. Because when we watch what the Republicans do, the record is remarkable, the high number of President Bush's judicial nominees who have gone through. It is extraordinary compared to the treatment President Clinton received.

I would hope when we finish this exercise, we can in fact go forth and deal with the issues which are essential and should be dealt with. We have a minimum wage that has been stuck for years now. It should be increased. We have a host of other issues that need addressing. I hope we can.

I yield to my colleague, Senator CORZINE.

Mr. SANTORUM. Will the Senator yield for a question?

Mr. REED. I am happy to yield.

Mr. SANTORUM. The Senator from Rhode Island has complained about how the Clinton nominations were treated. Does the Senator from Rhode Island know there were 42 judges who were not brought forward out of committee. But at the end of the Bush presidency, Bush 1, there were 54 judges not brought forward out of committee? Under a Democratic Senate, President Bush 1 had 54 that were not considered. Under a Republican Senate, President Clinton only had 42 nominees. I would just suggest the record by the Republican Senate was actually better than the last Democratic Senate.

Mr. REED. Let me reclaim my time. I would simply say regardless of the residue of judges in the Bush administration versus the end of the Clinton administration, the point I am making is there was apparently a very consistent effort on the part of Republicans to deny votes to all manner of judges. I think 64 of President Clinton's nominees never got a vote, never got to the floor. I have the time. I think what it amounts to is a very deliberate protest, which the majority has the power to do, of using the committee process to deny hearings and to deny votes.

It is a contradiction then to come to the floor and say: We can use the rules of the Senate. We can use these rules and we can deny judges, but if the Democrats choose to use the rules of the Senate to challenge a judicial nominee of the President, Bush or otherwise, that represents a violation of the Constitution.

That is my point. The point is borne out regardless of the residue of judges of either administration. The record today, this Senate and the Senate under the leadership of TOM DASCHLE, shows we have done a remarkable job in confirming this President's nominees. That was not suggested in the treatment of President Clinton's nominees.

I yield to my colleague from New Jersey.

Mr. CORZINE. I appreciate the discussion my colleague from Rhode Island brought up. I wanted to clarify one point of questions about an individual. Did you suggest Elena Kagan is now the dean of the Harvard Law School?

Mr. REED. I suggested it because that is my understanding, that she was nominated for the District of Columbia circuit and she is now the dean of the Harvard Law School. She is a remarkable dean. I am somewhat prejudiced since I graduated from Harvard Law School, but she is a remarkable personality.

Mr. CORZINE. Was she unable to get a hearing in the Judiciary Committee when President Clinton nominated her for circuit court?

Mr. REED. Let me just say my recollection is she was not given a vote after being nominated to the court.

Mr. CORZINE. So she suffered from what you were suggesting, a pocket veto.

Mr. SANTORUM. Will the Senator yield for a question?

Mr. CORZINE. Yes.

Mr. SANTORUM. Do you know when the nominee you are talking about was nominated for that position?

Mr. CORZINE. As the Senator from Pennsylvania knows, I was just inquiring myself to try to find out more about this. This is not one of those I was aware of. I have a whole list of folks who waited 1,454 days, 1,000 days for a hearing, 602 days. If somebody looked at one of those nominees who was not allowed to come to the floor of the Senate for a vote, at least a broad group of folks who review the qualifications of an individual, you are qualified enough to be the dean of Harvard Law School but somehow not qualified to have a vote on the floor of the Senate.

Mr. SANTORUM. If the Senator will yield for a point of information.

Mr. CORZINE. Certainly.

Mr. SANTORUM. My understanding is the nominee you are referring to was nominated in August, 2 months before the election.

Mr. CORZINE. If the distinguished Senator from Pennsylvania would allow, I don't know what elections have to do with confirming nominees, if they have gone before the Judiciary Committee and they are qualified. That seems disingenuous in the context of, we have qualified folks. They ought to be dealing with the circumstance of having an opportunity to be reviewed and brought to the floor. What we are debating is what is the technique that has been used at different times in our history—by the way, the pretty immediate history—to deal with a very simple question that some people want to understand the judicial philosophy and actions, how an individual will deal on the court. Sometimes when Republicans are not controlling the White House, they are willing to use the committee system to make that happen. Some of us on our side of the aisle sort of wouldn't mind debating folks on the floor, using the rules to make sure we bring out extremists' points of view.

I point out, 168 to 4. I will go through the circuit courts in a minutes.

Mr. REED. Will the Senator yield?

Mr. CORZINE. Yes.

Mr. REED. A question has come up about Elena Kagan's nomination. I have some information. Ms. Kagan was nominated in June of 1999. For 18 months, there was no action on her nomination. I believe her nomination was certainly available for action by the committee and by the relevant bodies of the Senate for 18 months, yet she never received a hearing and there was no floor vote.

Mr. CORZINE. I appreciate the Senator from Rhode Island helping me respond to the Senator from Pennsylvania's question: 18 months, not 2 months; no hearing; no floor vote; someone who at least some folks who look at legal capacity and qualifications thought enough of, after she was not reviewed by the Senate either with a hearing or floor vote, to become the dean of the Harvard Law School.

Again, my point is, we seem to be talking out of a sort of surreal context. One hundred sixty-eight to four is on the face of it an important statement of how there has been cooperation. I went through in New Jersey five for five on district court judges and one circuit court judge. When people work together, you can get the positive results in this whole process.

The 168 to 4 shows we can have a positive result. Ninety-five percent of all judicial positions are filled. That, by the way, is in contrast with only 75 percent at the end of the Clinton administration, because there had been such a limited number of folks who had been able to actually get a hearing and ultimately a floor vote.

There is also the statement that we are somehow or another being far more restrictive. I do want to review that it is 10 times the number of nominees blocked by the technique of not giving hearings or allowing for nominations to be reported to the floor that occurred in the Clinton administration. It was 63 nominees blocked in the 1995-to-2000 period, against 2 percent so far in the 2001-to-2003 period of Bush nominees. There is something about the raw numbers of this that don't make sense and wouldn't to anyone if they actually focused on them in a commonsensical way.

I want to get to the circuit court judge issue. If you look back to the Carter administration on through, we heard it is roughly 10 circuit court judges a year per individual. This is sort of like figuring out when the best rate of return in the market is over the last 50 years. You can pick certain sections and everything looks wonderful. I would just like to look in this 1995-to-2000 period when Clinton nominees were languishing in the hearing room. Hearings held for judicial nominees averaged for the Clinton administration 9 versus 22 with respect to what is going on in the current situation. Judicial nominees given hearings, 43 versus 81. Circuit court judges, nominees given hearings, 9 under President Clinton, 19 circuit court. That is on average. The confirmation is 68 judges confirmed on an annual basis versus 38 in the Clinton years. That is 1995 to 2000. Circuit court judges, it was only 7, not 10 as we heard before, if you look at that 1995-to-2000 period. It is 12 judges under the current administration.

We can pick these numbers, any number you want, to try to make cases. But the fact is, we are approving more judges, we are dealing with the situation on a much more legitimate basis, on an ongoing basis than what occurred in the previous administration.

I just happen to have the yearbook of those folks who were left out in 1995 to 2000. There could be four we would have here supposedly under the current situation.

By the way, I happen to know one of these judges, Stephen Orlofsky, a district judge in New Jersey who was unanimously confirmed for district court judge and then never got a hearing. I happened to know the specifics of that because it was closer to home. Ultimately we just filled this position with Michael Chertoff who seems to me to be a fine appointment, one I recommended, stood by and pushed very hard for because people worked together. They cooperated, the White House, the folks in the Judiciary Committee, and the Senators from the area. I think this can be done. I think 168 to 4 shows it is being done. I would contrast that with the over 50 nominees, 1995 to 2000, who never got a hearing.

I am just going to point out two of these. Judge Helene White of Michigan was nominated to the Sixth Circuit, waited in vain 4 years, 1,454 days for a hearing. It may not be a filibuster on the floor, but for 1,454 days she couldn't get a hearing. I think it gets to the same result. We are not dealing with Presidential nominations. The fact is, there were 55 of these folks. In fact, we have only identified four who seemed to be so far out of the mainstream that a number of us are concerned about how that fits.

I could go through this. There is a James Beatty from North Carolina nominated to the Fourth Circuit. He didn't get a hearing either, waited 3 years, 1,033 days, never got a hearing. This went on. You could get on down into the weeds on a whole series of these folks. But these people never got a hearing. It is just a different technique. We are talking about four people. There is a legitimate view that their actions were outside the mainstream. Maybe they got votes once they got to the floor, but they never got out of committee. I think that is a major issue.

The other thing I will segue off into is the issue the Senator from Rhode Island talked about. What is really hard about this is there is an incredible agenda for America to be discussing. I think we could afford to spend 30 hours talking about how we put 9 million Americans back to work. I think it is pretty hard to understand how we got the priorities. We have 168 positive elements with regard to our judicial nominations accepted and only 4 turned down, but we have had 3 million lost jobs, 2½ million manufacturing jobs. We have had the deficit go from a $236 billion surplus to a $304 billion deficit. We have seen a $500 billion plus negative cashflow because we are managing the economy poorly. We have seen it hurt and bite real individuals, 9 million. Two million people have been unemployed longer than their unemployment benefits would allow; 4 million people have dropped off the rolls.

It is an incredible misprioritization, in my view, that we are talking about four judges when there are 9 million people that we ought to be figuring out how to get back to work.

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

Mr. CORZINE. I thank the Chair. We will be back.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

Mr. SANTORUM. Mr. President, I want to respond to what the Senator from New Jersey has said. I think to put it into the proper context, the Senator from New Jersey is talking about people who were nominated by President Clinton who didn't get hearings. Most of the people who didn't get hearings had blue-slip problems. Democrats, right now, are holding members of their States in committee—right now—with blue slips. That has been done.

In fact, there are a whole bunch from Michigan being held by the Senators from Michigan for the circuit court, by blue slips. Democrats are holding up judges right now. So the idea that we are going to compare that, which has been a historical right of Senators, to the home State being consulted on nominations for the district court—speaking as a Senator from Pennsylvania, I can certainly suggest to the President who I would like him to look at for the circuit court from my State. But I don't get a right to tell him who it is. The precedent has not been that way. The Senators from Michigan are blue-slipping these nominees and they have blue-slipped others.

Some of the nominees pointed out by the Senator from New Jersey, held by the Clinton administration, were actually pulled by the Clinton administration. The number that were actually not pulled because of FBI problems were 42, not 63; 42 did not receive a hearing. Some of them had blue-slip problems.

Members were not properly consulted from the States. Some were Democrats and some were Republicans. This has been a practice throughout Senate history. The question is not whether that practice should be changed. Some suggest—and, in fact, there has been a movement by several people to try to change that process. But this is something that is a prerogative of home State Senators, which has been a prerogative of home State Senators throughout the tradition of the Senate. It is one that I think most Members would say is probably a good thing.

Home State Senators are consulted by the President before people from their State are nominated. They should have some advice and consent into the process. When they don't, some Senators get very upset about that and they sign a negative blue slip.

So let's talk about apples to apples. We have 42 Clinton nominees not acted upon for a variety of different reasons; some the committee didn't like, some were blue-slipped, some were submitted late in the process. So there were 42, after 8 years. There were 377 confirmed nominees and 1 was defeated on the Senate floor. There were zero filibusters on the floor.

Under President Bush 41, there were 54 nominees not considered by the Democratic Senate Judiciary Committee—more than President Bush, substantially less number of nominees confirmed by the Senate.

Now, we don't know how many George W. Bush nominees are not going to be confirmed by the end of this year or next year, but there will be some. Some will be nominated late in the process, and it takes a while for the process to work. There will always be some in the pipeline. That is the way the process works. So the idea that we are going to take the normal process of processing judges here and say we have not considered every one of them and that sort of makes everything all equal, no it does not.

The issue here is that, once the Judiciary Committee has done their job, just as every committee here does their job—lots of committees have nominations. It is their job to scrub them and find out whether they are qualified and capable to do the job and report them to the Senate floor if they think they are.

I was on the Armed Services Committee. We reviewed thousands of nominations; some we didn't report out because we didn't think they were proper for promotion or appointment. That is the obligation of the committee.

We get lots of bills in these committees. Is every bill that we don't report out somehow as a result of a filibuster in the Senate? I don't think so. That is the job of the committee. Once the committee makes the determination and the majority of the committee—whatever it is, Democrat or Republican, or a combination—reports a nominee out, reports a bill out, the question is, what happens on the floor of the Senate?

With respect to nominations, since the filibuster rule was put into place, 2,372 nominations have come to the floor of the Senate, and not 1 has ever been stopped from an up-or-down vote. Not one. All of them received up-or-down votes.

This idea that 168 to 4—we keep hearing that is a good percentage. Is it? Is it a good percentage when the four are subjected to a process that has never been done before? It is soon to be 6, promises to be 12. All of a sudden, 4, 6, 12—exponential growth here. Why? Because we are going down a very twisted and tortured path, with the logic that is being followed by the minority in the Senate. What is happening here has never happened in the history of the Senate.

This is a great body. Incredible debates have occurred here in the past. This is the greatest deliberative body in the world. It should be. We should talk about these issues. It is great that we are here all through the night talking about this. But in the end, our responsibility, according to the Constitution, is what every other Senate for 107 sessions of the Senate, for 214 years, has done. Our responsibility under the advise and consent clause of the Constitution is to consider judicial nominations and give them a vote up or down. That is what every Senate leader, every Senator who had the opportunity to have an impact on this process—they all came down with the decision that that is what this constitutional provision meant—until this year.

Some have suggested, well, these judges are so far out of the mainstream; they are so bad; there have never been judges this bad; these guys are really bad; they are not just bad, they are really bad, worse than we have ever seen in 214 years; nobody has ever been this bad; therefore, we have to change the rules.

Let's talk about a couple of judges. One who I voted against—I will use one of them—was Judge Paez, who was referred to on the other side. I voted against Judge Paez. But I voted for cloture. I thought Judge Paez would be one of the worst judges this country would ever see. I didn't want him to be a judge. He was already a judge in district court, but I would loathe to put him on the Ninth Circuit because I thought he would absolutely take the Constitution and set a match to it and throw it in the trash can and do whatever he damn well pleased.

Well, they are saying that Judge Pickering is so far out of the mainstream that he would light a match to the Constitution and throw it away and do whatever he pleases. That is pretty much what they are saying. Well, let's look at Judge Pickering and Judge Paez and see what they did with two similar cases.

Judge Paez and Judge Pickering both had cases before them having to do with sentencing guidelines. Judge Pickering didn't like the sentencing guidelines that were before him in a case. The other side has used this case

as their principal reason—one of them—of opposing Judge Pickering. They didn't like the way he dealt with this case because he didn't like the sentencing guidelines. So what did Judge Pickering do that they really don't like? They find it deplorable conduct that this judge would do this. What did he do? He complained about it. He complained about it. That is it. Judge Pickering complained about it.

What did Judge Paez do? He struck it down and said it was unconstitutional.

Now, who is the judge that is throwing the Constitution in the trash can? What was the provision that Judge Paez struck down and said was unconstitutional? The three strikes and you are out provision, which was voted in by the people of California. What happened to Judge Paez? His decision was overturned by the U.S. Supreme Court.

Who is the mainstream and who is the extreme? Every time you hear mainstream over there, put an X in front of it. It has nothing to do with mainstream. It is extreme. It is dangerous.

Let's talk about some of other Judge Paez's decisions. He was one who tried to stop the California election a few months ago. Yes, he was one of the ones who said it is unconstitutional for them to do that. Oh, by the way, he was also on the Pledge of Allegiance case and said ''under God'' should not be in the pledge. Oh, he is very mainstream, the kind of guy we really want. The Senator from New York said tonight, ''I think he is in the mainstream.'' Understand, folks, what mainstream is: ''Under God'' not allowed in the pledge, the three strikes and you are out law is unconstitutional, and the California election is unconstitutional. If I don't like it, it is unconstitutional. That is mainstream? A government of men, not of laws is mainstream? This is very dangerous, folks.

People ask me all the time: Senator, why should this matter to us, what is going on here? Why does this matter? What do judges have to do with my life? Well, the answer to that question should be: not much. That is what the answer should be—not much. Unless you get into trouble one way or another, it should not matter that much to you at all.

What a judge should do is as little as possible. They should try to make decisions based on the narrowest law possible, not try to make pronouncements and change the law from the bench or amend the Constitution from the bench. They should do as little as possible.

See, that bothers a lot of my colleagues on the other side of the aisle. They don't want judges who will do as little as possible. What they are concerned about with Judge Pickering is not that he will do as little as possible. They are concerned he will do as little as possible, that he will make decisions based on the narrowest grounds, not broad, sweeping grounds, the grounds that change laws and create new rights or responsibilities. No, they want someone who will put their world view in the law that they cannot accomplish through the legislative process. They want judges who will do it through the judicial process. That is what they are getting. They don't want anybody who will say we are going to stop doing that.

That is not what the Founders wanted us to do here. If they wanted us to respect the legislative branch and presume that what they pass is constitutional—if in fact it is not, we have problems—then decide the issue on the narrowest grounds. That is what we want. That is not what they want.

I am really troubled. I am really troubled by what I see going on in the Senate of people who are willing—for what? For what cause? Are they willing to take the Constitution of the United States, when it comes to the confirmation of judicial nominees, which has been upheld by every Congress in history, and turn it on its ear to accomplish some goal?

My question is—and I asked it earlier—in 214 years, no group of Senators ever decided that it was what they cared about, with respect to the courts, that it was so important that they were willing to go against the Constitution, which says a simple majority for advise and consent. It did not require a supermajority. They were going to go against the Constitution and raise the bar. No Senate in history said we were going to raise the bar and require a supermajority vote, given all of the incredible issues that we had to deal with in the Senate; no Senate has ever said the issue today is so important that we need to raise this bar, that it is best for our country to do that. Why? Because most Senators always felt, as I deeply feel, that we are a Nation of laws, and this Nation of laws and of constitutional law is important to preserve. We should not just throw it over for an immediate political whim, or policy whim, because once the process is corrupt, once the law is violated, once the procedures are changed, you cannot put the genie back into the bottle.

What this debate tonight is all about, this process we are going through is is a plea. Someone suggested it is not a very effective plea because the chances of getting a vote up or down on the judges is not very high. Yet it is a plea. It is a plea to those who have done something unprecedented in the history of this Chamber to stop. If they stop and they admit this was wrong, that this was not the way to deal with judicial nominations, that this is not a precedent they want to set—not 4 times, or 6 times, or 12 times but probably many times after that—and that this is not the right way to handle judicial nominations, maybe then we can bring some civility back to this process. Maybe we can say to the people who want to serve this country in one of the most honorable ways they can—to be a judge—a very important function in our society, maybe we will be able to attract the best and brightest to come here and offer up their services and not feel they are going to be put through a washing machine or, worse yet, maybe somebody who cares about the long-term health of our judiciary, that we don't politicize it by applying litmus tests. Let's just lay the cards on the table. What is this cause? What is this cause that the other side is so passionate about that they had to change the rules? The cause is the right to privacy. That is the cause—Roe v. Wade.

I have given many talks on abortion on the floor of the Senate. I said the right to privacy under Roe v. Wade has had its tentacles reach out and corrupt so many areas of our culture: abortion, eugenics, euthanasia, stem cell research, cloning, the right to same-sex marriage—all of these rights come from this right to do whatever you believe is right for you to do. You are the law. You have the right to do whatever you want to do. That is where this right comes from.

I said it has infected and poisoned the culture beyond what people even today realize: the cheapening of the value of human life, the debasement of the family, the basic social structure of our country. It is corroding and eroding who we are. But I forgot one, it is now corroding and eroding the Senate.

Mr. HATCH. Will the Senator yield for a question?

Mr. SANTORUM. I am happy to yield.

Mr. HATCH. I would like to ask the distinguished Senator, we have seen this poster they have over there: 168, and only 4 stopped. But isn't it true that there are at least 12 circuit court of appeals nominees, ones who correct lower courts who many times make mistakes, who are being held up in filibusters here—not just four?

Mr. SANTORUM. I say to the Senator from Utah, the chairman of the Judiciary Committee, there have been 28 or 29 circuit court judges confirmed. Out of that 168, there are 29.

Mr. HATCH. Right.

Mr. SANTORUM. So as the Senator from Missouri said further, the little fish they let go through the nets but they catch the big fish, the folks who rule on the law, who have the ability to influence the character of the law in this country, the appellate level. They catch the big fish in the net. They have let 29 go through. But 29 to 12, that is about a third of the nominees that the President has put up for the circuit court who have been caught.

I ask the Senator from Utah if he knows what is the usual percentage of circuit court—by the way, let me state this. Never have circuit court judges ever been filibustered, ever. But let's set aside the unconstitutional filibuster occurring right now, the unprecedented abuse of the Senate rules that is occurring here right now. Let's go back as if this were being done on an up-or-down vote.

What percentage of Presidential nominees for the circuit court get through and are approved in a normal course?

Mr. HATCH. Normally in the Reagan-Bush I-Clinton years, 80 to 85 percent—85 to 90 percent.

Mr. SANTORUM. So 85 percent are approved; the rest are held in the committee.

Mr. HATCH. By the end of the third year.

Mr. SANTORUM. By the end of the term. Can you recall, let's say, what is the percentage in the first 2 years of an administration? What was the percentage in the last few years under Clinton, under Bush I, and under Reagan?

Mr. HATCH. Well, in the case of Bill Clinton, President Clinton, 91 percent, if I recall correctly.

Mr. SANTORUM. It was 91 percent.

Mr. HATCH. People don't realize how important these circuit courts of appeals are. We have shown this chart that they have is not only inaccurate, it is a bold-faced lie. Because they can't really come out here with a straight face and admit they are going to filibuster at least 12 circuit judges and some district court judges.

Mr. SANTORUM. I ask the chairman, my understanding is they are only putting four up so they are suggesting they are not filibustering Janice Rogers Brown and they are not filibustering Carolyn Kuhl.

UNANIMOUS CONSENT REQUEST

I ask unanimous consent that the Senate now proceed to consideration of Calender No. 455, the nomination of Janice Brown to a United States Circuit Court for the District of Columbia Circuit, provided further that there be—pick a number—50 hours of debate equally divided for the consideration of the nomination, provided further that following the debate the Senate proceed to a vote on the confirmation of the nomination with no further intervening action or debate.

The PRESIDING OFFICER. Is there objection?

Mr. BINGAMAN. I object.

Mr. SANTORUM. So that is 168 to 5. Let's go to the next.

UNANIMOUS CONSENT REQUEST

I ask unanimous consent that the Senate now proceed to consideration of Calendar No. 169, Carolyn Kuhl to be a United States Circuit Judge for the Ninth Circuit, provided further that there be 100 hours of debate equally divided for the consideration of the nomination, provided further that following debate the Senate proceed to a vote on the confirmation of the nomination with no further intervening action or debate.

The PRESIDING OFFICER. Is there objection?

Mr. BINGAMAN. I object.

Mr. SANTORUM. I think we need to change the chart. It has to be 168 to 6 now. Anytime the chart comes up I think everybody here, for the record, should make it clear, 168 to 4 is now an outdated chart.

Mr. BINGAMAN. Will the Senator yield for a question?

Mr. HATCH. It is a total misrepresentation is what it is.

Mr. BINGAMAN. Will the Senator yield for a question?

Mr. SANTORUM. I will be happy to yield for a question.

Mr. BINGAMAN. Will the Senator concede that there is a difference between a Senator objecting to a unanimous consent request which had not been presented before on the Senate floor and the stage of a filibuster?

Mr. SANTORUM. I say to the Senator that in normal cases I would say that may be the case. But it is clear we are going to have a cloture vote on Friday on this nominee. It is abundantly apparent to everyone who has been listening to these proceedings that the chances of the two gentlewomen from California, Ms. Kuhl and Ms. Brown, being given the record 60 votes to defeat cloture, or to get cloture, is highly unlikely. So we are not going to be able to get cloture. That is at least what we have been hearing from the other side. We are not going to get cloture. We can't get unanimous consent. It sounds like a filibuster to me.

So I agree in part getting a unanimous consent is not in and of itself a grounds for saying it is being filibustered but voting against cloture certainly is. Other than the Senator from Georgia, that has seemed to be the order of the day on that side of the aisle.

I am a very optimistic person so I am hopeful I am wrong.

Mr. ALLEN. Will the Senator from Pennsylvania yield?

Mr. SANTORUM. I am happy to yield.

Mr. ALLEN. When my colleague from the Commonwealth of Pennsylvania talks about what makes this different for the Democrats, the difference is really about 3 years and a different President. I have looked at previous statements made by Senators on these issues, though I was not a Member of the Senate until 2001, and I am listening to all of these arguments being made now. I was earlier in the day quoting—much earlier in this day——

Mr. SANTORUM. Yesterday.

Mr. ALLEN. Yesterday. Time really passes when you are having fun—I feel as if I should be singing like Faron Young: ''Hello Walls.''

As I was saying, Senator LEVIN is quoted as saying in 2000:

> We should not be playing politics with the Federal judiciary. Candidates for these vacancies deserve to have an up-or-down vote on their nominations.

Earlier this morning, I listened to Mr. REED, the Senator from Rhode Island and the Providence Plantation. But in 2000 he said:

> I ask my colleagues to take their constitutional duties seriously and vote for these nominees on the basis of their objective qualifications, not on the basis of petty politics.

Another quote from Senator REED of Rhode Island, this is from the March 9, 2000 CONGRESSIONAL RECORD. He said that there is ''considerable attention'' being paid to various nominations

> . . . especially among members of the Latino community because the Senate is not doing its job. This is troubling. In regards to nominations the public rightly expects us to move judiciously and expeditiously and without regard to politics.

Those are the prior statements. The statements we hear from our Democratic colleagues on this floor—whether late last night or early this morning, are inconsistent with previous statements. It is a double standard within their own ranks.

Mr. SANTORUM. I say to the Senator from Virginia that he is absolutely right. The Senator from the Commonwealth of Virginia is right. But I will tell you who has been consistent. Senate Republicans have been consistent. We said all along we are not going to filibuster judges. When holds are put on a nomination—a hold meaning I need to be notified for a unanimous consent and I may want to talk some on this nomination or this bill—we said we are not going to mess around with that. We are going to vow to wipe out holds, everything else. We are going to move nominations. We are going to get up-or-down votes. We are not going—we are going to have cloture. We are going to get the people's business done.

The PRESIDING OFFICER. The time of the Senator has expired. The Senator from New Mexico.

Mr. BINGAMAN. Mr. President, let me speak for a few minutes on this issue that brings us here at this early hour and then also talk about another issue that I think also deserves some serious attention by the Senate; that is, the health care crisis that we face in the country. But let me first talk about this process for nominating and confirming Federal judges.

The obvious question is, How is the system intended to work under our Constitution, under article II of our Constitution?

As I understand it, based on my reading of article II of the Constitution, the President has the authority to nominate judges and it is fairly clear from the language of that document that the intent is that he will consult with the Senate, that he will make a nomination based on that consultation, that then the Senate will review the nominee and confirm or not that nominee—then either go forward or not with that nomination.

In fact, with regard to most nominees I would say the system works very well. In fact, it has worked with previous Presidents. It is working with this President.

Yesterday I was present at a hearing of the Judiciary Committee where we had a nominee from New Mexico who has been nominated for our district court, Federal district court there. I

support that nomination, the nomination of Judith Herrera for that position. Senator DOMENICI strongly supports that nomination. He recommended her to the President for that position.

Frankly, the White House consulted with me—consulted, I am sure, with Senator DOMENICI but consulted with me as well—and asked if I would support this nomination.

I had the chance to meet with the nominee, to talk with her, and of course I have known her for many years, and I was very glad to support her nomination. That is essentially the process we have followed with regard to all of the nominees for Federal district court positions in my State of New Mexico and with regard to the court of appeals position which is reserved for our State, New Mexico, on the Tenth Circuit Court of Appeals.

There again, the President and Senator DOMENICI both consulted with me before a nomination was sent forward. I had a chance to review the nominee and concluded that I would strongly support that nominee.

So the system, in fact, generally works the way it is intended to work. We get very good people serving on our Federal courts as a result of that.

But for some reason as regards some of these judges we are arguing about, the President has chosen not to follow this approach. In some cases the President has chosen to nominate people without consulting with the Senators from the States those individuals hail from and has done so in many cases over the strenuous objection of Senators from those States.

There is strong opposition from the States, for example, to the two nominees I was hearing about a few minutes ago from the Senator from Pennsylvania, Judge Kuhl and the other is Judge Brown, from California.

In both of those cases, as I understand it, the President has determined to go ahead with nominations. He has nominated those individuals and he has done so over the strenuous objection of both Senators from the State from which those two nominees come. To my mind, it is somewhat unprecedented in the Senate that both Senators from a State would object strenuously to a particular nominee and the President would say, that's your problem; I am going to go ahead and nominate them anyway.

What's more, the Judiciary Committee would go ahead and confirm or recommend those two nominees for confirmation over the strenuous objection of the two Senators from the State I involved—to me that is unprecedented. We have all this talk about a blue-slip procedure. That is out the window as far as I can tell. The blue-slip procedure used to mean that unless you got—unless the judiciary had returned to it a blue slip signed by each Senator from that State, there would not even be a hearing on the nominee. That was the system that prevailed.

Not only are we to the point where, even if the Senators from the State where the nominees come from do not return a blue slip would they be voted out, they can even affirmatively object to those nominees and the Judiciary Committee goes ahead and votes them out at any rate. They put them on the Senate floor and they file a cloture motion and they say we are going to have a vote on the Senate floor on these individuals; we could care less what the Senators from the State involved think about these nominees. That, to me, is an unprecedented procedure. I am not familiar with that.

I think about my own situation. As I have indicated, I have been pleased with the courtesy and consideration I have received from the White House and, of course, from my colleague, Senator DOMENICI, with regard to nominees by this President for Federal judicial positions. I have always been consulted before the nomination was sent forward. I have been given a chance to meet with those nominees and have been given a chance to get back and say: Yes, these are people I would support.

I have assumed in going through that process that, if I had come to a different conclusion, if I had determined that I had a strong objection to one or more of these nominees, that would also be honored and that the President would find someone else who was acceptable to, of course, the President but to the two Senators from the State as well before going forward with the nomination. I have assumed that. I still assume that. But that has not happened in the case of some of these nominations.

As I understand it, tomorrow we are going to have a vote on a cloture motion on the two judges I mentioned. You can argue about the merits of the positions that these judges have taken, but the thing that sticks in my craw, the issue that I want to focus on is the process. Why would I want to vote in favor of going forward to confirm a judge when I know the two Senators from the State that the judge comes from strenuously object to that judge being confirmed?

If the shoe were on the other foot, if in fact I was the Senator who was objecting, I would hope my colleagues in the Senate would support my right to object and to keep that person from being confirmed as a Federal judge. I am not sure they would do that, but I would certainly request they do that. That is exactly the request we have received from the two Senators from California, one of whom serves on the Judiciary Committee, and both of whom have spent extensive time looking into the records of these two judges. Why in the world are we not willing to defer to their view on this and hold up on confirming these judges? It seems to me that is the tradition of the Senate and we ought to adhere to that tradition. I think the President ought to adhere to that position.

We are talking here about what might be wrong with the process for confirming judges.

Mr. ALLEN. Mr. President, will the Senator yield?

Mr. BINGAMAN. I am glad to yield.

Mr. ALLEN. If I may question the Senator, using the criteria which he set forth insofar as the two judges being opposed and which we are now debating. My colleague said that the reason or a rationale for him to vote against them is because the two Senators from California are opposed to these two nominees? In the case of Priscilla Owen, both Senators CORNYN and Senator HUTCHISON are strongly in favor of Justice Owen. Does that mean that when we get to a vote on Justice Owen the Senator from New Mexico will then vote to move forward to at least allow a fair up-or-down vote on Judge Owen since both Texas Senators are strongly in favor of her?

Mr. BINGAMAN. Mr. President, let me first say I think that is a very good question. The answer is, no, I would not vote to move forward with a vote on Judge Owen because of the other problems that have surfaced with regard to her views and her judicial record. But I think as I approach this issue we have a threshold question. The threshold question is: Do the Senators from the State that is affected support these nominees? If they don't, the President shouldn't nominate them, and the Judiciary Committee should not report their nomination to the Senate floor. If they do support these nominees, there is still an obligation on each Member of the Senate to review the nominee and to determine whether in fact we believe that nominee should be confirmed for a Federal judgeship. That is the process we are going through.

I would say I do not think just getting the support of the Senators from a particular State entitles a person to a lifetime appointment to the Federal bench, but I do think that absent the support and in the face of strong opposition from the Senators from the State that is affected, the Senate should not be considering the nominees under these circumstances.

To criticize those of us who do not want to move ahead with an up-or-down vote on that on the theory we know how an up-or-down vote will come out on these issues, the President has very good ability to line up Republican Senators to vote for virtually anything, so far as I can tell—not just on judicial nominations, but virtually anything he opposes around here. I am amazed, frankly, at some of the willingness of some of my colleagues on the Republican side of the aisle to march down to the Senate well and cast a vote in favor of positions the President is advocating regardless of how it would affect our constituents. We know what the outcome will be if we go to an up-or-down vote. I think it would be a disservice to the Senators from the States affected for us to go

ahead and confirm these individuals over their strenuous objections.

I hope when we get to these votes on cloture tomorrow on these particular judges we have talked about that we will not move ahead and invoke cloture.

I do not think, as far as I know, based on the information I have, none of them are individuals I would favor promoting to the positions they have been nominated for.

I know my colleague is here and may wish to speak as well. I don't want to use all of our time.

Let me just talk for a minute about another issue. In many ways, this is a very unusual process we have gotten into here with a 30-hour diversion from the other business we could be pursuing here in the final weeks of this legislative session. There is other important business. Frankly, when I go home to my State of New Mexico, it is difficult for me to explain to people in my State who I represent why I am not dealing with some of the issues that directly affect them in their daily lives. Instead, we are here talking through the night about judicial nominees in many cases who are strongly opposed by the Senators from the States they come from.

I want to speak for just a few minutes about the health care crisis in the country. Earlier this year, I introduced the first part of a series of proposals to try to strengthen our Nation's health care safety net. That bill is entitled Strengthening Our States, or the SOS Act, of 2003. It seeks to protect the Medicaid Program, to improve the Medicaid Program. That is a program that is under severe stress and pressure because of the budgetary problems in our States. Dianne Rowland and Jim Talin of the Kaiser Commission on Medicaid say that:

> Medicaid is the glue that helps hold our health system together. It takes on the highest risk, the sickest and most expensive populations from private insurers and from Medicare.

That is a lot of people in my State who depend on the Medicaid system. We need to take steps to strengthen that system. Like a waterfront community that seeks to set up barricades against a rising river, defending the Medicaid Program from attacks such as the idea of a block grant is a top priority. This administration began this year recommending we adopt essentially a block grant approach to Medicaid. That concept is one which I strongly opposed. I am glad to see many of our Governors have now come out in strong opposition to that concept. It would be extremely adverse to those who depend upon this very important system in our States.

It is critical to maintain Medicaid, as it has correctly responded as a safety net program by adding coverage to millions of people as the country has slipped into recession. We are now pulling out of that recession—at least we all hope we are. Certainly the economy indicates we are. But as we have been in this slow period of economic growth, it has been clear the Medicaid system has been extremely important. The total number of individuals who are uninsured in this country have increased. Nearly 44 million people are without any coverage. Once the future of Medicaid is assured and protected, we also need to take some additional steps to confront the fact this nearly 44 million people—or 15.2 percent of the population—is without health insurance for the entire year of 2002. That is an increase of nearly 4 million people over those who were uninsured in the year 2000. The numbers for 2003 undoubtedly have gotten even worse.

The report of the National Coalition on Health Care says the confluence of powerful economic forces fueled by terrorist attacks of September 11 have unleashed a perfect storm that increases dramatically the number of uninsured in the United States with as many as 6 million people in total losing their coverage.

In light of this, I just make the point again it is somewhat shocking to me that we are spending 30 hours—essentially that means this whole week. The truth is our ability to get work done this week has been substantially impaired by the decision of the majority here in the Senate to devote 30 hours to talking about this handful of judicial nominees they would like to have confirmed for Federal judicial positions in spite of the serious problems that have been found with regard to that program.

The number of people in our country who need health care is staggering. New Mexico ranks second only to Texas in the percentage of its citizens who are uninsured. In New Mexico, we are the only State in the country with less than half of our population currently covered by private health insurance. That is a rather shocking statistic when you think about it. But it is true. Forty-two percent of the Hispanic population has employer-based coverage; that is, nationwide. That is not in New Mexico. That is in comparison to 67 percent of non-Hispanic whites who have employer-based coverage. To address the growing crisis, we have been working with the American College of Physicians since last fall on a legislative proposal we are calling the Health Coverage Affordability Responsibility and Equity Act of 2003. This legislation does a variety of things which I want to educate my colleagues on at some time when we have more opportunity to do so.

Our colleague from New Jersey wishes to speak again on the issue that brings us here at this early hour, so I will yield to him, but I think the course we are following with regard to judges is not a course any of us would choose at this point. If we could get the President back into the consulting mode with regard to all judges he has pursued, with regard to most judges, I think the problem would be eliminated and we would not have the difficulty and confrontation which has been required as a result of nominations so far this session.

Mr. ALLEN. Mr. President, will the Senator yield?

Mr. BINGAMAN. I am glad to yield.

Mr. ALLEN. The Senator brought up the two Senators from California opposing two judges for the Ninth Circuit Court of Appeals as if the Ninth Circuit Court of Appeals is only in California. That court of appeals covers many States—I believe even the State which the Presiding Officer is from, Nevada, but also Idaho, Oregon, Washington, Hawaii, Montana Arizona and Alaska. It is not just the Senators from one State that are affected when you have a circuit as large as that. This is the same court that almost hijacked the Constitution of California. Three of these judges attempted to do just that until they were all overruled so they could go forward with the California recall election. It is not just one State that is affected when you are talking about a circuit.

Let us talk about the District of Columbia Court of Appeals. There are no Senators from the District. I will not get into that debate on this issue.

Who is the President to consult in the case of the D.C. Circuit Court of Appeals? The President consulted many people and put forth a person of impeccable credentials, Miguel Estrada, who is actually a resident of Virginia. Senator WARNER and I presented him to the committee. I will not speak about that wonderful day at this time. The President looked for people from all across the country and presented Miguel Estrada's nomination to the Senate. Seven times we tried to get an up or down vote on Miguel Estrada. The reason we are still fighting this right now is because the minority is denying me, as a Senator, and other Senators, the ability to advise and consent and fair up or down vote. I am not saying people have to vote for any particular judge. But we all have a responsibility to vote. From the perspective of the Senator from New Mexico, who is the President supposed to consult for the District of Columbia Court of Appeals when he put forward a superbly qualified and exemplary individual who was held up for over 2 years and finally could not continue with the years of delay and obstruction?

Mr. BINGAMAN. Mr. President, reclaiming my time, it is a very good question. My own view would be we clearly have in the Senate for well over a century now delegated the initial responsibility for reviewing judges to the members of the Judiciary Committee. I would suggest the President should be consulting with members of the Judiciary Committee, both Republicans and Democrats, and if he determines he can't get a single Democrat on the Judiciary Committee to support his nominee, that should be a signal to him he should find a nominee who could be supported by Democrats, as well as Republicans.

It is true the Democrats are in the minority at this point. But a great many Members of this body are Democrats and a great many members of the Judiciary Committee are Democrats. If to a person they are opposed to the nominee after they learn of the qualifications and the positions taken by the nominee, I think that is a signal to the President he should find someone else. Clearly, that is not the course he has chosen to follow.

I see my colleague from New Jersey. Let me yield the balance of my time to him.

The PRESIDING OFFICER. The Senator from New Jersey.

Mr. CORZINE. Mr. President, I thank the Senator from New Mexico for what I think is a very appropriate underscoring of the unprecedented nature of not working with the Senators from the State which the judge has been nominated.

I concur with the Senator from New Mexico. In New Jersey's case, we are 5 for 5 on district court judges because there has been strong cooperation back and forth between the White House and Senators from New Jersey. We are one for one on the circuit court judges where people work together to try to move things. That is how we ended up, frankly, in general with 168 to 4 because this process has worked a lot more smoothly than I think this 30-hour talkathon has indicated.

I want to use the last few minutes of my time this morning to talk about priorities.

One hundred sixty-eight to four—scratch that and make that six, if you want. The fact is that is about 97½ percent if it were 6 of all of the judges who come up have been approved. When there is an outreach toward cooperation, things work pretty well around here. For some reason that has worked pretty well in most instances, and we are trying to look at a very narrow segment of something I think reasonable people can have differences of view about—the qualifications of the individuals. That is exactly why the rules are being used the way they are.

I want to place this in context. It is really more important in how it plays off of what the Senator from New Mexico said.

We have real issues in this country right now. The fact is we have 9 million Americans unemployed. We can spend 30 hours here talking about four or six judges when we have 9 million people unemployed.

By the way, the statistics going down in national terms don't seem to fit New Jersey. The latest statistics we have show we have had 11,800 jobs lost in the last reported period. Unemployment has grown by about 258,000 since the year 2000. New Jersey has brought 55,000 manufacturing jobs in the Nation.

These are real people. At least when I go back to the streets of communities I represent, people are more interested in what is going on with their jobs and what is going on with the economy than whether we have a difference of opinion about four judges or five judges when we have confirmed 168.

It seems to me we have our priorities all messed up here when there are 9 million Americans left out of the economic system.

It is hard for me to understand why poverty is growing in this country. The number is up almost 1 percent—from 11.3 to 12.1 percent. In New Jersey, that is 69,000 people who have gone onto the poverty rolls who weren't there before the current administration's economic policies were put in place, and 148,000 New Jerseyans have gone off the rolls of those who have health care. These are real issues. These are the things that impact people's lives.

These 4 judges out of 172—it is pretty hard to understand why we are spending all night and all day talking about that when we ought to be doing something about health care in this country; when we ought to be doing something about prescription drugs, while we have been waiting for somebody in the dark of night to try to put together a bill. It doesn't make sense that we have the focus on something that is so narrow and is not even in the context of actual reality because we are actually filling those jobs. But we are not doing anything about the 9 million Americans who are losing jobs.

We can't get, by the way, an increase in the minimum wage. It has been 7 years since we increased the minimum wage around here. We can't get a debate on that.

UNANIMOUS CONSENT REQUEST

I ask unanimous consent that the Senate now return to legislative session to proceed to the consideration of calendar No. 3, S. 224, the bill to increase the minimum wage, that the bill be read a third time and passed, and the motion to reconsider be laid upon the table.

Mr. ALLEN. Objection.

The PRESIDING OFFICER. Objection is heard.

The time has expired.

Who yields time?

The PRESIDING OFFICER (Mr. THOMAS). The Senator's time has expired. The Senator from Virginia.

Mr. ALLEN. Mr. President, we are now entering the 13th hour of this debate. The reason it has taken so long is because some Democrats have denied a fair up-or-down vote on many nominees. The sun is rising, of course, along the eastern seaboard from Miami and Jacksonville. It is rising in Charlotte and Myrtle Beach and Virginia Beach, all the way up to Maine. I am sure there are truck drivers from Bangor, Maine to Bakersfield, California who have been listening very intently to this debate. It is nice to be here this morning with my Senate colleagues, but surely we did not start this day as advised by the great country singer Charlie Pride, ''to kiss an angel good morning.'' I do not see any angels around here. My angel is at home with our children getting them ready for school.

You hear arguments from the other side that they just have to stop these nominees as in the case of Miguel Estrada. In the case of Miguel Estrada, he even had the support of several Democrats. There were four Democrats who did vote for moving Miguel Estrada's nomination to an up or down vote. But the minority is setting a new standard, and I dare say not a constitutional standard. This new standard has crept into the Senate. While the Constitution says you are supposed to advise and consent and a nominee is confirmed by a majority vote, my colleagues on the other side have set a new standard for a supermajority. Because of that, a majority of us in the Senate have been denied our opportunity to act responsibly for our constituents and have the guts to stand up and vote yea or nay after examination, deliberation, exploration, inquisition, in some cases, interrogations of judges to determine their judicial philosophy.

I care a great deal about judicial philosophy. I believe strongly that judges should be interpreting and administer the law, as opposed to inventing the law.

Earlier the Senator from New Jersey was talking about economic matters. I clearly want to say, for all those who are bright eyed and listening this morning, the number one goal of us on this side of the aisle is to make sure America is competitive—to have the right tax policies, the right regulatory policies so businesses can invest, whether in New Jersey or Virginia or elsewhere in this country, and to help create more jobs. We have to have the right policies in place for this to occur.

And America's competitiveness directly relates to our courts. We have to make sure there is class action fairness so as a nation we make sure those who have grievances or injuries due to negligence have access to the courts, while helping to reduce frivolous lawsuits. Obviously, this is something that means a great deal for jobs.

What happened to the class action bill that was going to help create jobs and defend against junk lawsuits? We had obstruction on that. We were able to get 59 votes, but we had to get 60. This reform is important for jobs and the retention of jobs. We want to pass an energy bill, an energy bill that will help create 500,000 new American jobs with clean coal technology, advancements in hydrogen fuel cells as well as hopefully development of our domestic reserves of oil and gas. We want to create more jobs by passing an asbestos bill that ensures that people who have asbestosis or asbestos-related diseases can actually get compensated as opposed to the lawyers.

We successfully passed the Small Business Administration bill that will help create 3 million jobs. We want to make sure we get homeland investment or repatriation of profits to come back into this country. We have to pass a

variety of other measures so families, individuals, and businesses can prosper.

We have done a lot so far, and you are seeing the results of it. I was listening to the Senator from New Jersey. He seems not to have been listening in some regards to recent economic facts. We have had great gross domestic product growth in every quarter since we passed the economic growth and tax relief package in 2001. This most quarter we had the biggest growth in almost 20 years as far as gross domestic product. You are seeing in the beginning more jobs being created—126,000 net new jobs. The reason for this is businesses and individuals are reacting favorably to tax cuts. The Senator from New Jersey did not vote for those tax cuts. If it were up to the Senator from New Jersey, taxes would be higher on individuals, on families, and on small businesses. You would have less investment, fewer jobs, and less hope for opportunity, prosperity, and jobs in the future.

We are going to continue working to make sure our economy is running as strongly as possible. Are we satisfied with where it is? No. There are people still looking for work, and we need to make sure we address those issues. But it does not mean we ignore the issues of the third branch of our Government, the judicial branch. What we have here is an abrogation of our constitutional responsibility. What we have here is a diminishment of the accountability and responsibility of Senators. What we have here is a perpetuation of unfairness and an injustice to many judges.

The Senate has a clear responsibility in the judicial nomination process, as seen in Article II, section 2 of the Constitution. It is to advise and consent. It is not to obstruct and delay. Senators can be expected to examine different nominees in a fair method. We can have a debate. I don't expect any Senator to be a rubberstamp for any President. The Senate can properly give thorough and honest consideration of a nominee prior to a vote in deciding whether consent should be granted. That means every Senator has every right to vote against a nominee if they feel that person is unsuited to the bench.

The advise and consent in our Constitution does not, though, give the Senate the right to deny a simple up-or-down vote to a nomination once that nominee has been thoroughly debated and evaluated in the Judiciary Committee of the Senate and brought forward to the floor. The Constitution requires fairness and accountability from the Senate in confirming nominees. Without a proper up-or-down vote, I am afraid what you are finding here is the judicial nomination process, as laid out in our Constitution, is being hijacked by the minority—not every single Democrat, but a majority of the Democrats. Their position is one that is irresponsible and an obstruction of our constitutional responsibilities. There is no accountability. There is no fairness.

For over 214 years, the President has had the responsibility of nominating persons to vacant positions on federal courts. That is spelled out in the Constitution. This is essential to maintaining the constitutional framework of a separation of powers.

Five years ago, the New York Times said the Senate should ''rise to the occasion and address the institutional responsibilities of the Senate rather than surrendering to the petty tactics of the blockading few.'' This was in 1998. On this rare occasion, I agreed with the New York Times.

I would say to my colleagues, if you do not like Judge Janice Rogers Brown, Judge Carolyn Kuhl, Justice Priscilla Owen, or any other judicial nominee for whatever reason that may be, whether I consider it justified or not, vote against their nominations, but vote. Take a stand up or down. Show your constituents where you stand. Don't hide behind the arcane procedural maneuvers of the Senate.

What we have here is justice being delayed and being denied. It is beyond me how some Senators can continue to practice blatant political maneuvering at the expense of these well-qualified, respectable nominees, when the administration of justice is so important to our country. They cannot continue to use these machinations and procedural rules to perpetuate this obstructionist agenda. I believe Americans are astute. They can see these arguments being made are to avoid an up-or-down vote. They are not based on reason but rather petty partisan politics.

It is not just the people's work and business that is being made a victim when the other side denies these nominees a fair up-or-down vote. It is justice in our courtrooms that is also a victim to this obstructionism. Justice delayed is justice denied. It means cases that need to be litigated are delayed longer. It means in criminal cases, it may take a longer period of time for cases to be heard and decisions to be made. It affects victims of crime, as caseloads back up. Access to our courts for legal disputes and an expeditious decision making process by the courts are both important.

Let's consider Miguel Estrada. This is a gentleman I feel very passionately about because I got to know him in the midst of his consideration before the Senate. Miguel Estrada now lives in Virginia. He came to this country as a teenager, unable to speak English. He applied himself. He worked hard. He is the modern day Horatio Alger story and exactly the model we tell our children about. If you work hard, apply yourself, do well in school, get a good education, then you can have great opportunities in life. That is what Miguel Estrada did when he came from Honduras as a teenager.

He worked hard, learned English, and ended up going to Ivy League schools. He clerked for a Federal judge. The American Bar Association, after looking at his record when working in the Solicitor General's office and a variety of other positions, gave him their highest unanimous rating. Indeed, he argued 15 cases before the Supreme Court of the United States, winning most of them.

I remember that hearing in the Judiciary Committee, as my good friend and colleague JOHN WARNER and I presented him. His sister was there. His wife was there. His mother was there, so proud of Miguel. I was thinking, this is just a wonderful day in America to see that dream of America, the land of opportunity for people of qualifications and performance, is still there. I remember speaking for all Virginians, congratulating Miguel Estrada.

Then to see what happened to him, the injustice of holding it up, not just for consideration for 3 months, not consideration for 6 months, 1 year, but over 2 years, with repeated efforts to bring it to a fair up-or-down vote on the Senate floor—not once, not twice, not three times, four times, five times or six, but seven times. Finally after 2 years, this wonderful gentleman decided that he had to get on with his life and that this process was too stressful to him and to his family. Undoubtedly you could understand why being held up this way in such an unfair and unjust matter that he finally decided that he had to go on with his life.

To me that was a very sad day in the history of the Senate. It does not reflect on the views of the majority of the Senators because we had a majority of Senators for Miguel Estrada. We just didn't have 60. To me that is an injustice.

Some of my colleagues will talk from time to time about Miguel Estrada. I see that the Senator from New York, Senator SCHUMER, is here. Senator SCHUMER called Mr. Estrada ''a far right stealth nominee, a candidate who will drive the Nation's second most important court out of the mainstream.'' Mr. President, we cannot allow the politics of personal destruction, evident by this statement by the Senator from New York, to continue to infiltrate our judicial nomination process. After 2 years of refusing to vote, that was enough injustice without these gross mischaracterizations.

I will tell you what Virginians across the Commonwealth are saying. The Fredericksburg Free Lance Star said that ''the filibusterers are abusing the Senate's advice and consent role under the Constitution'' and that ''Senate Democrats need to stop snacking on sour grapes and give this President his due.''

The local newspaper in Staunton, Virginia, said: ''Regarding filibustering engaged in by Democrats in the U.S. Senate to block Bush's judicial picks, either vote them up or vote them down, then live with the consequences. Filibustering is one of the least palatable tactics politicians can engage in, one which only serves to bolster the

public's lack of confidence in our elected representatives. It's no accident that the word ''filibuster'' derives from a Spanish term for pirate—''filibustero.'' It's an apt description for a process whereby politicians seek to board and hijack the legislative process.''

The Richmond Times Dispatch said: ''According to the ''gold standard,'' each [of President Bush's] candidate's ability to serve on federal appellate courts is impeccable. Yet [Senator] LEAHY and his calculating cohorts presume the judicial nominees' perceived ideology to be more important than their ability—and have resorted to stall tactics perfected decades ago on the Carolina hardwood.'' That is basketball terminology for those who don't remember the four corners.

From the same newspaper:

> Miguel Estrada did not deserve such shabby treatment. No one does.

The Manassas Journal Messenger argues:

> The worst part about the Democrats' continued stonewalling on Federal judicial nominations is the legacy that it leaves.

The Winchester Star, a newspaper owned by a former Senator who served as a Democrat and an independent, Harry F. Byrd, Jr., predicted that:

> The precedent set here is ghastly. If this threat continues to go unchallenged, advice and consent in the future will be tantamount to obstruct and destroy.

And just last month that same paper said:

> The constitutional prescription of a simple majority for confirmation no longer applies. A 60-vote supermajority . . . is now standard operating procedure in a process held hostage by a liberal minority.

They went on to call the Democrats' actions ''lamentable'' and ''reprehensible.''

Mr. CORNYN. Will the Senator yield for a question?

Mr. ALLEN. I yield to the Senator from Texas.

Mr. CORNYN. The Senator has talked about Miguel Estrada and his admirable qualities, the fact he emigrated here as a young man at 17, barely spoke the English language, and yet rose to the top of his profession and, indeed, represented the United States Government before the highest Court in the land in 15 cases, which is a remarkable professional accomplishment. But you also alluded to the comments made by our colleague from New York, and you gave us some quotes about the nature of President Bush's judicial nominees. I believe at another time he accused the President of loading up the judiciary with rightwingers who want to turn the clock back to the 1890s and warning that America is under attack from the hard right, the mean people. They have the sort of patina of philosophy, but underneath it is meanness, selfishness, and narrowmindedness.

If I may ask the Senator, how in the world can you reconcile the public record of Miguel Estrada and this sort of characterization? Do you have an explanation for what is happening here?

Mr. ALLEN. There is no justifiable explanation. Miguel Estrada is a person of very calm demeanor. He is very mild mannered and soft spoken. He is one who, throughout the entire nomination process, was willing to subject himself to whatever written interrogatories submitted to him by Senators. He was willing to and did meet one on one with Senators. So that characterization is not accurate.

Do you know what that characterization is? It is pure politics. It doesn't matter what the truth is because they have not justified it. What is unfortunate about statements such as that is that it is the politics of personal destruction. We should rise above that.

I say to the Senator that my very first speech on the Senate floor was about judges. I said that I care about treating people as individuals rather than partisans. I spoke about Roger Gregory. President Clinton had appointed him as an recess appointment. This had many Republicans, understandably, infuriated. I examined and talked to Roger Gregory to determine his judicial philosophy. I studied his records of accomplishment, considered his temperament, and all of the attributes judges who are appointed for life should have. You have to be sure you are not going to end up with some judge who is a radical one way or the other, an activist, but rather one who interprets the law and applies the facts of the case, rather than inventing or creating laws. My first speech was to say, ''let's rise above that and to be statesmen.''

I found Roger Gregory to be very qualified. The first thing I said to President Bush when he asked me my thoughts on this nomination was that I had interviewed judges for various positions when I was Governor and that one can never be absolutely sure about a nominee. But I told President Bush that I felt that Roger Gregory truly had the right philosophy and capabilities, and I hoped he would appoint him. And President Bush did.

That is an example of rising above partisanship, rising above this picky, partisan process in the Senate, which denies an opportunity for me, as a Senator, to vote up or down. But it also denies the American people the accountability and responsibility they expect for their Senators.

Mr. CORNYN. Will the Senator yield for one other question?

Mr. ALLEN. Yes.

Mr. CORNYN. The Senator has characterized what he thinks is happening here in terms of these attacks on qualified nominees, such as Miguel Estrada. I just wish to ask the Senator this. We all know, in order to get to the Senate, we have to run for election; and I just ask the Senator what his reaction is, or whether he would include this in the category of petty partisan politics that he just described in terms of the way Miguel Estrada has been attacked.

Most recently, in a fundraising electronic newsletter to potential donors, the chairman of the Democratic Senatorial Campaign Committee, our colleague from New Jersey, recently acknowledged—he boasted that the current blockade of judicial nominees is ''unprecedented.'' But the context in which he used that is to raise money for Democratic candidates to the Senate and the statement we are hearing on the floor regarding the figure 168 to 4, that they have only blocked 4. But at the same time we see they are using these unprecedented filibusters to block the highly qualified nominees of the President. Is that what you would characterize as a political use of this obstructionism of President Bush's nominees?

Mr. ALLEN. It is worse than that. I was not aware of that, I say to the Senator from Texas. That is more than just petty partisan politics. That is disgusting. This will lead to a continual downward spiral of our constitutional responsibilities. You can say you are against a judicial nominee, but to use it to brag and to admit that it is unprecedented in an attempt to raise money—to me, that is the sort of retaliation and retribution that is a real loser, and not just to Republicans or Democrats; the real loser is the justice system of the United States, which has been the pinnacle of the protection of our liberties and freedoms under the Constitution, which was created and designed to protect our God-given rights.

Mr. INHOFE. Will the Senator yield for a question? I know his time is running out.

Mr. ALLEN. Yes.

Mr. INHOFE. I have been observing this all night long and all of these legal scholars. I admire you so much, although I have to admit I have often said that perhaps one of my best qualifications for being a Senator is that I am not a lawyer. When I read the Constitution, I know what it says. It is very clear what it says. It says advise and consent. It is a very important process.

The reason I wanted the Senator to yield is you have been justly talking about the qualities of Miguel Estrada. I have met him, too. He is such a humble man. When you hear the horrible things said about him, it makes you cry inside. There was one thing that all of these nominees the President nominated have in common, and that is they are also eminently qualified. You have talked about his qualifications. Besides that, he worked in both the Bush and Clinton administrations.

Also, look at the rest of the nominees. William Pryor is the youngest attorney general at the time he was appointed and was nominated by the President. He has the highest ranking of the American Bar Association. Priscilla Owen has the highest ranking of the ABA. In 2000, she won 84 percent of the vote. She was supported by three former Democrat judges from the

Texas Supreme Court. Judge Pickering—99.5 percent of his cases were affirmed and not appealed.

I think we are talking about people who the President has done such a great job of singling out and finding, the most highly qualified people. I wanted to ask you that question. Isn't it true that everything you have said about Miguel Estrada and his qualifications is true about all these nominees?

Mr. ALLEN. It is. I very much agree with the Senator from Oklahoma. Miguel Estrada, Priscilla Owen, Judge Pryor, Judge Brown, and Judge Kuhl—they all have impeccable records. They have different experiences but great experience, and they are highly recommended by the people who know them best. This is a great way of judging their capabilities. Nonetheless, the facts don't seem to matter.

I close and say we need to act in accordance with the Constitution. The Constitution is important. Accountability is important. Fairness and justice are important. As a matter of principle, our judicial nominees deserve a fair and simple up-or-down vote. These nominees are individuals who are important for the function of justice in these various courts. And it is not just these three; there are others being obstructed.

I ask my colleagues to show some guts. Stand up and vote yes or vote no. Act responsibly. Since I started off with a Charlie Pride admonition and, unfortunately, we have not been able to ''Kiss an Angel Good Morning'' here on the Senate floor, why don't we follow Aaron Tippin's advice that ''you got to stand for something.'' So why don't you stand. Vote yes or no on these judges but vote.

Thank you, Mr. President. I yield the floor.

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

Who yields time?

The Senator from New Mexico is recognized.

Mr. BINGAMAN. Mr. President, let me first compliment my colleague from Virginia for his vast knowledge of western song lyrics. I think he has recited several of his favorite lyrics. I always preferred the famous western song ''Who Drank My Beer While I Was in the Rear.'' That always seemed to be one that isn't played near enough. I am sure that is part of the Senator's repertoire.

Let me comment on a few of the things the Senator said. First, he said that justice delayed is justice denied; there is a terrible burden we are putting on the American people by not filling these judgeships.

Let me call to the attention of my colleagues what has happened as far as judicial vacancies during the last 8 years. You can see from this chart that, in January of 1995, there were 63 judicial vacancies. That was when the Republican majority was here in the Senate. That number increased to 110 judicial vacancies by January of 2002.

At that time, the Democrats took the majority in the Senate and the number came down precipitously, down to 60 vacancies by the time the Republicans gained control in the Senate and, at that point, of course, it has continued to go down. So now, in January of 2004, the expectation is that we will have 40 judicial vacancies.

This is the best record as far as filling judicial positions, vacancies, of the Senate in many years. We have fewer vacancies today and will have fewer by the end of this year than we have had for a very long time. So we do not have this problem that the public is being denied judges, judgeships.

I am very proud of the record of accomplishment that we have achieved so far in this Congress. I think we have approved a great many judges. We have approved a great many of this President's judges. This other chart, which has been up several times during last night's discussion says the whole thing. It basically makes the point that we have approved 98 percent of the judicial nominees who have been sent to us.

In my State, we have approved several very good nominees for Federal judicial positions. I have supported those. As I indicated earlier, those nominations were brought forward, in my view, in the way the system is supposed to work. That is a system whereby the President and the White House—the President's legal counsel—essentially contacted me, as well as, of course, Senator DOMENICI, my colleague, and assessed our views with regard to people they were intending to nominate. That is the way the system is supposed to work. That is what advice and consent has come to mean and should mean in our system. The President seeks advice, the Senate gives its consent, or withholds its consent.

I have been very pleased to give my consent to the nominations that the President has chosen to send forward with regard to nominees for judicial positions in New Mexico. I also know and would like to say that I have assumed—and I continue to assume—that after my advice is requested and after my consent is sought, that if I had strenuously objected to some of those nominees and had stated so, the President at that point would decide to go ahead and choose someone else.

In my State, we have a great many people who are practicing attorneys, who have held key positions in our State in various capacities, who are qualified to serve as Federal judges. That is one of the great strengths of our legal system. I am sure that is true of every State in the Union. If one of those individuals, for some reason, is not the appropriate choice and Senators from the State involved determine that, then the President should take that into consideration.

My colleague from Virginia talked about being consulted by the President about Roger Gregory before the President made a decision on that appointment. That is entirely appropriate. That is the way the system ought to work. The President and his legal counsel should be consulting Senators about the appropriateness of various candidates for judicial office before the nominations are sent to the Senate for consideration.

I think the reason we are here tonight, the reason there is angst about this issue about these four judges who have not been confirmed, the 2 percent, is because as to those 2 percent we did not have that consultation. The members of the Judiciary Committee, the ranking member of the Judiciary Committee, Senator LEAHY, the other members of the Judiciary Committee on the Democratic side, did not have that opportunity to be consulted, and nominations were sent forward that, in fact, were not acceptable, were not strongly supported, had no support, and had strong opposition to them. Accordingly, we have agreed not to move forward with those nominations, which I think is entirely appropriate.

The notion that the Senate should have the right to consent—and that is contained in article II, section 2 of our Constitution—implies in it the idea that the Senate should have the right to withhold its consent, and that, in fact, we have exercised that right with regard to 4 of the 172 nominees who have come to the Senate floor so far for consideration. That is a pretty good record for this President. I think this President has done much, much better than the previous President in getting his nominees confirmed.

There was great frustration on the part of many of us in the prior administration, and it has been expressed here on the floor, that very good nominees were being sent forward by President Clinton and were not afforded a hearing. It was not as though there were objections that would be expressed, there were not articulated objections. It is just that they would not be given a hearing because of some view by some Member that the person should not be entitled to a hearing before the committee.

That practice has not been followed with regard to President Bush's nominees. We did not follow that when the Democrats were in the majority in the Senate, since President Bush has been in office, and, of course, it is not being followed at this time.

Let me put this in a larger context, which is something we have tried to do here during the recent hours; that is, the context that we have major issues facing our country today. There is significant work—undone work—still crying out for attention in the Senate before this session of Congress is over. The majority leader tells us we will adjourn on November 21. That is a week from tomorrow. I don't know if we will make that deadline or not. We have had other deadlines that have not been made. But that is the schedule as we now know it. We will adjourn a week from tomorrow, and we are essentially

wasting this week talking about a set of issues that have been talked about and talked about and talked about during recent months.

I hope that before we leave this year, we will not only finish the appropriations bills, which clearly need to be done to keep the Government functioning; I hope we will also conclude work on a Medicare prescription drug bill, which will preserve the Medicare system but which will provide a genuine benefit to Medicare recipients. I am informed that some time—perhaps by the end of the week—we will have some better indication as to what resolution is finally coming out with regard to those issues that have been in conference.

I hope, also, we get a decent Energy bill. I have complained repeatedly about the process that has been followed with regard to the Energy bill because Democrats have been excluded from those conference meetings. But I still hold out hope that the final product, which we have been assured we will be able to see 48 hours before the final meeting of the conference—I am informed—I still hold out hope that final product will be something that will be good for the country and, on balance, will be a step forward. I don't know that that is the case. Until we see the bill, we will not know that is the case. We don't know what is being put in the bill that was not in the Senate-passed bill. We don't know what is being put in the bill that was not in the House-passed bill. But clearly there is important work the Senate needs to be doing.

We have very few days in which to accomplish that work. I regret that we are spending so much time on this single issue. Frankly, in my State, if I go around New Mexico and ask people what do they think we ought to be having all-night sessions to resolve here in the Congress, this would be a very distant item on the list of priorities. I think the first priority would probably be, Why don't you do something significant on the health care crisis? Why don't you do something about the 44 million people who have no health care coverage in this country? That number continues to rise.

I have served in the Senate now for a little over 20 years, and that number has risen during most of that time. We have not acted effectively to deal with that health care crisis and, accordingly, we have a great many people in my State who do not have access to quality health care, do not have access to affordable health care. We need to do something about the cost of health care. We need to do something about the availability of health care.

Of course, we need to do some things to try to maintain our job base, the jobs about which we all are concerned. We have lost over 3 million jobs since this President came into office. I am glad to see we are finally, now, in the last month, beginning to see some jobs created on a net basis. We created more jobs last month than we lost. I hope that will continue. It is going to have to continue for some period before we are at a break-even point. But I hope we are at a break-even point in the near future because, clearly, there are a lot of people looking for jobs, looking for good-paying jobs, and we see too many of those jobs going overseas, too many of our better paying jobs, particularly manufacturing jobs, leaving for other parts of the world.

My colleague from New York is here. He is a member of the Judiciary Committee and has been intimately involved in these issues related to judicial nominations. I know he spoke last night. He is ready to speak again and give his views on this issue, so I will yield the remainder of my time to him.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. Mr. President, I thank my colleague from New Mexico for, as usual, his thoughtful, balanced, and fair remarks.

We have, I guess, now been debating 13 hours 45 minutes here. I don't think too many new arguments have come out. I don't think we have accomplished anything. But let's proceed, although I couldn't agree more with my colleagues that we could have devoted some of this time to speaking about issues we have not debated on the floor at length—jobs, the yearning of the average American to have a secure and good job; health care, and the millions who are not covered and millions more who are covered and cannot afford health care; even a debate on the war in Iraq, where we are going and what we should be doing. It would be far more instructive and illuminating to the American people than what we have done here.

But we are here, and I think we should be talking about the judicial nominations. One point I make, just before getting into the substance: We heard some paeans to Miguel Estrada; Horatio Alger, we heard. He is a bright man of accomplishment, but let's be fair here. His father was a banker in Honduras. He came from a privileged background. America welcomes people of all backgrounds. That is wonderful. But the bottom line is he was not typical of an American immigrant. His father was a banker, they were part of the Honduran elite. The Senator from the other side said he didn't speak English when he came here. We think he probably did.

But Horatio Alger? No. Horatio Alger was somebody who started off poor. There are indeed, I would like to inform my colleague from Virginia, millions of immigrants who came here poor as church mice and struggled and worked their way up. It is sort of interesting that the hero to those on the other side is a wealthy Honduran who became a wealthy American—that is the modern-day Horatio Alger story. So let's be straight here.

Miguel Estrada, to be fair, is a very bright man. But just because he is bright and just because he came from a good background doesn't give him carte blanche to become a judge. He didn't answer any of our questions. How many Americans would get a job if they told the boss: I refuse to fill out the questionnaire. I don't want to answer that question.

These were not esoteric questions; these were not demeaning questions; they were very simple questions: What is your view of the first amendment and how expansive it ought to be? What is your view of the commerce clause? The very things on which he would opine as a judge.

These have been regarded as legitimate questions from the day of the founding of the Republic. Let me say, why are my colleagues so appalled that we would ask such questions? I will tell you why. It is very simple. Because this President, George Bush, despite his wanting his image to be moderate, on the issue of judicial nominations has been the most hard right President we have seen. His nominees are not mainstream, many of them.

People on this side of the aisle have voted for many of them with whom we do not agree. But when some go so far, we believe the Founding Fathers almost importune us to question them thoroughly, and to block them if necessary.

Again, this chart, I would say to the American people, says more than all the words and rhetoric and name calling we have heard from the other side: 168 to 4.

Is the process broken down? No. Is the process so much so that a reasonable judge can't get through? Obviously not, unless you think George Bush is not nominating any reasonable judges.

What has happened here? There is such anger on the hard right that they can't get every single judge they are pushing many on the other side, against their own will, to engage in performances like we have seen over the last 14 hours. We want every single judge approved. That is their goal. That is the goal. And then we come up with the arguments.

So we went through this last night. Filibusters are OK, as long as they fail. That makes no sense. We have had filibusters in the past. We have had six of them, four by the Congresses in the 1990s and 2000. If a filibuster is wrong, it should be wrong whether it passes or it fails.

But then look at the other argument. Over 50 judges were blocked by the other side. We didn't hear any speeches about Constitution in crisis. They weren't even giving hearings.

The logic defies me: It is OK to block judges by not giving them hearings, and it is OK to filibuster as long as you fail; the only thing that is wrong is to have a filibuster succeed and that brings the Constitution in disrepute and brings the Republic to its knees.

My colleagues, that argument does not hold up in first year law school. It

is just totally hypocritical and contradictory. It is saying, I want my results so I am making whatever argument it takes. Sort of like the judges we don't want. A little like Justice Brown's way of arguing—of deciding cases. Blocking is not bad because they blocked 50 of them and there was no outcry. Filibusters aren't bad because they filibustered six of them, or four of them, and that was just fine.

So let's be honest here. For some reason, there is white hot anger among a small, narrow group of people that they can't get every judge. Again, I welcomed—I don't think this serves our time well—but I welcome it, in the sense that all of those talk shows and all of those radio programs and all of those editorial boards leave out the one overwhelming fact, which is 168 to 4.

I will march in parades in conservative parts of my State and once in a blue moon—most people don't care about this issue, to be honest, compared to the things that make their lives better, compared to the relief American families want when they sit down at the dinner table on Friday night to figure out how to pay these bills. But the occasional time somebody called out, ''Why are you blocking the President's judges?'' because they listen to the radio or read a biased article in the editorial pages, I would say: ''We approved 168 to 4,'' whatever the number is, and they say, ''Oh, OK.''

You can do all the sophistic arguments you want, how many angels are on the head of a pin, say this way to block judges is OK.

By the way, I would like one of my colleagues to defend, in the 30 hours we have, was it all right to block the 50 judges of President Clinton? Was that OK? Do we ignore that fact? It is not ancient history; it was in the last decade. Was that OK? I would ask any of my colleagues to answer that.

Then I would ask them to point out to me when Senators on the Republican side of the aisle launched filibusters, who got up and complained and said the Constitution was being violated?

No, no, no. The arguments here, again, are outcome determined. There is no internally consistent logic. It just says: We want all the judges; we will take whatever argument it takes. When they originally put forward Miguel Estrada, they said he was a rags-to-riches case, and then of course the facts came out. Now he is Horatio Alger: Honduran banker's son becomes successful American lawyer. I don't know if that is going to tug at the heartstrings of most Americans. Most, I think, would say Horatio Alger is the person who came here penniless and worked in a factory, who tried to struggle to provide for his family, who started a small business and struggled, the whole family worked in it and then they got a little money, and they got richer and God bless America. That is what is wonderful about this country.

But again, whatever argument fits. Is there a solution to this conundrum? Obviously, there is. There is. It is to follow the Constitution, not to come up with this idea that somehow, buried in the Constitution—by the way, that is not being literalist. When my colleagues say the Constitution says you can't filibuster a judge, they are reading words into the Constitution. I believe in a flexible Constitution. I think most people do in the 21st century. But if you want literal reading of the Constitution, find the word ''filibuster.'' Find me the number 60. Find me the sentence that says everything in the House and Senate, or just the Senate, should be supported by majority rule.

If majority rule were so important, then we should not have committees because when committees block judges, as they did, we don't even know what the majority thinks. The Senate has a very important function in this Republic. It has had for 200-some-odd years. It is to be, as Madison put it, the cooling saucer.

As I mentioned last night, I didn't have qualms about some of my colleagues trying to stop Judges Paez and Berzon. The Ninth Circuit is a very liberal circuit. It is too liberal for my taste. To put more liberal judges on there probably didn't increase the balance. That is why this year I supported the nomination of Judge Bybee, Jay Bybee. I don't agree with him on almost anything, but on the Ninth Circuit to have a hard right conservative is probably a good thing.

My view is there ought to be moderation on the courts. And probably it is great to have one Justice Scalia on the Supreme Court and one Justice Brennan. You should not have five of either. Judges should not be at the extremes because they are the ones who tend to make law.

We have a nominee coming up Friday, Justice Brown, who wants to go back and reratify the Lochner decision that has been in disrepute for 70 years. Is that justice, someone who is interpreting the law? Lochner, which said a State couldn't pass a law that said bakery workers could work only 60 hours a week? We have come a long way since then.

But it is true, there are some in America who say: We don't want the Government doing anything. If I am a businessman, I should be able to do whatever I want. I should be able to pollute the air. I am a self-made person. Or I should be able to take my property and do exactly what I want with it—no zoning.

That is a view, certainly a view that can be argued in this Chamber or anywhere else. It is not the view close to the mainstream of the American people.

So the bottom line is a very simple one. We believe—it may drive some crazy, but we believe we are defending the Constitution. We believe that through whatever sophistry and sophistic arguments we hear that every one of the President's judges should be approved does not do justice to this wonderful document, this living, breathing document, the Constitution. We believe that if the only way you were to reject a judge was because the judge didn't have high enough grades in law school or because they smoked marijuana when they were in college, it would demean the process. We believe that asking questions about a judge's judicial philosophy—that is what is at the core of what makes a good judge. We believe that when a President brings ideology into the nominating process—we didn't, he did, and he said it. To his credit, he was honest. He said he is appointing judges in the mold of Scalia and Thomas. That wasn't about their law school grades or diversity; it was about a philosophy: Let's take the courts and change the way they view things.

We believe that our examination of these nominees and their views, and what they do as judges, is not only appropriate but obligatory.

I say this to the American people, to those of you who may be watching here at 7 in the morning. Judges have a tremendous effect on all of our lives. It is hard to see because it is not like a debate here in the Senate, this wonderful institution, or the President deciding a policy. It is done on a case-by-case basis. That is the beauty of this country. But that can determine, if you are a woman or a minority or disabled, what kind of discrimination might be allowed to exist against you. They can determine, if you are a worker, what kind of structure there is to protect your rights.

The PRESIDING OFFICER. The time of the minority has expired.

Mr. SCHUMER. Thank you, Mr. President.

The PRESIDING OFFICER. Who seeks time?

The Senator from Texas.

Mr. CORNYN. Mr. President, I have to give my colleague from New York credit. He is a determined, articulate advocate of his point of view. The problem is the facts just don't sustain that point of view. This has been refuted time and time again, but we see the same charts being trotted out time and time again that just are proven not true by the facts that we all know. I want to talk a little bit about those facts. I want to talk a little bit about what Democrats in the past have said about filibusters and their conviction that they should never occur and that they are, in fact, unconstitutional. In fact, those are the arguments we are making today, and we will use their own words to prove it.

My colleague from New York time and time again trots out a chart that claims that a number of judicial nominees have been filibustered by Republicans when in fact, those same nominees have been confirmed and are today sitting on the Federal court. How he can claim that what a Democrat minority is doing to Miguel Estrada or Priscilla Owen, Janice Brown, Carolyn Kuhl, Bill Pryor, and

Charles Pickering is somehow the same thing Republicans did in the past is just disingenuous at best.

He claims that Stephen Breyer was filibustered. The last time I checked, Stephen Breyer sits on the U.S. Supreme Court. You go down his list, and, frankly, the chart is not worth the paper it is printed on.

Don't take my word for it. Listen to the words of TOM DASCHLE on January 30, 1995. The minority leader said:

> The Constitution is straightforward about the few instances in which more than a majority of the Congress must vote: A veto override, a treaty, and a finding of guilt in an impeachment proceeding. Every other action by the Congress is taken by majority vote.

That is our position. They are denying those very words here today.

I just hope the American people are listening, even though the hour is early and even though we have been talking for a long time now.

My question is, should we believe you today or should we believe what you said in 1995, Senator DASCHLE, when you said, other than a veto override, a treaty, or a finding of guilt in an impeachment proceeding, every other action in Congress is taken by majority vote?

I believe he was correct then and because of the politics of the moment he is not correct today.

Senator TOM HARKIN, in 1994, said:

> I really believe that the filibuster rules are unconstitutional. I believe the Constitution sets out five times when you need majority or supermajority votes in the Senate for treaties, impeachment.

We could go down the list:

Lloyd Cutler, White House Counsel under President Carter and President Clinton; Senator BIDEN; Senator BOXER; Senator FEINSTEIN; and Senator KENNEDY. Senator KENNEDY said: ''Nominees deserve a vote.'' He is not saying that here today. He is voting to obstruct a vote where a bipartisan majority of the Senate stands ready to confirm these nominees. Senator KENNEDY said: ''Nominees deserve a vote. If our colleagues do not like them, vote against them.''

I would prefer the Senator KENNEDY of that era because I think he was right then. None of our colleagues on the other side of the aisle have made any explanation for why they have changed their position on what the Constitution means. But yet we have heard from Senator ALLEN and others that the characterization we are hearing from the other side about these fine judicial nominees is nothing more than politics.

The Senator from New Jersey, Mr. CORZINE, in a moment of stark candor, had this to say. This was an e-mail he sent to prospective donors to the Democratic Senatorial Campaign Committee. He said:

> Senate Democrats have launched an unprecedented effort.

How he could call it unprecedented if, in fact, as Senator Schumer and others have said, it hasn't happened in the past? Senator CORZINE, I guess, is guilty of telling the truth here. He said:

> Senate Democrats have launched an unprecedented effort by mounting filibusters against the Bush administration's most radical nominees. Senate Democrats have led the effort to save our courts.

Of course, we understand what is going on. This is about raising money. This is about stirring people up by throwing them some red meat. We all understand what is going on. The American people understand what is going on, that this is about politics. This is not about politics as usual, this is about politics at its worst.

The reason I say that is not because it is unusual for us to disagree in this body. In fact, that is one of the things I love about this body—that any Senator can stand up and talk about what they truly believe to be in the best interests of this country. We know many times there are disagreements. But then ultimately we have a vote because we believe in majority rule in this country. That, in fact, is what distinguishes this form of government from others—that sooner or later, after we have talked—and we have talked about some of these nominees for 2½ years or more—but sooner or later, we vote. Sooner or later, we vote. That is what democracy is about. That is not what is happening with regard to these filibusters, and it is wrong.

The thing that really concerns me—there are a lot of things that concern me about this process. I believe it is not simply in need of tinkering. I think the system is broken down completely and we need a fresh start.

Together, myself along with my colleagues who are new Members of this body who have been here now for just about a year, we sent a letter to the majority leader and the minority leader, the chairman and ranking member of the Judiciary Committee, and said: We are really not interested in this game of tit for tat or recrimination, pointing to the past and saying we were entitled to treat President Bush's nominees today badly because we believe you treated President Clinton's nominees badly. Frankly, I wasn't here then. I don't endorse treating any nominee badly. These are honorable men and women who have been chosen by the President to serve in positions of important public service, and they deserve to be treated better than the nominees we are talking about today have been treated. Perhaps there were excesses in the past. I regret that. Unfortunately, I wasn't here to do anything about it. But I am here today.

What I believe is that we need a fresh start. We need to agree among ourselves that what has happened in the past in terms of the way judicial nominees have been treated does not reflect credit on this institution, and the people we are talking about, people who have risen to the very top of the legal profession and who should be treated with honor, it is wrong to treat them as common criminals. It is wrong to treat them as a caricature of their true selves. It is wrong to call them names. We can disagree with them. We can have a great debate. But ultimately, we need to treat them respectfully.

That doesn't mean a Senator has to vote for them. Every Senator has a clear right to vote their conscience—to vote up or down. That is really all we are asking for today and last night and for the remainder of this day, and as long as it takes to make clear that what is happening is wrong. It is unconstitutional, as Democrat leaders have said in the past—a fact which they have apparently forgotten, to put it charitably.

But I think the thing that really concerns me more than anything else—and as I have said, there is a lot to be concerned about—is the tactics used against some of these nominees, and the way they are treated after they have volunteered to offer their services to the American people on the bench.

We have seen charts that say 168 to 4. As we pointed out before, the real number, if we are being honest, should be zero to 4, zero being the number of filibusters against judicial nominees from 1789 to 2002. That is right. It never happened before—never in the history of the United States of America. It has never happened before, until this year. This year we have seen four filibusters. What has changed? Has the Constitution somehow changed? For those Senators who decried filibusters in the past and who now embrace them, what has changed to cause their change of opinion and change of view? I think we know what has happened.

That is why the number should be zero to 4—zero filibusters since 1789 until 2002 and 2004, in this last year, in an attempt to block President Bush's highly qualified nominees.

But as I was saying, where I come from we don't treat people as statistics. Where I come from, if you are going to attack someone and call them names, you at least give them a chance to meet with you and sit down and talk face to face. Yet obstructionists have time and time again refused to even meet with these nominees. Any Member of the Senate who would like to meet with these nominees and talk about their concerns and to see if they are justified, to listen to the response, has that right, and indeed every Senator has had that opportunity, but many have turned it down rather than take advantage of that opportunity and reach understandings and then vote.

We have even had this process sink to a new low when it comes to embracing the idea that a nominee's personal views on religious issues should play a role in determining whether or not they are fit to serve as a judge.

I strongly disagree with that concept, and I think all of us should reject

it. I believe that when a nominee's personal theological beliefs become a legitimate course of debate before the judiciary and before the Senate, when we insert ourselves somehow between the relationship between an individual and their God, we violate both our conscience and our Constitution.

I have sensed in the Judiciary Committee that some of my colleagues are genuinely alarmed and uncomfortable when a nominee speaks about his or her faith in honest terms in the public arena. Indeed, it is so rare today where people feel free to talk about things that are most important to them.

I would like to read a comment that unnerves some of these folks, who are uncomfortable with such frank and honest discussions.

We are inspired by a faith that goes back through all the years to the first chapter of the Book of Genesis. God created man in his own image. We on our side are striving to be true to that divine heritage. We are fighting, as our fathers have fought, to uphold the doctrine that all men are equal in the eyes of God. There never has been, there never can be, a successful compromise between good and evil. Only total victory can reward the champions of tolerance and decency and freedom and faith.

This was not the comments or the testimony of a nominee to the Federal bench. These were the words of President Franklin Delano Roosevelt. I seriously doubt that anyone in this body at that time took President Roosevelt to task for speaking frankly and honestly about his deeply held personal religious beliefs. President Roosevelt was certainly within his rights to say that in 1942, and it is just as right and proper that our nominees today express their deeply held religious beliefs when they are talking about things that concern them in response to questions, whether it be about abortion or any other issue. I wonder today if, testifying before the Judiciary Committee, President Roosevelt himself would be challenged for these very remarks.

We have most recently witnessed the strident animus directed toward Judge Carolyn Kuhl and Attorney General Bill Pryor who have faced challenges over their religious beliefs, particularly concerning the matter of abortion. Both nominees have, from a legal scholar's point of view, criticized the legal analysis used to support the Roe v. Wade decision. These nominees personally hold beliefs that are absolutely consistent with their faith and the doctrine of their church. Their understanding of religion holds to the doctrine that abortion is wrong. Yet, still, the obstructionists have argued that for both of these nominees—and Bill Pryor, in particular, who is repeatedly challenged over his philosophy and deeply held views above all those arising from his religious beliefs, rendered them simply unqualified to be confirmed.

I would point out that these nominees are hardly alone in criticizing the Roe decision as a legal matter. Numerous legal scholars and jurists across the political spectrum who call themselves pro-choice and pro-life have publicly criticized the legal analysis in Roe, and indeed that is what lawyers do and judge us do. They parse words. They challenge an analysis to try to sharpen legal thinking. But Supreme Court Justice Ruth Bader Ginsberg, who was overwhelmingly approved by the Senate, has described Roe as ''heavy-handed judicial intervention'' that was ''difficult to justify.'' Allan Dershowitz, a law professor from the Harvard Law School, described Roe as a ''case of judicial activism more appropriately left to the political process.'' Edward Lazarus, former law clerk to Justice Blackmun, the author of Roe, said that ''Roe borders on the indefensible as a decision and, at its worst, is disingenuous and results oriented.''

I read these quotes not for any other reason except to show that there has been over time serious scholarly concern about the legal justification for that decision.

But perhaps more to the point, even though Attorney General Pryor and Judge Kuhl have criticized the reasoning of Roe, they recognize that Roe v. Wade is the law of the land. Indeed, one of the things I admire most about Attorney General Bill Pryor, as the Senator from Tennessee noted in his comments last evening, is that he has said: ''No matter what my personal beliefs are, I believe in the morality of enforcing the law.''

Indeed, I believe as a public servant, as attorney general, as a judge, it is the obligation of a judge to interpret the law as written, not as I would have it be. Indeed, some of the problem we have had is judges who have elevated their personal beliefs, their political agenda above the law. I submit that a judge who is a lawmaker is, in fact, a law breaker.

We understand in this country what was settled well over 200 years ago at the Constitutional Convention in Philadelphia; that is, we have three branches of Government. We have the Congress or legislative branch, which everyone understands. That is the reason we run for election, tell people what we believe, and then we are either accepted or rejected by the public because they believe that same way or not. But then we have a President, the executive branch, whose job it is to execute the law that Congress has written. Indeed, they are servants of the law as well because we recognize they, too, must comply with the law and that no President is above the law; that we are a nation of laws, not of men.

Then there is the judicial branch of Government. The Federalist Papers refer to the judicial branch as the ''least dangerous branch.'' I wonder whether James Madison and Alexander Hamilton are spinning in their graves today when they see what the Federal judiciary has become in too many instances, where judges have assumed the role of lawmaker, something that was anathema to the Framers.

My point is simply this: People such as Priscilla Owen, with whom I served for 4 years on the Texas Supreme Court, understand that no matter what their personal beliefs are, when they put their hand on the Bible and they take an oath to uphold the law of their State and of the United States of America, they have a sacred obligation not to elevate their personal views above the law. Indeed, the judicial philosophy we should all embrace is that of a judge who interprets the law and not makes law.

As I said earlier, a judge who is a lawmaker is indeed a law breaker because they violate the fundamental commitment that all of us have made to enforce and uphold the law, including the Constitution that dictates those respective roles for the various branches of Government.

When I see people such as Priscilla Owen, who received 84 percent of the vote in her last election by the people of Texas and who has been twice selected to the Texas Supreme Court; when I see people such as Justice Janice Rogers Brown, who was supported by 76 percent of Californians in the last election in 1998, the highest of four justices on the ballot; these are not out-of-the-mainstream judges, unless words no longer have meaning.

I agree with Senator SANTORUM who has said, to many it appears that their definition of ''mainstream'' is extreme. But these are mainstream judges who have received the support of the people they currently serve, both in Texas and California, because they have faithfully interpreted the law. They have been true to their oath. They have been true to the Constitution.

We live in a pluralistic society. People across this country have a variety of different beliefs on a variety of different matters. Indeed, that is what makes this country so great and so strong because we believe everyone is entitled to believe as they wish, to speak and say what they want, but that ultimately we are all governed by the same rules: the rule of law.

It does my heart great sadness to see that people who have dedicated their life to upholding the law are treated so shabbily in this, the world's greatest deliberative body, and that reputations that have been earned with a lifetime of public service are degraded and denigrated to the point that we would not recognize them; that their families, who listen to these unfair and, in some instances, scurrilous attacks, must certainly suffer when they hear the name calling and the unfair characterization of these good and decent human beings.

Just one example of this, perhaps, has taken us to a new low. This cartoon appeared in the Black Commentator on September 4, 2003. This was displayed at the hearing of Janice Rogers Brown before the Judiciary Committee, someone who currently serves

on the California Supreme Court. I had the honor to introduce her to the committee because her two home State Senators refused to do so. But it was my honor to do so.

This is the kind of scurrilous, mean attack that is embraced by some who oppose these nominees. I know it is not necessarily easy to see, but this depicts a caricature of President Bush, a picture of Janice Rogers Brown in the most extreme sort of racial stereotype you can imagine, Justice Clarence Thomas, Secretary of State Colin Powell, and Condoleezza Rice, National Security Adviser to the President. The President is saying: ''Welcome to the Federal bench, Ms. Clarence . . . I mean, Ms. Rogers Brown. You'll fit right in.''

Our colleagues on the other side would do well to disavow this kind of support for the obstruction of these judicial nominees. Indeed, I would think every fairminded and decent human being would decry and denounce these sort of vial and loathsome tactics. We can disagree. We can have different points of view. Indeed, I think that is what makes this body so unique and so important. But we should agree to maintain a certain minimum level of civility in our discourse and, indeed, when there are those who inject this sort of scurrilous attack on President Bush's nominees, or anyone else for that matter, we ought to stand up and say: Unfair, unjustified, and we repudiate it.

Frankly, I have not heard the kinds of repudiation that I would expect for those who are joining in this obstruction against Janice Rogers Brown and denying her the right to a vote.

That is all we are asking for, an up-or-down vote.

The PRESIDING OFFICER (Mr. BENNETT). The Senator from Florida.

Mr. NELSON of Florida. Mr. President, I have said often what a great privilege it is for me to be here and to represent the State of Florida. Little did I think 3 years ago when I came into the Senate that I would be speaking to an empty Chamber at 7:30 in the morning. But, indeed, it is a privilege to be here and to offer the ideas of this Senator and the perspectives.

It is pretty clear to me that when I vote for 172 judges and only 4 of 172 are rejected, I am doing my duty. It happens to be this Senator from Florida. Of those 4 who were rejected, I voted for 1 of those 4. But the notion that somehow this is not being fair for the Senate to advise and withhold consent on 4 judges out of 172 just seems to me to be something that we in the South would say is ''just beyond me.''

Mr. President, 172 judges have come in front of this Chamber. I have voted for 169. I have voted against 3 of those judges. Now why? Why did I?

Well, because what I want is a judge, particularly at the level of the appellate court, but for that matter any Federal judge because they are there for a lifetime appointment, they are there beyond any kind of influences that would remove them from the bench save for skulduggery and unethical behavior, they are there to be free to exercise their judgment—in so doing that, I want a judge who is open-minded, who approaches the bench in a fairminded way. I don't want a judge who comes to the bench and his mind already made up.

In the South we have a phrase for that. It is a ''know-it-all.'' I don't want a know-it-all as a judge. I want a judge who has an open mind, who is going to listen to the facts, and apply the law. That is what the security and sanctity of this judicial system is based on: Fair and equal justice for all.

That means that a judge ought to have judicial temperament to open their mind and not have all the answers as they approach the bench.

So for this Senator, it is pretty clear, when I vote on 172 judges, and 3 of those 172 don't meet my test, and in the will of this body, 4 of those 172 don't meet the test, it seems to me that is a fairly reasonable point of view. That is inserting the check and balance of the constitutional system that is so unique to our system of government, where a legislative branch offsets, and checks and balances the executive branch, and so, too, a judicial branch offsets and checks and balances the other two branches.

I am delighted to be here with my colleague from Oregon today and to share the floor as we give some of our ideas about this all-night session. It was quite a challenge getting here. There is a real wind storm in Washington today. Fortunately, since the power went out at my residence, my stopwatch and also alarm clock wristwatch went off, and I had to stumble around in the dark with a flashlight and race over here. But I am delighted to be here and to join with my colleague from Oregon.

Mr. WYDEN. I thank my friend. I think he has made a number of important points about judges. The fact is, there is an alternative path. I think about how I have had a chance to work with my colleague in the Oregon delegation, Senator SMITH. We have gotten judge after judge confirmed because we have felt, while some consider it quaint, that you ought to try to work in a bipartisan way. We have not applied an ideological litmus test. I think what the Senator from Florida is saying is that is the kind of approach we ought to be pursuing, to try to find common ground to get the Senate together.

As I begin my comments this morning, I will say that I think a lot of Americans look at what is going on now on the floor of the Senate and say that it is sort of like the great wall of China, an almost impenetrable barrier surrounding a forbidden community where their voices just go unheard.

I know what I hear from my constituents—I have open community meetings in all of Oregon's counties—is awfully different than essentially what the Senate has been doing through the night.

For example, what I hear about is how medical costs are just gobbling up everything in sight. I hear, for example, about how the crushing small businesses, scores of them dying to cover their people, have been unable to do it. I hear about providers, physicians, and others leaving the system because of inadequate reimbursement. I hear about so many who are not poor enough for Medicaid, they are not old enough for Medicare, and they fall between the cracks. Again, there is an alternative approach to all of the partisanship.

The senior Senator from Utah, ORRIN HATCH, has worked with me for a number of years now on the Health Care for All Americans Act. It is absolutely critical that the Senate get moving on this issue because we all understand that there is a demographic tsunami coming. Millions of baby boomers are about to retire in a few years. All of the problems we are seeing today are going to be multiplied three or fourfold.

Yet the Senate isn't tackling that kind of issue because, in effect, things have ground to a halt over exactly the kind of polarization the Senator from Florida has talked about.

I would hope that as we wrap this up, we understand that nothing important is going to get accomplished in the Senate unless there is an effort to work in a bipartisan kind of fashion.

Mr. NELSON of Florida. Will the Senator yield?

Mr. WYDEN. I am happy to yield.

Mr. NELSON of Florida. On that point, we have been fortunate to have a bipartisan approach in Florida with regard to the confirmation of judges as well. My senior colleague, Senator GRAHAM, as Governor back in 1978 to 1986, was able to get the legislature to pass a series of panels called the Judicial Nominating Commission. This would be composed of lay people and members of the bar, leaders of the community who would receive applications for a vacant judgeship, and then that committee would screen them, interview them, look at their credentials, and nominate three, and then the Governor would select. That is still law today.

When Governor GRAHAM was elected to the Senate in 1986, he started to institute a similar situation, but rather by custom instead of law, in the confirmation of nominees to the Federal bench. It has worked well, while there have been two Senators of the same party and, indeed, while Florida has had two Senators of both parties. Indeed, the judicial nominating commissions formed back in Florida nominate three for the vacancy. The Senators sit down and interview all three of those. Now we are operating under a system that we have worked out with the existing Governor of Florida that it will be six nominees for the vacancy.

Senator GRAHAM and I sit down and interview all six, and we make a recommendation to the White House if we have an objection.

Otherwise, the White House then goes about and selects which one they want. It is a way of working this in a bipartisan fashion, with a bipartisan commission; and all of our judges have gotten through without controversy.

The fact is exactly what the Senator from Oregon says. If you put your mind to it and you want to be bipartisan, you can have this process work, work efficiently, work effectively, and work timely in order to have good, fair, and open-minded judges.

Mr. WYDEN. The Senator from Florida is being logical. Heaven forbid that logic break out sometimes in this area that is often called the ''logic-free zone''—this area surrounding the Capitol. It just seems that in so many of these areas, the institution just takes leave of its senses because both of us have described a bipartisan way to deal with the issue of judges—an approach that works in Florida and has worked for Senator SMITH and I in Oregon. I do not think the Senate has the time or luxury for a lot of this pettiness.

I mentioned the health care issue with Senator HATCH that I have felt strongly about since my days as co-director of the Oregon Gray Panthers. This demographic revolution is coming on us, and the prescription drug issue we are tackling now is vitally important. But if there is one thing the Senate has learned, health care is like an ecosystem. What you do in one area affects all other areas. Senator HATCH and I have pulled together an approach that has now gotten the support of the Chamber of Commerce and the AFL–CIO to get back on track for what, regrettably, was not finished back in the early 1990s. In the health care area, you see an alternative path.

I see my good friend from Virginia here, Senator ALLEN. He and I are working on at least five major technology issues right now on the question of Internet access, and we are working in a bipartisan way with the States and localities to ensure that the Internet medium is allowed to grow and prosper. We have come together on nanotechnology, and we are working together.

I want to give some additional time to the Senator from Florida because I know his schedule is short. If you look at the big issues of our day, including the health care question, where I have outlined what Senator HATCH and I are talking about on so many issues that are social and ethical; and the technology question, where it just seems fitting that the Senator from Virginia is here, Senator ALLEN, my friend and partner on so many of these technology issues, the Senate has a choice either to listen to our constituents and take the bipartisan approach that will lead to real solutions or continue what is seen by most Americans as just small food-fight-like exercises.

I want to give additional time to my friend from Florida because of his schedule. I appreciate, particularly, his outlining, as we have tried to do in Oregon—Senator SMITH and I working together—the kind of bipartisan approach that the Senator from Florida has described in his State for choosing judges.

Mr. NELSON of Florida. Mr. President, I will pick up on that theme the Senator from Oregon has mentioned. I must say this has been one of the greatest experiences, and most enjoyable, to get to know all of these Senators. I must say there is not one Senator here I do not personally like. I must also say that my degree of frustration—and usually if I am frustrated, it is with a smile because of enjoying my colleagues here so much; but my one frustration is that this place is way too partisan. And, from time to time, this place is way too ideologically extreme. When you have a country as big and as broad and as complex and as diverse as ours, it is very difficult to govern this country when it becomes highly partisan and ideologically extreme. It makes it very difficult for the people who are in the political center trying to reach out and bring people together to build consensus when there is sharp, highly charged partisanship and ideological extremism. It is very hard to build that consensus.

Mr. ALLEN. Will the Senator from Florida yield?

Mr. NELSON of Florida. I would love to yield to my colleague, but it is my understanding that, under the rules, we are given, in each hour, one-half hour for the Senator from Oregon and me to make a presentation, and one-half hour is given to the Senator's colleagues to make their presentation. It would be my intention for Senator WYDEN and I to continue our remarks, since we only have about 12 minutes left.

Mr. ALLEN. Mr. President, I thought it had been agreed that any speaking or questioning I may do would get charged against our time in the next hour.

Mr. NELSON of Florida. Mr. President, it is my understanding that I have the floor. I have some thoughts I want to express. Rather than have those interrupted, I prefer to just continue on.

The PRESIDING OFFICER. The Senator from Florida has the floor.

Mr. ALLEN. Thank you, Mr. President.

Mr. NELSON of Florida. Mr. President, I thank the Senator from Virginia, who is one of my favorites here. I have the privilege of serving with him on a number of committees.

Back to what I was saying, if we would stop this excessive partisanship—you cannot get things done with this excessive partisanship. Especially, you cannot get it done in a Senate that is basically split down the middle, 50–50. I think it is 51–49 now. So if you are going to get anything done, we ought to be Americans first, not partisans first. That is what part of all this fight is. That is what part of this all-night session has been.

Do you know what. The folks out there in America—and I think all of you know this—don't like these partisan food fights.

I would like the perspective of the Senator from Oregon on that.

Mr. WYDEN. Mr. President, I think the Senator from Florida and I have tried to spend our half hour talking about specific ways in which the Senate, on a bipartisan basis, can come together to find common ground. Let me repeat them as we move to the end of our half hour. The Senator from Florida and I have talked about an alternative approach on judges, which works in the State of Florida and in the State of Oregon. I have talked about the health care issue, the issue that I feel the most passionate about, going back to my days when I worked with the elderly, and the wonderful help I have gotten from ORRIN HATCH, trying to focus on getting the country ready for this huge set of population changes that is coming. I thought it was very fitting that the Senator from Virginia was here, Mr. ALLEN, who has worked with me on technology issues.

A fourth area—something that is fresh in the Senate's mind—is that just a few days ago, we got 80 Senators—far more than anyone could have imagined—to support a major natural resources bill dealing with the forest fire issue. This is something of enormous concern in my part of the country and, obviously, all Americans. Our hearts go out to the people in California where they have had this terrible tragedy. Senator FEINSTEIN and Senator COCHRAN—I always wanted to work with Senator COCHRAN on an issue as chairman of the Agriculture Committee. I haven't had the opportunity until now. He could not have been more constructive and helpful. I think that is why the Senate got 80 votes for that forest rebuild.

So I think the Senator from Florida is setting the right tone and certainly, in our 20 minutes, on the question of judges, health care, technology, and on the question of forestry, the two of us have shown that there is an alternative to a lot of the smallness, a lot of the harshness that we are seeing dominate this debate.

I thank my colleague for all of this extra time, and I believe the tone he is setting is one that will respond to what I hear the country talking about, and certainly what I hear people of Oregon talking about at our 36 town meetings in every part of the State.

Mr. NELSON of Florida. If the Senator will yield, I want to discuss another subject where partisanship gets in the way, and that is putting our fiscal house in order.

The Senator will remember about 2½ years ago, the wonderful optimistic view that we had of the Federal budget,

where we were sitting on a budget surplus in the year 2001—something in excess of $250 billion in that 1 year, with a projected surplus over the next decade that was going to allow us to pay down and almost pay off the entire national debt, and still have enough left over in order to enact a substantial tax cut, and still have enough left over to start new programs that were needed, such as the adequate funding of the bill that we ultimately passed but did not adequately fund—the No Child Left Behind Act—and modernizing Medicare with a substantial prescription drug benefit. We had the opportunity to do all of that and still be fiscally conservative and fiscally responsible in not invading the Social Security trust fund, letting that Social Security trust fund surplus pay off the national debt over the next decade.

Instead, 2½ years later, we are looking in this fiscal year at a budget deficit—not a surplus but a deficit—of a half trillion dollars. That means we are spending $500 billion more than we have coming in in tax revenue. What do we do? We go out and borrow it. Who do we borrow it from? We borrow it in part from the average American citizen when we buy Treasury bonds. Do you know what surprises people? We end up borrowing it from countries such as China and Saudi Arabia.

If we are going to get out of this fiscal briar patch, it is going to take bipartisanship. The excessive partisanship gets in the way, just like it has gotten in the way of having us in session all night for that side of the aisle to make their point of view, and our side of the aisle to say that we have taken up 172 judges and approved 168 of them.

This country has its challenges and we have not even talked about Iraq and Afghanistan and the war on terror. But it certainly has its challenges with this fiscal mess that we are in of bleeding to the tune of deficit financing of $500 billion in this fiscal year.

Again, I thank my colleague. What he represents, my colleague from Oregon, and our colleague from Louisiana, who is with us—what they represent is the bipartisanship of reaching out and trying to bring people together and build consensus. That is what we need to do when we are dealing with Iraq and Afghanistan, the budget deficit, the environment, education, prescription drug benefits, and the approval of judges.

Mr. WYDEN. Will my colleague yield?

Mr. NELSON of Florida. Yes.

Mr. WYDEN. I think you have given us an ideal way to wrap up our half hour. I want to tick off yet another area where we have outlined an opportunity for an alternative path. We have spent our half hour describing a way in Florida and Oregon where you can deal with judges in a bipartisan fashion. We have talked about health care issues. Orrin Hatch and others have helped me, as have other Democrats. I think that has been constructive and a real path to try to deal with what is coming in 2010 and 2011.

Senator ALLEN was here and we talked about technology and the fact that the Senate got 80 votes a few days ago for forestry legislation—an unprecedented bipartisan vote. Finally, the Senator from Florida puts us on this question of fiscal responsibility, another avenue for cooperation between the parties.

I think about the outstanding work done by the Senator from Maine, Ms. COLLINS, who chairs the committee overseeing the operations of Government. She and I have been very concerned about the lack of openness in competition in the contracting process for these reconstruction contracts. It looks, given the events of this week, as though you are going to get more information out of Baghdad than you are going to get out of Government agencies in Washington, DC. There wasn't a shred of partisanship with respect to how we tackle this issue. So I think what we wanted to do in our half hour of time—the Senator from Florida and I—is not just talk about everything that has gone wrong, but to outline on specific issues an alternative path—a path that shows that we are listening; that the notion that somehow Washington, DC, is like a great wall of China, an unpenetrable community for the American people doesn't have to be that way. Whether it is judges, health care, technology, forestry, or the fiscal morass that the Senator from Florida has talked about, we want people who are listening this morning to know that we do think there is another way for the Senate to do its business.

I say to my friend from Florida, we came to Congress essentially together in the other body and then here. I have really enjoyed this and particularly the tone that I think he set out when we began—that the Senate needs to do better, and if you want to get anything important done—which is why we are sent here—it has to be bipartisan. I thank my colleague.

Mr. NELSON of Florida. Mr. President, has the half hour expired?

The PRESIDING OFFICER. The minority has an additional 1 minute 50 seconds.

Mr. NELSON of Florida. Mr. President, I thank my colleague from Oregon, and I thank the Senator from New York, who has already shared his comments. I am looking forward to the comments of the Senator from Louisiana and also the Senator from Iowa.

Bottom line: What is this about? This is about fair and equal treatment for the American people and producing a Federal judiciary that will be open minded. Over two centuries ago, a group of political geniuses got together and crafted a written document called the Constitution, which would not allow power to be concentrated in the hands of any one person or any one institution but, rather, that an arrangement of sharing of power would occur. Each institution would have a check and balance against the other.

You are seeing that check and balance play out now in the nomination and confirmation, and/or the advice or nonconfirmation of this body, the Senate. So it is a great privilege for me to participate in it, along with the Senator from Oregon.

Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. NICKLES). The Senator from Virginia.

Mr. ALLEN. Mr. President, I listened to the words of the Senator from Florida and the Senator from Oregon. As the Senator from Oregon said, we have worked together on things from cybersecurity to nanotechnology, important initiatives for the competitiveness of our country. We have worked together to prevent access taxes on the Internet and other matters, particularly in the technology area.

I listened to the Senator from Florida. This is why I wanted to pose a question to him. I realize both sides were out of time so I bring up the issue now.

In the way he was speaking earlier, I would say, the Senator from Florida, Mr. NELSON, said we approved all these judges and there were four we have not approved. Indeed, on one of them he actually voted for; that was Miguel Estrada. Miguel Estrada received 55 votes for cloture to actually go to a vote.

In the case of Miguel Estrada, the majority of Senators were in favor of Miguel Estrada. I commend Senator NELSON as one of the four or five Democrats who, on Miguel Estrada's nomination, thoroughly examined his qualifications and decided that he should be accorded a vote. But we now have a supermajority requirement for judicial nominations, a 60-vote margin.

However, to look at a cloture motion as a vote up or down is not correct. The Constitution does not require a 60-vote margin. The Constitution requires advice and consent in a simple majority, one way or the other, with a simple, fair, and equitable vote. Miguel Estrada had 55 votes. Senator NELSON was one who voted to end cloture. Clearly, with a fair vote, he would now be on the DC Court of Appeals. Instead we had to go through seven cloture votes.

The same with Attorney General Pryor, Judge Pickering, and Justice Owen—all have had majority votes to end cloture. So the reality is, and why there is frustration and aggravation and why we are trying to get justice and equity done, is that in fact there has not been a simple up or down vote on this nominees.

In the event that one of these cloture votes had only resulted in 47 or 48, I expect the writing would be on the wall and we would recognize the President would have to renominate. That happened years ago with Justice Fortas.

In this situation, it is clear, with Miguel Estrada, Mr. PRYOR, Judge

Pickering, and Justice Owen, the majority are in favor. It there will probably be a majority in favor of Judge Kuhl and Judge Rogers Brown.

I have been talking about country music songs through the night and through the morning. This reminds me of an analogy to ''Rawhide,'' except the opposite, instead of ''movin', movin', movin','' we have ''stallin', stallin', stallin'.''

What we want is people to decide in the Senate, yes or no, whether you are going to move them up or move them down; yet, nevertheless, move and decide. That is the responsible thing to do, consistent with the Constitution, consistent with the accountability of the Senators to the Constitution and to their constituents as well as fairness to these nominees, to give them the fairness of an up-or-down vote. Simply decide.

Mr. BENNETT. Will the Senator yield for a question?

Mr. ALLEN. Yes, I will.

Mr. BENNETT. I am interested to hear the Senator make the point that an up-or-down vote is what we are asking for. The Senator was in the Chamber when the cartoon was displayed with highly offensive racial characteristics attributed to the judge from California. I ask the Senator if he is aware that this African-American woman, who in my opinion has been slandered, has been the subject of comment by Al Sharpton, one of the candidates for President. Al Sharpton said he disagrees with the woman and believes she is not qualified to sit on the bench but that she is entitled to an up-or-down vote. Is the Senator aware of Mr. Sharpton's comment on that?

Mr. ALLEN. No, I was not aware of that. I thank the Senator from Utah, Mr. BENNETT, for bringing that up. I hope some of our colleagues on the other side of the aisle will look back on some of their own statements from 3 years ago and 4 years ago when they were saying judges deserve up-or-down votes, and at those contemporaneous times, from Reverend Sharpton. I may not always agree with Reverend Sharpton, but he seems to be a man of fairness and I hope our colleagues on the other side of the aisle will heed his advice.

Mr. BENNETT. I would say I almost never agree with Reverend Sharpton, but I have seen the diligence with which he and other civil rights leaders have pounced upon any politician who has ever dared hint at any kind of racial slur or attack on an African American. At least he has shown this degree of consistency, that he has now spoken up against those who are Democrats who may have been guilty of a racial slur, and come to the defense of an African American, even though he disagrees with her.

I think it appropriate for us to note that. I appreciate the Senator's yielding to me for the opportunity to make that comment.

Ms. LANDRIEU. Will the Senator from Virginia yield for a question?

Mr. ALLEN. I thank the Senator from Utah for bringing up, not only the Sun, but that enlightening view.

Ms. LANDRIEU. Will the Senator yield?

Mr. ALLEN. I yield at the sufferance of the Senator from Tennessee. I will yield, but it will be on your time.

Ms. LANDRIEU. Just a question. I am sorry the Senator from Utah left the floor. Perhaps if he hears this question, he might come back to respond.

I am wondering, since he raised the name of Al Sharpton, Rev. Al Sharpton, who asked for a vote on one nominee, supposedly. If Al Sharpton—I am sure he did, and others—asked for a vote on 60 of President Clinton's nominees, which represented 20 percent of the nominees sent up by a former President, would the Senator from Utah have agreed to a vote, if Rev. Al Sharpton had called him? I don't think so. He could come back to the floor and respond to that.

The issue is not single votes. The issue is whether the Senate of the United States, the Democrats, have a right to give advice and consent to the President. The facts speak for themselves. The Senator from Virginia knows them well. The numbers are 168 of President Bush's nominees have been approved with bipartisan support and cooperation from the Democrats in the Senate. Only 4—only 4—have been stopped—only 2 percent. That is in contrast to the thousands—this is my question.

The PRESIDING OFFICER. The Senator may ask a question.

Ms. LANDRIEU. Did the Senator from Utah or the Senator from Virginia know that when President Clinton was in the White House, thousands and thousands of individuals—did you know—called to ask for votes on the 60 percent?

The PRESIDING OFFICER. The Senator is entitled to ask a question. She is not entitled to make a speech.

Ms. LANDRIEU. I am asking a question: Did you know? That is my question. Did they know that when the former President sent hundreds of nominees and asked for a vote—and I am sure Reverend Sharpton and others—did they know, some of the members and groups involved and interested Americans involved—did they know that 55 nominees were not given a right to have their vote called?

Mr. BENNETT. May I respond?

The PRESIDING OFFICER. The Senator from Virginia has control of the time.

Mr. ALLEN. The question was propounded to the Senator from Utah, and I yield to the Senator from Utah. But before I do, the point is here and now. The four you are talking about is already six. The Senator from Florida was talking about these so-called cloture votes as being votes. They are not fair up-or-down votes. That is the point here. Don't try to shirk responsibility or shirk accountability. Are you going to vote for or against these individuals based upon their merits? If you are against them, that is fine. But have the equity and fairness of a vote.

I was not here in those days. All I know is, since President Bush has come into office, he has put forward individuals, including Roger Gregory, whom I mentioned earlier, who was a recess appointee of President Clinton, and it was really difficult for a lot of Republicans to act on statements of Judge Roger Gregory based on his qualifications and merits, but we did. We think you on the other side ought to accord these nominees the same fairness and equity of a fair vote.

But I will yield to Senator BENNETT, responding on the Al Sharpton question.

Mr. BENNETT. Mr. President, I will answer the Senator from Louisiana.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. I am unaware of how many nominees did not get out of committee. I am unaware of what may have happened prior to a nomination coming to the floor. But I do know I would allow a vote on every nominee who comes to the floor, regardless of which party it may be or regardless of which President might put that nominee forward. And I would agree with Al Sharpton or anyone else who called for an up-or-down vote, without a filibuster, on any nominee, any judicial nominee who has come forward.

There is no question but nominees get lost in committees. There is no question nominees get held up by holds and other activities. But once a nominee has been cleared by a majority vote of the committee and placed on the floor, that nominee is entitled to an up-or-down vote. I have always held that position. I always will hold that position. It is for that reason I will support the Frist-Miller rule change that will make that position very clear.

I do not care who the President is, under the Constitution he or she has the right to make nominations. The Senate handles those nominations. I understand sometimes those nominations will be stopped in committee. But once the committee has voted by a majority vote to put the nomination on the floor, whether it is my President or someone else's President, I will always support and always have supported the notion that that individual is entitled to an up-or-down vote.

Mrs. LANDRIEU. Will the Senator from Virginia yield?

Mr. ALLEN. I will yield to the Senator from Tennessee.

The PRESIDING OFFICER. Who seeks recognition?

The Senator from Arizona.

Mr. KYL. Will the Chair advise me when I have spoken for 90 seconds? I simply want to make one point. That is, the chart that is before us on the other side is more than misleading; it is absolutely false. There are always judges who are not confirmed at the end of a Presidential term. There were

at the end of the Clinton term. There were at the end of the first Bush term. So it is wrong to say that, because there were judges who continue be confirmed because they were nominated late, they were rejected.

What is correct is to say is there have been four nominees rejected by filibuster without a fair trial, without an up-or-down vote. I have been trying to think of an analogy, watching people say: Look, it's 168 to 4; we have only filibustered 4. Of course, there are a lot more in the wings.

But here is an analogy that deals with the law: We only hanged 4 people without a trial. We gave the other 168 a fair trial. We had a vote in the jury.

That is what is going on here. It is not a matter of defeating the judges. Judges are defeated by both parties very seldom, and there are some at the end of a President's term who can't be voted on just because of time constraints, and it is about the same number in every party, if I go back in time.

What is unprecedented is the filibuster where you don't even allow them a vote. The analogy I came up with is the one I just mentioned—I think it is very apt—to say, Look, we only hanged four people without a fair trial; the others got a fair up-or-down vote.

That to me is wrong. That is what we are talking about here.

Mrs. LANDRIEU. Will the Senator yield for a clarification?

The PRESIDING OFFICER. Who seeks time?

Ms. LANDRIEU. Will the Senator yield for a clarification?

The PRESIDING OFFICER. Who seeks time?

Ms. LANDRIEU. The Senator from Arizona.

The PRESIDING OFFICER. Is the Senator from Louisiana in control of time?

Ms. LANDRIEU. I think I——

The PRESIDING OFFICER. The Senator from Tennessee is in control of the time. The Senator from Tennessee.

Mr. ALEXANDER. How much time does the majority have?

The PRESIDING OFFICER. The majority has 17 and a half minutes.

Ms. LANDRIEU. Parliamentary inquiry: How much time do the minority and majority have at this hour to be allocated?

The PRESIDING OFFICER. The majority has 17 minutes, the minority has 28 minutes.

Ms. LANDRIEU. Thank you.

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. ALEXANDER. Mr. President, insofar as the Senator from Arizona's comments are concerned, he said we gave 168 a fair trial and hanged 4 without a trial. He might have also said we had never done that before this year. That is the point.

Let me step back from this and try to put it in a little different framework. I am new to the Senate. I came here in January for the first time even though I worked here before, 35 years ago, for Senator Howard Baker.

A lot of people ask me, knowing I was a Governor for a while: What do you think of it? How do you like the U.S. Senate?

I suspect the reason they ask that is that some former Governors who have come here have not liked it. It is a very different sort of job. But this has been a great privilege for me. It is hard for me to think of a thing that has not been good about the last 10 or 11 months.

The Senator from Louisiana is here. One of the good things is she and I have worked together on issues that have to do with the environment and energy. So the opportunity to speak, the people with whom I work, the issues I deal with, all those things make serving in the Senate a great privilege.

The only real disappointment I have had is this issue of judges, of the treatment the Democratic side has given to President Bush's appointment of judges. I have been puzzled by that. I have even said to some of my friends on the other side: Before this year, before I got here, the Republicans must have done something awfully bad to you to produce this kind of reaction because I really don't understand it.

I know something about the appointment of judges. As Governor of Tennessee, I appointed about 50 judges. In fact, the other day, I went back to Nashville for the retirement ceremony for Chancellor Irwin Kilcrease. I appointed him in 1980. He was the first African American ever to serve as a chancellor in our State. He served with dignity. I didn't ask him his political party before he was appointed. It turned out he was a Democrat. I didn't ask him his view on abortion. I still don't know what it is. I didn't ask him how he was going to decide the cases before I appointed him. I thought it would be totally inappropriate.

I checked to see if he was intelligent, fair, had good character, if he would respect people who came before him, and I appointed him and he has served with great distinction, as did the others.

I also worked for a great judge. The Senator from Louisiana certainly knows him well, or knew him well. His name was John Minor Wisdom. He lived in New Orleans. When I graduated from law school in the mid-1960s, he was already considered to be one of the great Federal judges of the country.

He and Judge Elbert Tuttle of Atlanta, Judge Richard Rives of Florida, and Judge John R. Brown of Texas, all appointed by President Eisenhower, Republican judges, presided over the peaceful desegregation of the South in the 1960s and into the 1970s. In 1962, they ordered Ole Miss to admit James Meredith. They are regarded as heroes in the South.

Judge Wisdom was a great judge. I am sure, before he was appointed, no one in the Senate asked him how he would decide the cases he was about to decide.

What is going on in the Senate today reminds me of the old mountain story about the lawyer who came up to the judge at the beginning of the case and said: Judge, may I make a few arguments on the law? May I tell you about the case?

The judge said: You don't need to tell me about the case. I got a phone call last night. I pretty well know the facts. Just give me a few points on the law.

The importance of judgeships in America is that when we go before them, we expect to be treated fairly. We don't believe it is a political exercise. And we accept the results. That is why it is so inappropriate, it seems to me, for us suddenly to be rejecting President Bush's appointments because of their permanent views when it is established by their long records that they are able to apply the law.

Let me especially speak about a couple of cases from the part of the country I know the best, the South. I want to mention first the attorney general of Alabama, Bill Pryor. I want to mention, second, the Federal judge from Mississippi, Charles Pickering.

Let's talk about Bill Pryor. He is a young attorney general, I just learned the other day. I had not really focused on him enough to know exactly who he is. He also was a law clerk to Judge Wisdom. He was editor in chief of the Tulane Law Review. I am certain the Senator from Louisiana would agree that would qualify someone, at least on paper for good starters, to be a good judge. I know Judge Wisdom hired extraordinary people. I know he never hired anyone who wasn't fair. I know he would never tolerate anyone in his office who wasn't committed to civil rights because he was one of the leading civil rights judges in the country. Yet on the other side of the aisle, the argument against Bill Pryor—this is no more than a racial smear—is that he is not sensitive to civil rights, he is a white conservative from Alabama and, therefore, can't be trusted, that is what the point is. But there is nothing in his background that would suggest that. That is made up out of whole cloth. That is not the reason the other side will not give Mr. Pryor an up-or-down vote, something that has never been done in the history of our country until this year with Federal nominees.

Let me just speak about what Mr. Pryor's career has included. When he was appointed attorney general of Alabama, he voluntarily said in his ceremonial remarks he criticized the State constitution for banning interracial marriage. He didn't have to do that. He volunteered that.

What is he doing today? He is trying to oust the chief judge of the Alabama Supreme Court because the judge insists on keeping a copy of the Ten Commandments in the courthouse in violation of a Federal court order. It is not because Mr. Pryor doesn't believe in the Ten Commandments. He believes in the law. He is able to put the law ahead of his own views.

He is a Republican. He took to the Supreme Court of the United States a reapportionment case that worked against the Republican Party in Alabama. He didn't do it because he wanted to hurt the Republican Party, he did it because he was able to put the law above his own political beliefs.

What else did he do? This may be the most serious and difficult act that an Alabama attorney general could do. I am surprised that he is still in office having done it. He wrote a letter to every school district in Alabama—to every superintendent in every school—telling them the football coach couldn't lead a prayer before the football game—not because he doesn't pray, not because he is not religious, but because he believes the law doesn't permit it. He is a Roman Catholic. He said so in the hearing. He is pro-life. But on the issue of abortion, he wrote all of the district attorneys in Alabama and told them they could not enforce an anti-abortion law passed by the State of Alabama because parts of it were unconstitutional. He put the law before his religious beliefs.

Here is someone who was the editor in chief of the Tulane Law Review, a law clerk to the greatest civil rights judge of the last 30 years in the South, who has consistently put the law ahead of his own beliefs, and the other side won't bring him up for a vote. Why would that be?

Let us go to Judge Pickering for a moment, another example in the South.

The suggestion has been made that he is not racially sensitive. Those are code words. That is to suggest that somehow Mr. Pickering is a bigot and is not fair to African Americans. We all know what the slur is, what the slander is, what the implication is. We all know what that means. But what do the facts show?

The facts show that Mr. Pickering was not on the sidelines, that he was not in the background, that he was out front during the great civil rights struggle of the 1960s and the 1970s. He lives in Laurel, MS. He lived at the center of the problems of racial desegregation. He lived in the same town as the head of the White Knights of the Ku Klux Klan, Sam Bowers. The White Knights were organized because they didn't think the Klan was mean enough. The White Knights and Sam Bowers, according to the Baton Rouge Advocate, was the most dangerous, the most violent racists living in the 1960s.

We hear a lot about terrorists today. The terrorists of the 1960s in the United States were the Klan members in Laurel, MS.

What did Charles Pickering do? He testified in public against Sam Bowers, in the courthouse, against the most violent living racist in America, according to the Baton Rouge Advocate. That was 1967. He has had a whole lifetime of commitment to racial progress. It seems as if almost everybody in Mississippi supports him, including most of the Democratic leaders.

William Winter, my friend with whom I served, former Democratic Governor, a beacon for racial progress in Mississippi, strongly supports Judge Pickering. Frank Hunger, who was a law clerk on the Fifth Circuit Court of Appeals where I was—Frank Hunger was President Clinton's Deputy Attorney General, he is Al Gore's brother-in-law, and he strongly supports Judge Pickering.

Why in the world would the other side slur Judge Pickering and suggest that he is guilty of racial insensitivity when he stood up for desegregation? He might have been on the other side that opposed segregation, but he wouldn't. He was out front risking his life, literally, and putting his own children in public schools when others were running off to segregated academies. When we bring him up before the Senate—after sticking his neck out and sticking up, in Mississippi, for desegregation—we cut his neck off in Washington, DC? Why is that being done? I am not sure. I know it is not right constitutionally.

The President nominates the judges. That has always been the way it was. Despite the rhetoric on the other side, until this year, this Senate has never used the filibuster to deny an up-or-down vote to a Presidential nominee who has a clear majority in the Senate. The filibuster has been used for other purposes by the other side.

I was hearing a lot of talk last night about protecting the rights of the minorities. There were not a lot of African Americans in the South in the 1960s who felt really protected when a filibuster was being used by Senators to stop the most important piece of civil rights legislation that was offered here. So it is not that great a device to have.

Why are they doing this? I don't know. One clue is to change the rules, which we may have to do, but the other is the election, which I guess is what I prefer.

In Senate races in Florida, in North Carolina, in South Carolina, in Arkansas, in Georgia, and all across this country, I hope this is an issue. I hope people say: Why was President Bush, for the first time in our history, not given a chance to have up-and-down votes on men such as Charles Pickering and Bill Pryor who were extraordinarily qualified, had the majority vote and were courageous leaders in the South? Is it because they are southerners? I don't know what it is. But the other side is so captured by narrow interests that they are digging a hole so deep that I hope it has an important political result next year.

I would prefer to see us operate differently, and I will pledge to do what the Senator from Utah pledged to do. While I am a United States Senator, if a nominee comes to the floor for a judgeship by any President, Democrat or Republican, I will not participate in a filibuster. I will vote to cast an up-or-down vote on any nominee of any President. I think that is the right thing to do. The sooner those of us on both sides do that, the more we will get back to appointing judges in the way Judge Wisdom was appointed, and the way Judge Kilcrease was appointed. And we would appoint judges we would respect. We would not be asking them how they will decide cases before they come in, and we would not be submitting them to an ideological litmus test before they are appointed.

I yield the floor.

The PRESIDING OFFICER. The Senator from Louisiana.

Ms. LANDRIEU. Mr. President, I would like to answer a couple of points that the Senator from Tennessee raised. My colleague from Iowa is here to join me for a few moments to speak on the floor about this subject.

Let me say there really isn't a Member I respect more in the Senate than the new Senator from Tennessee. He and I served together on the Energy Committee. I am well aware of his very progressive views on civil rights. I am aware of his history as a clerk for one of the finest justices who has served in the country. I am aware of his connection to Louisiana and as a southern leader. As a Democrat, I respect the work he did in Tennessee as a Republican Governor of that State. I look forward to many wonderful years working with him.

But I would like to answer the question of why many people in the South are upset and concerned about what the Republican majority is calling on us to do today.

I want to start with the charge that the Senator from Virginia said—stalling, stalling, stalling. The Senator from Tennessee knows very well the Democrats did not ask for this 30 hours. The Republican leadership is stalling the veterans bill, the Energy bill, and the housing bill, which people in our State—as the Senator from Tennessee knows, I have 400,000 veterans in Louisiana. He must have 500,000 veterans in Tennessee. Their bills are pending while we debate whether or not it is fair to block 4 of 168 nominees—4 of 168.

The second point I want to make is that the Senator from Arizona took 90 seconds to come to the floor and refer to the people who are listening—and we do believe the country is interested in the debate here in the Senate—that these four individuals were ''not given a trial.'' I think the words were ''hung without a jury,'' or some such inflammatory language.

Please let me say for the RECORD that these 4 judges out of 168, only 2 percent of President Bush's nominees, were given hearings. The nominee from Texas, Priscilla Owen, 1 full day of hearing; the nominee from Alabama, Judge Pickering, 2 days of hearings, and 1 day was given after the anthrax attack. The Capitol was literally under attack and we felt so strongly about providing a hearing the day after the attack that the nominee was given a hearing.

Mr. Estrada was given 1 day of hearing, and Mr. Pryor was given 1 day of hearing.

So the notion that these nominees have not been given their day in court, time to express their views and to answer questions, is absolutely false. That is in contrast to the 57 nominees of 63 of President Clinton's nominees. Let me repeat: 57 out of 63 who didn't get 1 minute of a hearing, not 1 minute.

These 4 we have blocked for reasons that I and my colleagues will go into—and Senator HARKIN will speak about in a minute—have been blocked for very good reasons. All of them got a hearing. I just wanted to make that clear.

I know the Senator from Tennessee will remember those hearings in those committees.

The third point I want to clarify is the Senator from Utah said he would never not give a nominee the opportunity for a vote. The RECORD will reflect that the Senator from Utah has voted seven times against cloture for giving a nominee—not a judicial nominee but appointee—a vote on the Senate floor.

I urge Senators to not use words such as ''never'' or ''every'' because the fact is, filibusters have been attempted before over the course of our history: In 1968, in 1980, in 1994, and in the year 2000, but they haven't been successful.

This filibuster is successful for one reason and one reason only: The American people do not want these four judges on the bench. They just do not want them on the bench, and they are expressing that through the Democrats here in the Senate. I will tell you why.

Let me talk about Mr. Pryor for just 1 second. I want my colleague from Tennessee to know, and my colleague from Alabama will know this. I know I am going to aggravate some Democrats when I say this. But I was willing to vote for Judge Pryor, and I had basically told that to the Senator from Alabama, who is a good friend of mine, someone with whom I really enjoy working, who is much more conservative than I am on some issues. But I really do like him and I really do trust him in many ways. I talked with him and we talked about it. I was prepared to vote for Mr. Pryor until this ad appeared. Let me read it to you. Judicial Chambers:

> While some in the Senate are playing with religion, Catholics need not apply.

I am a Catholic. When these ads appear, by right-wing groups that want to divide this country, Catholic against Protestant, Gentile against Jew, man against woman, straight against gay, it is something inside me that just boils up.

When the Republican leadership tells me I have a problem with Catholic judges—my father is a Catholic judge, and my sister is a Catholic judge. I don't have problems with Catholic judges. I don't have problems with William Pryor. I have problems with this red meat rhetoric that is anti-American, anti-constitutional, and defies every principle that this country and the men who are dying today and women in Iraq fight for. It is not a matter of whether you are Catholic, whether you are Jewish, whether you are Protestant. You should be judged on qualifications. But the right wing—and I told the Senator from Alabama until the National Republican Party repudiates this ad, the chairman of the party stands up and says these ads have no place, and the Republican Party repudiates these ads, the nominee will not get my vote—not because he is pro-life and I am pro-choice, not because of this or that, but because of this ad.

That is what this election is about. I will tell you the people in my State are tired of it. I have Catholics and Protestants who want to be united, to be together, who want to create jobs, who want to help veterans, want to figure out the problem in Iraq, and they are so tired of the Republican leadership just using every little wedge issue, religion or race to wedge everybody apart. I know Democrats aren't completely innocent of these tactics, but it has gotten to the point where it has basically shut down the work here.

I want to be clear. My dad is a Catholic judge; my sister is a Catholic judge. I am not against Catholic judges. But we are against ads like that, and until they are repudiated we will not allow this nominee to go forward.

I don't even know if I want to go into Judge Pickering from Mississippi because I know he is from a fine family. But I will say this about that. I know his son well. He is a wonderful man. He is in Congress. I know he has beautiful grandchildren, and he has a wonderful family. But I will tell you this: The Senator from Tennessee should know this better than anyone because I think he is part of the new South. I think his whole life has been spent helping us in the South deal with the terrible issue of discrimination, to the point where it breaks your heart to think about what the laws did to people, crushed their spirits, crushed their lives, robbed them of the opportunity for anything. I grew up in that kind of place. I spent my whole life trying to change it, and I know he has, too.

One of the reasons we have stopped the Pickering nomination is that many of us—and I don't think it is just Democrats, it is Republicans and Independents in the South—want the nominees on that Fifth Circuit to be about the new South, not the old South. To many of us, many of the moderate, middle, mainstream civil rights organizations, this Pickering nomination is about the old South. He was not one of the strongest civil rights leaders in Mississippi. There are hundreds of qualified judges, White and Black, who really sacrificed for civil rights. Why couldn't we have somebody like that on our bench? They don't have to be liberal. They could be moderate or conservative. Why do we have to reach back and find someone from the past? Why not reach forward?

When Judge Pickering got out of law school, he asked his law partner to join him. His law partner belonged to the Mississippi Sovereignty Commission. My father got out of law school a few years before he did, in 1954. Judge Pickering got out in 1961. My father never, in 100 years, would have asked a member of the Mississippi Sovereignty Commission to be his law partner. It just wouldn't have happened, because our family was a civil rights family. We rejected everything the Mississippi Sovereignty Commission or the Louisiana Sovereignty Commission or the Alabama Sovereignty Commission did, which was to basically intimidate African Americans. No matter how good they were, no matter how hard they worked, no matter how talented they were, no matter how many times they went to church or loved their children, because they were Black, they couldn't get a job, they couldn't live in the neighborhoods. That is what the sovereignty commissions did.

So you are asking me, after spending 40 years of my life fighting against this, to stand here and say it is OK to appoint someone like this to the bench? And then get upset when I say I have a problem with that?

Well, I am sorry about it. I do have a problem with it. Most of the people in my State have problems with it because, believe me, there are lots of people in Mississippi who were in the civil rights movement on the right side of the movement, not the wrong side; the forward side, not the back side. And I will tell this President or any President, we are looking for people in the future, not the past. We are looking for a new South. We reject the old South.

In conclusion, let me just say that my time has expired. Senator HARKIN is in the Chamber. I thank him for his great patience. I am sorry I got a little exercised. But I guess coming from the part of the country I do and being Catholic, it has been very hard, especially for us, to have to hear some of the rhetoric that is thrown around on the Senate floor.

Again, to my friend from Tennessee, I have the utmost respect for him. He has been a real leader in this effort.

I yield the floor and acknowledge Senator HARKIN who is here to speak.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. HARKIN. Parliamentary inquiry: How much time do I have?

The PRESIDING OFFICER. The Senator from Iowa has 14 minutes.

Mr. HARKIN. Is that under a unanimous consent agreement?

The PRESIDING OFFICER. The Senator has 14 minutes under the consent arrangement and 2 minutes remaining under this hour segment.

Mr. HARKIN. Mr. President, I was driving in this morning and listening to NPR. I couldn't turn on the television this morning because our house

didn't have electricity. The wind knocked out the electricity. So I was listening to the radio driving in. They had a little snippets of the debate last night: Some people talking about this as being theater, whether it was real theater or false theater. I don't know that I want to even venture a guess as to whether this is real or false, but I will tell you this: It is hypocritical theater. This is hypocritical theater going on right now.

The arguments of my friends on the other side, the Republican side, are so filled with hypocrisy, so filled with double standards. These arguments reek with pure, unadulterated partisan politics.

I have listened to this, and it is hard to know where to begin. This morning I was listening to some of my friends on the other side talk about a moral obligation to have a vote on the Senate floor on judges. However, I was listening to the words carefully. Evidently, it is not morally correct or morally right for Democrats to hold up judicial nominees on the Senate floor with extended debate or filibuster, whatever you call it. That is morally unacceptable. But it is morally acceptable for Republicans to hold up judicial nominees in committee.

Here is where the words get kind of funny. I have heard the Republicans talk about this, and they say: That is not a filibuster in committee; that is a hold. Here on the floor it is a filibuster. One is morally acceptable; one is not.

Please tell me where the moral demarcation line is on this. How absurd. How reeking of hypocrisy. I remember 15 times more judicial nominees were blocked by Republicans. But they did it in committee.

When this all started last night, I thought, this is so appropriate that this theater, this hypocritical theater we are engaged in, is happening at nighttime. It is so appropriate for this event to take place at night because under cover of darkness is where this majority likes to operate, in committee, not open on the floor. No, block the nominees in committee. That is not a filibuster. That is a block. That is a hold. That is OK. Morally, that is acceptable. It doesn't count. But don't dare block them out in the open, on the Senate floor.

Three years ago, Bonnie Campbell, former attorney general of the State of Iowa, head of the Violence against Women Office at the U.S. attorneys office here in Washington, did a great job, came before the committee. President Clinton had nominated her for judicial appointment to the Eighth Circuit. Both blue slips were turned in by the two Senators from Iowa. She had a hearing, a great hearing. Not one issue was raised in public against Bonnie Campbell, no one said she was unfit to be a judge, that there was something bad in her background, that she had made bad judgments or decisions as attorney general. Not one thing came out against Bonnie Campbell, but she never got on the floor for a vote. She was held hostage in Committee never to be seen again.

Now I say to my friends on the other side: I stood here, asked numerous times unanimous consent to bring Bonnie Campbell out on the floor to have a debate. Every time, it was objected to. Where were my friends who are so sanctimonious now? Where were they 3 years ago when I asked unanimous consent to bring Bonnie Campbell out of committee?

Now I see clearly. The scales have fallen from my eyes. I see clearly. It is morally OK to stop them in committee. Don't give a vote in committee, under cover of darkness. You pull the cloak over it and you don't allow them out of committee. That's OK because no one really knows what's going on outside the Beltway.

It is hypocrisy—sheer hypocrisy.

The Senator from Arizona earlier said he had an analogy, something about, we are going to hang them without a trial. I kind of missed a little bit of that. How about this analogy—about Bonnie Campbell's analogy? How about all of these judges who were held in committee and blocked? They were held in prison forever with no charges, no trial, no vote, just lock them up and don't ever let them out.

Sanctimonious arguments on the other side. My, my, my. Notice the nuance of the words. How many times have I now heard Republicans on the other side say: I will never, never vote to block a nominee on the floor? I hear it all the time. That seems to be a common refrain from the other side: I will never vote to block a nominee using a filibuster.

My good friend from Utah said that. But check the record. The Senator from Utah, who was recently in the Chamber saying he would never vote against cloture, voted against cloture 8 times in the Clinton administration, against 8 nominees, Janet Napolitano to be U.S. attorney, Ambassador Flynn, Walter Dellinger, Rick Taggert, Sam Brown, Edmund DeJarnette, Henry Foster, Derrick Shearer. My friend from Utah voted against cloture eight times. Again, where is the moral demarcation line?

I guess it is morally all right for my Republican friends to vote against cloture on nominees for attorney general, ambassadors, et cetera. It is morally OK to do that. But it is not morally OK to vote against cloture on a lifetime appointment to the judiciary.

Please, someone tell me about the moral demarcation line. You can vote against cloture for nominees eight times and come out on the floor and say, I will never vote against cloture on a judicial nominee.

Again, notice the nuance of the words. This is a filibuster. But if they're held up in Committee with a hold for no apparent reason, well that doesn't count. There's nothing morally wrong about that. I heard that from my Republican friends: We didn't filibuster all of these judges in committee; they just had a hold put on them. Apparently, there's an obvious moral difference that I just have failed to see.

It is at times such as this I am reminded of one of my favorite refrains from one of my favorite plays, ''Finian's Rainbow.'' It goes like this: For life is like cricket. We play by the rules. But the secret which few people know, that keeps men of class far apart from the fools, is to make up the rules as you go. It is a little refrain from a song in ''Finian's Rainbow.''

Republicans just want to make up the rules as they go, change them to fit the times and circumstances, change their arguments—these actions represent sanctimonious hypocrisy, partisan politics, double standards.

Well, we have had 30 hours here, I guess. I want to just say, I thank all of the staff and the pages, the reporters, the police, all who had to stay and work overtime.

Speaking of overtime, while we are wasting time with this theater of hypocrisy, guess what is happening in other parts of this building. Guess what is happening under the cover of darkness. The Republicans want to take away your overtime pay protection. That is what is happening.

The administration, earlier this year, came out with a new proposed rule that will effectively take away overtime pay protection for 8 million Americans. Not one hearing was held on it. Cover of darkness. Not one public hearing was held on that. The Senate voted on an appropriations bill to stop the administration from enacting that rule. The House of Representatives joined in and voted.

Yet the administration, the President, says he is going to veto it. He is going to veto funding for education, health care, medical research at NIH, funding for job training programs, all because they want to take away your overtime pay protection. All these people who worked here overnight—police, reporters, staff, so many people who worked overtime—while they are playing this little shell game.

It reminds me of that carnival shell game. You watch this hand, but with the other hand they are picking your pockets. Let's waste 30 hours of time talking about 4 judges to hide the fact that we don't want to vote on the issues that really matter to the American people—like raising the minimum wage, protecting overtime, extending unemployment insurance assistance, passing a real medicare prescription drug benefit and responsible energy bill and passing our appropriations bills.

It is a shell game. Look at these 4 judges that the Democrats are blocking. Don't look a the 168 judges this Senate has confirmed under President Bush. Hype this up. We will have this theater to hide what's really going on.

The other side may think the American people don't know what is going on. But I believe the American people

haven't been fooled. They know this is a waste of time to hide what the Majority can't or don't want to get done.

The PRESIDING OFFICER. The Senator's time has expired. For the information of our colleague, his time has expired.

The Senator from Tennessee has 2 minutes.

Mr. ALEXANDER. Mr. President, I have been listening to my friend from Iowa. One thing he said that I agree with: The quote from ''Finian's Rainbow'' about making up the rules as they go a long.

The issue before us is a pretty simple one. I think a lot of other Americans think President Bush ought to appoint judges with conservative principles who will not make up the rules as they go along, who will not make up the law as they go along, who will enforce the law as they find it, as Attorney General Bill Pryor does in Alabama, as Judge Pickering does in Mississippi.

The issue here, after all the charts are taken down and all the rhetoric is put aside, is very simply this: For the first time in our Nation's history, the Democrats are using the filibuster to keep us from having an up-or-down vote on President Bush's nominees after they have gotten out of committee, after they have gotten to the floor, and after it is clear they have a majority of votes. That is the first time in our Nation's history.

Second, they are doing it to extraordinarily well qualified women and men. I don't know whether that is grounds to change the rules of the Senate or not. But it surely is grounds for the people of the South and this country to address in the next election. Should a President have the right to appoint judges with conservative principles who will enforce the law rather than make it up as they go along? We believe that a President of whatever party should have that right. The other side, for the first time in 200 years, says: We are going to stop you from having an up-or-down vote on people who have the majority vote.

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

The Senator from Iowa is recognized.

UNANIMOUS CONSENT REQUEST—S. 224

Mr. HARKIN. Mr. President, I ask unanimous consent that the Senate return to legislative session and proceed to the consideration of Calendar No. 3, S. 224, the bill to increase the minimum wage, that the bill be read the third time and passed, and the motion to reconsider be laid upon the table.

Mr. MCCONNELL. Mr. President, I object.

The PRESIDING OFFICER. Objection is heard.

Mr. MCCONNELL. Mr. President, parliamentary inquiry: The time is controlled how?

The PRESIDING OFFICER. Under the previous order, beginning at 9 a.m., the minority and majority each control 30 minutes.

Who yields time?

The Senator from Kentucky is recognized.

Mr. MCCONNELL. Mr. President, I rise today on behalf of my constituents in the Sixth Judicial Circuit to discuss the plight we confront in that circuit. That circuit is made up of Michigan, Ohio, Kentucky, and Tennessee. As you can see by this chart, the Sixth Circuit is currently 25 percent vacant. If you are a litigant in the Sixth Circuit of Kentucky, it takes you 6 months or longer to get your case decided than in any other circuit in America.

Why are we in this situation? We are in this situation because the two Michigan Senators won't allow the Senate to go forward on four nominees from their own State—the Michigan Four. So we languish with a 25 percent vacancy rate. Litigants have a 6-month or longer wait than anywhere in America, while the two Michigan Senators hold up nominees from their own State, presumably because President Bush will not nominate people the Democratic Senators from Michigan are recommending that he nominate to the Sixth Circuit.

It may have been a close election, but President Bush won. He gets to make the nominations. I can tell you as a Senator from the Sixth Circuit, I am not interested in seeing Democratic nominees to our circuit court. So what they have done here is set up a standard that cannot be met and will not be met, and they are punishing the litigants of the Sixth Circuit because of this pique they have that the Republican President won't nominate recommendations of Democratic Senators from Michigan to the circuit court.

My recollection—and I have been here a couple of terms myself—is that Senators don't get to pick circuit judges. We may have a lot of influence on the selection of district judges, but Senators typically don't get to pick circuit judges. Maybe we get to make a recommendation, but we certainly don't get to pick them under Presidents of either party. So what is being asked in this situation is that Democratic Senators get to select circuit judges in a Republican administration.

I can tell you if, as Republican Senators from the Sixth Circuit, we don't even get to pick Republican judges for the Sixth Circuit, there is no chance the Democratic Senators are going to get to pick Democratic judges in a Republican administration.

The National Judicial Conference has designated all four of these seats as judicial emergencies. Not surprising. Twenty-five percent are vacant. It is a judicial emergency. The President nominated four superior jurists to fill these seats. Each of these nominees—all languishing in committee because the Michigan Senators object to them going forward—has gotten an ABA rating of qualified or well qualified. That used to be the Democrats' coveted gold standard.

But despite the President doing his job and trying to fill these seats, the Senate has fallen down on the job. These nominees are from Michigan, and the Senate delegation from that State, as I said, has objected to the Senate considering them, even though the Sixth Circuit is in crisis. It is even rumored that if the nominees were to be reported out of committee, they would join the ranks of the filibustered nominees we have been talking about since yesterday at 6 p.m.

Our friends and colleagues on the other side keep talking about the four they filibustered. There are seven more who we understand are going to get the same treatment. So maybe we ought to be talking about 11 who are going to be subjected to a supermajority.

The wheels of justice in my State and the other States of the Sixth Circuit are turning very slowly. Sometimes they are not turning at all. Cases are going unheard and grievances unredressed because the Sixth Circuit bench is one-fourth empty. Each judge has to handle a much larger caseload.

According to AOC—Administrative Office of the Courts—in 1996, each judge on the Sixth Circuit had to decide an average of 364 cases. That was just 7 years ago. On the Sixth Circuit, each judge had to decide about 364 cases. Last year—in 2002—each judge on the Sixth Circuit had to decide 643 cases—from 364 cases up to 643 cases between 1996 and 2002. That is a 77 percent increase from just 6 years ago. By overworking judges on the Sixth Circuit, the Senate is causing great delays for litigants. It now takes an excruciatingly long time for citizens of the Sixth Circuit to get their appeals decided.

As this chart shows, the national average for the time to decide an appeal is 10.7 months. This is the national average in the circuit courts of a delay in getting your decision made—10.7 months. In the Sixth Circuit, however, it is 6 months longer than that, 50 percent more.

So if you happen to be a litigant in the Sixth Circuit, because of the demand of the Michigan Senators that the Republican President of the United States select Democratic nominees of their choosing to the Sixth Circuit, if you are unfortunate enough to be a litigant in the Sixth Circuit, you are out of luck. I hope your case is not too important because it will take 50 percent longer than the national average to get a decision. It is all because the Michigan Senators believe they should be able to pick one or more circuit judges for a Republican President.

The Sixth Circuit has the dubious honor of being the slowest circuit in the Nation—dead last. The blame for that resides not with the President of the United States, who has had four well-qualified nominees pending before the Judiciary Committee for quite some time; the reason for that is the Michigan Senators' refusal to sign off on any of them, unless they get to tell the President whom to nominate.

Looking at it another way, if you are lucky to have to be in one of the other

circuits, if you file your appeal by the beginning of the year, you may get a decision by Halloween. If you file at the same time in the Sixth Circuit, you will wait until Easter of the following year to get a decision. We have all heard the old saying that justice delayed is justice denied. So let's put a human face on those statistics.

In the area of criminal justice, Ohio Attorney General Betty Montgomery has said that numerous death penalty appeals are experiencing prolonged delays. In the area of civil rights, attorney Elizabeth McCord had been waiting 15 months just to have an oral argument scheduled for her client's appeal in a job discrimination suit—15 months to get an oral argument in a job discrimination suit because the Michigan Senators won't allow any of the President's nominees to go forward. In the interim, her client died. He waited so long, he simply passed away.

According to the Cincinnati Post, delays such as this have become commonplace because vacancies have left the court at half strength and created a serious backlog.

Commenting on this sorry state, Mary Jane Trapp, president of the Ohio Bar Association, said:

> Colleagues of mine who do a lot of Federal work are continuing to complain. When you don't have judges appointed to hear cases, you really are back to the old adage, ''justice delayed is justice denied.''

Mr. President, this situation is completely and totally unacceptable. I am astonished that our Democratic colleagues want to filibuster qualified judicial nominees who could address the problem.

My Democratic colleagues try to justify their obstructionism based on a grievance they believe they have suffered with respect to two of these seats. Bear in mind, there are four vacancies. This grievance goes back two Congresses and involves an intradelegation spat. The ''you started it'' excuse is more than just a little wanting in light of these troubling statistics and unfortunate stories.

As I said earlier, let's get back to the first principle: Democratic Senators don't get to pick circuit judges in Republican administrations. In fact, Republican Senators don't get to pick them in a Republican administration. We get to make recommendations. Presidents of both parties have long believed circuit court appointments were their prerogative.

So I say to my friend from Idaho, who has joined us on the floor, here you have a situation where the Democratic Senators in Michigan, with a Republican administration, are demanding that the Republican President appoint someone of their choice to the circuit courts when even we as Republican Senators don't get to make such selections. I think it is safe to say that that is never going to happen. That is never going to happen.

So in the meantime, four nominees the President has made—all from the State of Michigan—which would solve this 25 percent vacancy problem on the Sixth Circuit, languish because of this desire on the part of Democratic Senators to pick circuit court nominations in a Republican administration.

It is important to remember that Michigan doesn't own these seats. They don't belong to any particular State. Certainly, historically, at least in recent history, these four seats have belonged to Michigan. They belong to the people of the United States. If anybody has a particular claim, it is the people of the Sixth Circuit, all of whom are suffering because of this obstructionism. I know the people of Ohio, Kentucky, or Tennessee would be more than happy to have these judges if Michigan doesn't want them. If the Michigan Senators don't want Michigan judges on the Sixth Circuit, goodness, we would be happy to have a good Ohio, Kentucky, or Tennessee lawyer fill the vacancies. My people in Kentucky didn't have anything to do with this spat up in Michigan. They are having to pay for it, as are the people of Ohio, Tennessee, and Michigan.

I said there are four vacancies in Michigan. Two of the four seats the Michigan Senators are blocking don't have any connection to any prior intradelegation dispute. There were two of the four judges who were involved in all of this dispute during the Clinton years, but there are four vacancies. All four of them are being held up. President Clinton did not even nominate anyone. Let me repeat, President Clinton didn't even nominate anyone for the seat to which Henry Saud has been nominated. Henry Saud, if confirmed, would be the first Arab American to sit on a circuit court in U.S. history. That is one of the nominations they are holding up. President Clinton didn't even nominate anyone for the seat to which Henry Saud has been nominated. The seat to which David Mackey has been nominated didn't even become vacant until the first year of the current President's term. Two seats are being held up by the Michigan Senators, one of whom President Clinton nominated, and one didn't become vacant until President Bush took office. These two vacancies had nothing to do with whatever the spat was that went on earlier, and all four seats remain vacant.

This is simply an unacceptable situation. The American people should be aware of what is going on. They should demand that this obstructionism cease. This outrage that is occurring in the sixth judicial circuit puts a human face on what has been going on around here this year.

Real litigants, real people, are paying the price for senatorial pique, for senatorial demands for something that is totally unreasonable—where Democratic Senators, in a Republican administration, get to pick circuit judges. In the meantime, the lawyers and litigants of the Sixth Circuit continue to suffer under this 25 percent vacancy crisis, this judicial crisis of the highest order, as a result of Senate obstructionism.

Let me also add, just a month ago, both houses of the Michigan Legislature passed resolutions that noted the negative effects of the vacancy crisis and urged the U.S. Senate in general, and Michigan Senators in particular, to act on the Michigan nominees. The Michigan Legislature is passing resolutions asking the Michigan Senators to let the nominations go forward.

Mr. President, I thank the Chair for the opportunity to address the crisis in the Sixth Circuit. It is a very serious crisis confronting my State. I see the Senator from Oklahoma here.

I yield the floor.

The PRESIDING OFFICER (Mr. SUNUNU). The Senator from Oklahoma is recognized.

Mr. MCCONNELL. Mr. President, how much time remains?

The PRESIDING OFFICER. The majority controls 12 and a half minutes.

Mr. MCCONNELL. Mr. President, I reserve the remainder of our time.

The PRESIDING OFFICER. Who yields time?

The Senator from Oklahoma is recognized.

Mr. NICKLES. Mr. President, I will also be speaking later. I want to make a couple of comments after presiding and listening to some of the speeches made a moment ago. I think it is important to maybe give a couple of viewpoints about the positions of the Senate.

I have had the pleasure of being in the Senate for 23 years. I plan on serving 1 more year in the Senate. I have had a lot of great experiences, a lot of high points and low points. One of the lower points is the way judges have been treated in the last 2 years. In my previous 21 years, we never had a filibuster on a judge, and I never heard colleagues say, Wait a minute, President Clinton had nominees and they weren't considered. Most of those who were on the list he nominated very late in the last year of his term of office. One of them was from Oklahoma, and the two Senators from Oklahoma were never even consulted. That name was on the list.

So there is a difference between being nominated, going through the process—particularly with district court judges—consulting the home State Senators. That is the tradition of the Senate.

One of the things that bothers me is we are breaking the tradition of the Senate by saying now you have to have a supermajority, particularly on the appellate court level. I don't know that that has happened on district court, and I am glad. We have confirmed a lot of district court judges and I am glad. But when it comes to circuit court, the next higher level, it may be a higher standard and all of a sudden now, the standard for those judges appears to be 60 votes. That is evident by the fact of four having been filibustered and there

are another two who will be filibustered in the process. We will find out tomorrow.

Another of the traditions that has been trampled upon is what people are saying and how they are saying it. We had a speaker just recently who mentioned two Senators by name and kept using the words ''sanctimonious hypocrisy.'' That is in violation, in the opinion of this Senator, of rule XIX of the Senate.

We have rules. And we have rules for a purpose. Those rules should be adhered to. When Senators violate the rules, I think they undermine maybe to some extent the dignity and esteem of the Senate.

These rules have a purpose. Rule XIX says:

> No Senator in debate shall directly or indirectly by any form of words impute to another Senator or other Senators any conduct or motive unworthy or unbecoming of a Senator.

That rule is there for a purpose. It is gradually being ignored in debate, time and time again, by some Members—not by most Members, by an occasional Member.

I am giving a warning to Members, if they violate this rule, I am going to call it on them and I am going to ask the Parliamentarian if their comments are a violation of rule XIX. And if they are in violation, they will be seated. It will take an actual vote for them to be allowed to participate in debate again.

It is not right to be coming down mentioning Senators by name and using words such as ''sanctimonious hypocrisy'' and impugning a Senator's motives. That is in violation of the rules. People ought to know the rules. Maybe if we would abide by the rules, we would have a higher level of debate, greater civility, and maybe greater understanding of some of the challenges we have before us today.

Let me just make one other comment about there were some judges who are maybe left in the queue. President Clinton had a bunch of judges left in the queue. I had a judge who was left in the queue at the end of Bush 1's administration. His name was Frank Keating and he ran out of time. That is one of the traditions of the Senate. When people are nominated in the last year or the last few months of an administration, a lot of times they don't get confirmed. That is not a filibuster. Some people were equating that to a filibuster. It is not. There has not been a filibuster of a judge in my term—actually in the history of the Senate—until this year, on four individuals, and now we are going to find it on a couple of additional judges.

One other comment. My very good friend from Louisiana said her father was a Catholic judge, and God bless him. I am concerned that there is a religious litmus test coming. Maybe we can confirm Catholics, but if they happen to be pro-life Catholics—I don't know if her dad is a pro-life Catholic or not. I hope he is. I don't know. That is his business. I usually don't ask the nominees I am recommending or the President is considering—I usually don't ask them their position on that issue. But my guess is if someone is known to be a pro-life Catholic, they cannot get through this litmus test for appellate court judges that many are using today, and I think that is very regrettable. Maybe if they happen to be pro-life Southern Baptists or pro-life Mormons or pro-life Jews, I am not sure they can get through this new litmus test now being put on us by the Judiciary Committee and, unfortunately, by the minority in the Senate. I think that is very regrettable and we need to change that.

Our colleagues on the other side need to realize at some point, someday, they will regain the majority. They need to be thinking about what that means for the long term. I cannot imagine they assume we are going to have a 60-vote litmus test or a 60-vote margin or hurdle for confirmation of judges during Republicans but that is not going to happen at some point when Democrats might occupy the White House.

I think this raising the bar to 60 votes—I happen to believe it probably is unconstitutional, but I also happen to believe they are setting a precedent that they likewise will regret.

So I hope maybe more mature minds will be thinking about this on the Democrat side and say, wait a minute, shouldn't we really give somebody such as Miguel Estrada a vote?

Mr. MCCONNELL. Will the Senator from Oklahoma yield for just a moment? The Senator from Kentucky is here. I don't know how much time we have remaining.

The PRESIDING OFFICER. The majority holds an additional 6 minutes on this side.

Mr. NICKLES. I will be happy to yield to my very good friend from Kentucky.

Mr. MCCONNELL. Thank you. I yield the remaining time on this side, during this hour, to the Senator from Kentucky.

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. BUNNING. I thank for yielding my good friend from Kentucky and my good friend from Oklahoma. I have a question for the senior Senator from Kentucky.

I ask my friend from Kentucky: The Michigan Senators argue that they have not been properly consulted on these, the Michigan nominees. Yet I understand the White House Counsel's Office consulted extensively with the Michigan Senators. This chart reproduces a letter from the White House Counsel that shows from April to November 2001, the White House consulted with the Michigan Senators no fewer than 13 times. So I ask my friend from Kentucky, in light of the record, does it not seem that the Michigan Senators are defining consultation as picking the nominees, rather than the President picking them?

Mr. MCCONNELL. I would say to my friend from Kentucky, he is exactly right. I think what is clearly happening here is the Michigan Senators want to pick circuit judges in a Republican administration.

I remind everyone, the two Michigan Senators are Democrats. My recollection is that the Senator from Kentucky and I may get to recommend judges for the circuit court but we don't get to pick them in a Republican administration, so why should any Democrat Senator expect they would get to pick circuit judges in a Republican administration?

Mr. BUNNING. On the Sixth Circuit Court of Appeals, where these Michigan circuit judges are needed so desperately, isn't it true right now that Federal district judges are having to go to the Sixth Circuit and be seated because of the judicial crisis we have on the Sixth Circuit?

Mr. MCCONNELL. My friend from Kentucky is absolutely right. We have a 25 percent—25 percent of the Sixth Circuit is vacant. Not because of the President of the United States. Four Michigan nominees were sent up here some time ago. They have been in the Judiciary Committee. They are having to draft district judges. It is the slowest circuit in America because it is 25 percent vacant.

Mr. BUNNING. I only say to my good friend, the senior Senator, that even some of the newer judges with whom you and I are familiar are now having to do 2-week tours of duty over at the Sixth Circuit Court of Appeals—they have only been on the district bench for 2 years—to try to catch up the backlog we have at the Sixth Circuit Court. If we could only get a little better cooperation out of certain Senators from Michigan, maybe we could fill those four vacant seats in a rational and reasonable way.

Mr. MCCONNELL. I thank my friend from Kentucky for pointing this out. It is an outrageous situation.

Mr. BUNNING. Mr. President, we have heard from many on this side of the aisle this morning and last night. They have made great points about President Bush's judicial nominees and the bad situation they are in.

We started this year talking about Miguel Estrada. His nomination is no longer before the Senate because of the opposition party's tactics and for the sale of his family.

Today marks 918 days after Miguel Estrada's nomination. He has never received an up-or-down vote. That is unfair to him. President Bush, and the American people.

Miguel Estrada is a respected attorney here in Washington. He received a unanimous ''well qualified'' rating from the ABA which is the rating our Democrat colleagues call the gold standard for judges.

He would have been the first Hispanic to sit on the prestigious DC circuit. He was a clerk at the Supreme Court. He graduated with distinction from Harvard Law School and argued many

cases before the Supreme Court. He even served in the Clinton administration.

But that is not the most impressive part of Miguel Estrada's story. He was born in Honduras and came to America at age 17 speaking little English. He overcame that hurdle and graduated from one of our most exclusive colleges and law schools.

He also overcame a speech disability. And this is no small hurdle to clear when your career depends on making successful oral arguments in court.

Miguel Estrada became a victim of politics in the Senate when some here said his views were unknown. They made unprecedented demands for documents every legal office in the country would object to releasing. They asked questions that countless Clinton nominees also declined to answer. And opponents said that was unacceptable.

The real issue here is what is known about Miguel Estrada.

He is a bright young Hispanic lawyer who follows the law and would make a great Supreme Court nominee.

The idea of the first Hispanic on the Supreme Court being a conservative is unacceptable to them. I hope his nomination comes before the Senate again some day and we can vote to confirm him.

And then there is Priscilla Owen.

Her nomination has been pending for 918 days. She has been a supreme court justice in Texas since 1995.

In her last election she received 84 percent of the vote. I'm not sure many here know what it feels like to receive that kind of percentage. But I bet we would all like to.

And just like Miguel Estrada, the ABA gave her a unanimous ''well qualified'' rating.

She graduated with honors from Baylor Law School where she was on the law review and she earned the highest score in Texas when she took the bar exam. Having suffered through several children taking the bar exam, I've heard what kind of challenge that can be.

But most telling is what her colleagues in Texas say about her.

Justice Owen has the support of three former Democrat justices on the Texas Supreme Court. Fifteen bipartisan past presidents of the Texas bar endorsed her.

And running for re-election she was supported by every major Texas newspaper. We should all be so lucky to even get our hometown newspaper's endorsement.

We've had three cloture votes on her and we will vote again on Friday.

Each time a majority signaled we should give her an up-or-down vote. But again the minority is preventing her from having her day in court.

What is her crime? Twice in the Texas Supreme Court, Justice Owens said the court was wrong and that under Texas law the parents of a pregnant child had the right to be informed before their daughter had an abortion.

Several lower courts had already upheld these parental rights and that Texas law does not give parents the right to stop the abortion, but they did have the right to be informed.

But that precedent apparently doesn't matter and she is being obstructed by a radical minority in this Senate that believes children have unlimited rights to abortions and parents should not be able to talk to their pregnant child first.

I know the vast majority of Americans do not believe that. And it is well past time we give Justice Owen an up-or-down vote.

Alabama attorney general Pryor was the next judge to fall victim to special interest politics.

Bill Pryor was appointed Alabama attorney general in 1997 and re-elected twice, most recently with 59 percent of the vote.

He has argued before the U.S. Supreme Court, practiced at two law firms, and taught law school.

In law school he was on the law review and graduated with honors. After law school he was a clerk at the fifth circuit where he worked for a judge who spent years working to desegregate schools in the South.

Attorney General Pryor is supported by Republicans and Democrats in Alabama.

Newspapers praise the lack of partisanship in his office. He is known in Alabama for following the law. Ironically that is what his detractors say he won't do.

Bill Pryor is an outspoken man who does not hide his beliefs but he has proven that his personal beliefs do not get in the way of following the law. He does not support abortion and has never apologized for it.

But he made sure his office followed Supreme Court precedent in enforcing the State's partial birth abortion statute even though he disagreed with the decision, and most recently he acted against overwhelming public opinion in Alabama to enforce Federal court rulings ordering the Ten Commandments display in the Alabama Supreme Court to be removed.

Again a majority of this body has kept Attorney General Pryor from getting the up-or-down vote he deserves. He has proven without a doubt that he will follow the law even when he disagrees with it.

Twice a majority of the Senate has said he should get a vote. Next time I hope we give him an up-or-down vote.

Next up on the honor roll of filibustered judges is Judge Charles Pickering.

Judge Pickering was unanimously confirmed by the Senate in 1990 to be a Federal district judge in Mississippi.

He graduated first in his law school class at the University of Mississippi. He practiced in a law firm and was both a city and county prosecutor. He was a municipal court judge and elected to the Mississippi State Senate.

Judge Pickering has spent his career as a leader in race relations in Mississippi.

His career has been dedicated to tearing down racial barriers against minorities in the South, and he was not very popular for it in Mississippi in the 1960s and 1970s, but it was the right thing to do.

I remember traveling around the South in the 1950s and 1960s and remember race relations there.

I remember signs at cafes saying ''whites only'' and then bringing food outside with my white teammates and sitting down with our black teammates on the bus and eating with them.

I remember what it was like as professional baseball gradually embraced minorities. Judge Pickering helped break down these racial barriers and he risked his career and reputation to do it.

In recent years Judge Pickering served on race relations committees in Mississippi. He spent time working with at-risk minority children.

In 1967 Judge Pickering was a prosecuting attorney in Jones County, MS.

He took the witness stand to testify against a Klan leader in a trial for killing a Black civil rights activist.

By standing up for equality and justice, Judge Pickering put himself and his family in danger and lost his reelection. You can never really judge the character of a man until standing up for his beliefs costs him something.

Judge Pickering's willingness to stand up against racial violence cost him his job as a prosecutor. But that did not keep him from continuing to fight for racial justice.

Probably the most heated race issue in the 1960s and 1970s was integration of public schools. Integration came to Judge Pickering's town in 1973. The Black and White communities in Laurel were split and Charles Pickering worked to bring them together.

He created a plan to integrate schools. In the end many Whites still moved their kids to private schools to avoid integration. And Judge Pickering could have done the same. But instead, he believed in integration and kept his children in public school.

Many have said he has been soft on civil rights. But that does not sound like the story of a man who is soft on racial justice to me.

Again the special interests that have kept the Senate from voting on Miguel Estrada, Priscilla Owen, and Bill Pryor are preventing a vote on Judge Pickering.

A majority of the Senate again has said we should have a vote on Judge Pickering and the Senate must fulfill its constitutional responsibility and do so.

Now we come to the nominees who will soon be victims of special interest politics—Judge Carolyn Kuhl and Justice Janice Rogers Brown.

Judge Kuhl is a superior court judge in Los Angeles where she has worked on civil and criminal cases. Currently, she is the supervising judge of the civil division.

Judge Kuhl graduated from Duke Law School and clerked for the same

court she was nominated to. In the 1980's she worked at DOJ and the Solicitor General's Office where she argued before the Supreme Court.

The ABA says Judge Kuhl is ''well qualified.'' Republicans and Democrats in California have spoken about her fairness and competence. Fellow judges and attorneys who appear before her strongly support her nomination and urge an up-or-down vote.

Judge Kuhl's crime is that she represented her government while working for the Reagan administration. One instance our colleagues on the other side of the aisle like to point to is when she helped prepare a document supporting President Reagan's views in an abortion case.

In other words, she was doing her job and representing her client.

One thing they forget to mention is the case was the first major abortion case to follow Roe v. Wade when the new law was quite uncertain.

They also forget to mention that it was her job to represent the position of the President and not her own views.

They also forget to mention that three other attorneys who worked on that case were Senate confirmed to positions after the case. Judge Kuhl has said she will follow the law regardless of her views. Her record proves it.

Finally, we get to Judge Janice Rogers Brown of the California Supreme Court. Judge Brown, who a minority of the Senate says is out of the mainstream, was recently re-elected with 76 percent of the vote.

She was born in rural Alabama to a family of sharecroppers. She grew up in segregated schools. She lived in an era where laws were written to prevent racial equality in the South. Yet Justice Brown succeeded in school and became the first black woman to sit on the California Supreme Court.

What do my colleagues say about Justice Brown is out of the mainstream?

Justice Brown voted to uphold a law saying parents have a right to consent before their daughter can get an abortion. How far is that out of the mainstream? Recent polls tell us well over three quarters of Americans think parents should be involved in the abortion decisions of their children.

What else do opponents say she has done that is out of the mainstream?

Her detractors say she wants to undo decades of Supreme Court precedent in property rights and government involvement in the economy. But none of them can point to any court opinions where she disregarded the law and substituted her personal views.

However, she is supported by a bipartisan mix of professors, judges, attorneys, and civil rights activists.

That does not sound out of the mainstream to me.

I am convinced these nominees are each qualified and would serve this Nation well on the courts they have been nominated to.

The Senate has a constitutional responsibility to advise and consent on nominations made by the President. But so far a minority of the Senate has prevented us from fulfilling that responsibility.

I am not asking my Democrat colleagues to vote for and support these nominees. I just ask that they give them the courtesy and right to an up-or-down vote.

If they do not believe the nominee is qualified then they should vote no. But by preventing a vote they are ignoring their constitutional duty. We should vote on these nominees and we vote on them soon.

The opponents of these nominees are not just playing around with these nominees' lives—they are also toying with the Constitution.

The PRESIDING OFFICER. The time for the majority has expired. The Senator from West Virginia.

Mr. ROCKEFELLER. I thank the distinguished Presiding Officer.

Mr. President, I recognize my colleagues on the other side of the aisle would like to use this debate time to focus on the employment status of four people, all of whom are employed. I would like to talk about a different subject, and that is the millions of people who are not working. I think we owe it to the American people to discuss the millions of Americans who have lost their jobs under the economic plans of the sitting President.

In particular, I would like to focus on the millions of Americans who have lost good manufacturing jobs, and that is the subject of my discourse. I ask the Presiding Officer to cut me off in precisely 15 minutes if I have not finished. Since I will be back at 9 o'clock, I will finish at that point.

Let me draw your attention to a few very troubling statistics. Manufacturing employment in the United States has now fallen to the lowest level in 41 years. In the last 5 years, we have lost 16 percent of all of our factory jobs. In the last 2 years alone, we have lost more than 2.5 million manufacturing jobs. In my own State of West Virginia, we have lost 14,000 factory jobs since January 2001.

To me, these are frightening statistics. They ought to jolt every Member of the Senate and prompt an urgent call for action. A vibrant manufacturing base, in this Senator's opinion, is essential to our standard of living. For generations, factory jobs have been the path to the middle class, providing good wages, health insurance, and pension benefits. Advances in manufacturing technology account for most of our economy's increased productivity. Every dollar we spend on a finished manufactured good is estimated to produce about $2.43 increased economic activity.

Simply put, we cannot become a service-only economy, in the judgment of this Senator, and at the same time expect to maintain our high standard of living. We ought to act swiftly to ensure Americans will produce steel and computers and cars and pharmaceuticals and many of the other products which we generally refer to as manufacturing.

We ought not to be timid in the face of the devastating statistics I have cited. We can do something about them. In the Senate, that is what we are meant to be doing. And we certainly should not ignore these statistics and focus, instead, on the jobs of four judges who already have work. We would better serve Americans if we used our time today to debate ways to revive the manufacturing sector of our economy, and I am going to talk about it. People may not want to hear about it, but I am going to talk about it because it affects all the people of the country, and my people in West Virginia very much.

At the end of September, I introduced legislation to provide some relief for American manufacturers on several fronts. I am disappointed the Senate has not yet debated that legislation. I am not surprised, but I am disappointed. The bill I introduced is called the SAFE Act, which stands for Securing America's Factory Employment.

I wish that topic were all we were discussing this morning, today, this week, this month. Saving our Nation's factory jobs is crucial. I will take a moment to discuss what my legislation does.

The SAFE Act would offer relief to American manufacturers in several ways.

First, the legislation would provide a tax deduction to any company that has manufacturing jobs in the United States.

Second, this bill would help companies cover the cost of providing health care for retirees—a huge subject. It is a crippling obligation for many of our once-proud industries.

Third, I propose we strengthen our trade laws to ensure they offer the protections that in fact our domestic industries deserve from unfair and illegal trade practices practiced by others.

Let me take a moment to explain in greater detail how these proposals can help our domestic manufacturing base. Congress is compelled to repeal the Foreign Sales Corporation Extraterritorial Income provisions of the U.S. Tax Code in order to avoid $4 billion in trade sanctions authorized by something called the World Trade Organization. Regardless of my opinion of the WTO decision in this matter, I recognize that to protect our economy from a trade war, we may need to update our Tax Code. We can do so and still encourage manufacturing by reducing the overall effective corporate income tax rate on domestic manufacturing.

The SAFE Act provides a 9 percent deduction for profits derived from the manufacturing activities in the United States. This is the equivalent, I would say, of lowering the corporate income tax rate from the current 35 percent to 32 percent of the portion of profits that can be directly linked to U.S. factories; also mining operations and the like.

This is a very straightforward tax break. It will lower the cost of doing business in the United States and will help companies that employ Americans to compete in the global marketplace.

In addition, my bill includes a tax credit to employers to encourage them to retain their retiree health insurance coverage—a huge problem nationwide. As my colleagues well know, employers know their health plan sponsors continue to restructure how they provide health care benefits for both workers and retirees. The economy is in a tough situation and it makes it difficult for them.

Interestingly, the percentage of employers who offer retiree health benefits has declined substantially over the past 15 years, to wit: Two-thirds of all firms with 200 or more workers sponsored retiree coverage 15 years ago. According to the most recent data, a little bit more than one-third do that today. Despite these reductions, the employer-sponsored health system is the largest source of health care coverage in the country today, even with that diminution of the percentage.

The SAFE Act would provide employers with a tax credit to cover 75 percent of the costs associated with providing health care coverage to their retirees in order to protect existing coverage and reverse the current trend.

Finally, my legislation would strengthen our trade protections, our antidumping and countervailing duties. So-called AD/CVD trade laws are often the first and last line of defense for U.S. industries injured by unfair labor or illegally traded imports.

These laws are absolutely essential for the survival of our manufacturing sector in an increasingly global market. But some of these provisions have become antiquated by recent changes in our global economy and the new structure of international trade. The American steel crisis has made it very clear that these trade laws need to be strengthened. Companies, workers, families, and communities rely heavily on fair trade laws to prevent the ill-effects of unfair trade. Antidumping and countervailing duty laws need to be updated and amended so they work both as intended and as permitted under the rules of international trade.

For example, the SAFE Act includes a provision that allows us to consider whether or not an industry is vulnerable to the effects of imports in making antidumping and countervailing duty determinations. Another provision of this bill will make it tough for our trading partners to circumvent antidumping or countervailing duties. I have a variety of examples I could give of that, but I will not for the moment.

They could do so by clarifying that such orders include products that have been changed in only a very minor respect. What do I mean by that? Sometimes companies will make a product in another country, send it to a third country, and they will adjust a little tiny piece of something. Then that third country will export it into the United States and it will count as an export from the third country—not from the first country or the second country which actually produced the greatest mass of it—thus allowing them to have their trade surplus increased.

This will help prevent foreign nations from making slight alterations to products they are exporting to us in order to skirt existing antidumping or countervailing duty orders.

Another clear problem under our current trade law is that foreign producers and exporters of such merchandise may avoid AD/CVD duties by using complex schemes that mask payment of countervailing duties resulting in the underpayment of duty rates.

My legislation would restrict such practices by requiring the importer, if affiliated with the foreign producers or exporters, to demonstrate that the importer was in no way reimbursed for any AC/CVD duties that were paid.

There are certainly other changes we should consider to update our trade remedy laws. These provisions are by no means an exhaustive list, but we do need to get the debate started. I have offered this bill as a way to reenergize the debate. I have 15 minutes and I am using it to discuss something I think is useful.

Steel is a prime example of the need for strong trade laws, strong enforcement of the laws on the books, and strong considerations to toughen existing statutes.

As the Presiding Officer well knows, I have long been involved in the fight for the American steel industry. Currently, the industry, its workers, and steel communities around the country await a decision from the President of the United States on section 20 tariffs he imposed on steel imports in the face of an unprecedented flood of steel imports from foreign countries below price and below the cost of production in the home country.

Some of our foreign trading partners are lobbying the White House very hard to lift these tariffs. In fact, the European Union was in town just last week making irresponsible and illegal trade threats to try to sway the President's decision. I hope they fail. The administration has a very clear choice between preserving good-paying and hard-earned American jobs or caving in to the threats of our foreign trading partners.

All of the arguments made prior to the imposition of the tariffs about the potential damage and consequences of the 201 tariffs have been debunked.

This is important. We have something called the International Trade Commission. It is a nonpartisan quasi-judicial body. They found that the tariffs have done what they were meant to do—the tariffs on steel: give the American steel industry breathing room it needs to restructure. The International Trade Commission also found that the tariffs have not significantly impacted the U.S. economy in any other way.

If this administration is truly committed to the steel industry and, importantly, the communities built around it, the President will leave the tariffs just as they are and fulfill his promise to American workers. If not, we are facing very hard times indeed, and it may be the death knell for steel manufacturing in America—something I don't think we want to see.

I am extremely disappointed that rather than engaging in a serious debate, we are spending 30 hours talking about judicial nominees because some Senators believe it is an effective way to do whatever.

Instead of scoring political points, the SAFE Act addresses several very dire needs of our manufacturing companies. It improves our trade laws, helps with the burden of retiree health care costs, and effectively lowers the corporate tax rate on manufacturing activities. This package of reforms is an effective plan to stem the flow of manufacturing goods from overseas.

I will conclude by simply saying this: The fact that almost 9 million Americans are out of work, that is urgent; the fact that employment insurance is set to run out for many Americans who have been unemployed for a long time, that is very urgent; the fact that 43.6 million Americans lack health insurance and manufacturers and other employees are dropping health coverage to make ends meet, that is urgent; the fact that America has lost more than 3 million private sector jobs since our current President took office, that is urgent; the fact that the number of Americans living in poverty has increased by 3 million in 2 years, that is urgent; and the fact that 4.5 million Americans work part time because they cannot find full-time jobs, that is urgent.

I would simply like to suggest that the Senate return to the urgent business facing our Nation. We have appropriations bills to consider and pass. We have a comprehensive Energy bill to pass. We have a highway bill to pass. We have much to do.

I thank the Presiding Officer, and I yield the floor.

The PRESIDING OFFICER. The assistant minority leader.

UNANIMOUS CONSENT REQUEST—S. 1584

Mr. REID. Mr. President, yesterday at 6 o'clock we were working on S. 1584, a bill that funds the Departments of Veterans Affairs, Housing and Urban Development, and other agencies. It is a bill that has $122.7 billion. It includes $612 billion for the Department of Veterans Affairs, veterans benefits, all the health facilities, EPA, and NASA. It is an extremely important piece of legislation.

Therefore, for the veterans of America, I ask unanimous consent that at 6 o'clock tonight we move off this and go back to the VA–HUD bill and complete it within 2 hours. The two managers of the bill, Senators BOND and MIKULSKI, said they could do that. It would be an

important part of our legislative agenda. I ask unanimous consent that that be the case.

The PRESIDING OFFICER. Is there objection?

Mr. MCCONNELL. Mr. President, reserving the right to object, and I will object, we hope to complete that bill, in the next few days. Therefore, for the moment, I object.

The PRESIDING OFFICER. Objection is heard.

Mr. MCCONNELL. Mr. President, let me suggest another consent agreement that might make more sense. I ask unanimous consent that the Senator modify his previous request so that just prior to proceeding as requested, the three cloture votes would be vitiated and then the Senate immediately proceed to three consecutive votes on the confirmation of the nominations with no intervening action or debate.

Mr. REID. I object.

The PRESIDING OFFICER. Objection is heard.

Who yields time?

The Senator from Florida.

Mr. GRAHAM of Florida. Mr. President, the two unanimous consent requests that have just been made I am afraid might have come out of my 15 minutes. I would like to ask unanimous consent if I could have an additional 3 minutes so that I will have my full 15 minutes.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. GRAHAM of Florida. Mr. President, I thank my colleague from Kentucky for his generosity. I intend to use much of my time talking about the issue that was discussed by my friend and colleague from West Virginia. But I would like to start with some comments on the subject which has been before us since 6 p.m. yesterday; that is, the issue of judicial confirmation.

This is a fundamental issue in our democracy. One of the great figures in the development of the structure of our Nation's Government stands over us every day we are in session in this Chamber; that is, the first Vice President of the United States, John Adams.

Concerned about the structure of government, preceding the War for Independence and anticipating there would soon be a new nation which would be striving to develop the appropriate structures to maintain its democracy, John Adams wrote a series of his thoughts on government. These became the essential ideas first for the constitutions of the newly independent Colonies and State constitutions, and then in Philadelphia the development of the U.S. Constitution.

One of the central points of John Adams's thoughts on government was the essential role which was played by an independent judiciary. He said, as quoted in the Pulitzer Prize-winning biography of John Adams by David McCollough:

Essential to the stability of government and to ''enable an impartial administration of justice,'' Adams stressed the separation of judicial power from both the legislative and the executive. There must be an independent judiciary. ''Men of experience in laws of exemplary morals, invincible patience, unrivaled comments and indefatigable application should be subservient to none and appointed for life.''

There were a number of provisions placed in the U.S. Constitution in order to carry out that essential independence of the judiciary. Many of those occur after an individual assumes his or her judicial position, including lifetime appointments, and the fact that Congress cannot reduce the salaries of a member of the Federal judiciary. Those are designed to protect Federal judges, both politically and economically, from undue interference.

But the issue of how do you maintain impartiality in the selection of judges was one of the most contentious issues of the Constitutional Convention. Up until the very end of the Convention, the provision that was in the draft Constitution was for the Senate to appoint Federal judges. But there was concern that would put too much authority in the legislative branch, and thus the final compromise was to have the President make the nominations for judges but the Senate to confirm those nominations.

There was not intended to be a subservient position for the Senate. Rather, it was to be a position of equality as a fundamental part, as John Adams said, of maintenance of the independence of the judiciary.

What we are debating to date is the fundamental question of how should the Senate exercise its equal role in the designation of those persons who will become lifetime appointments to the Federal judiciary.

I believe that in this most serious of responsibilities we have, it is appropriate that the rules which apply to the general conduct of the Senate, rules which were largely written by John Adams's successor, Thomas Jefferson, who also looks down upon us this morning—that those rules should apply in order to protect the interests of the minority. That is not just a political minority; it might also be an economic or a regional minority.

It has been the practice in this body that there be the provision for extended debate and that the termination of that extended debate require more than a majority of the Senate. Why should that procedure which applies to all other activities not apply to one of the most important, if not the most important, activities of the Senate, which is to play its equal role in the determination of who will be the judges of the Federal system in our Nation?

Let me suggest that maybe we need to look beyond the confines that have dominated much of this debate and ask how can we, within a system that is balanced between the President and the Senate, do a better job of selecting judges and avoid the kind of contention and delay we are currently experiencing.

Let me make three suggestions. Excuse my egocentric discussion of this first suggestion. But for 12 years, the two Senators from Florida were one Republican and one Democrat. Over that 12-year period, for one period of time the President was a Republican and then later a Democrat. During that 12-year period, Senator Connie Mack and I established a process. The process was to have a nonpartisan panel of citizens roughly divided between lawyers and lay people review the applications of persons who were seeking Federal judicial appointments. We refused to allow on any of the documentation an indication, direct or indirect, of what the party affiliation of the applicant was. Senator Mack and I refused in our interviews with those who were selected through this process to raise any questions of their partisan affiliation. This process proceeded with interviews of the applicants and a recommendation of generally three persons to Senator Mack and myself. We would select one of the three jointly and then submit that to the President.

Virtually, if not totally, without exception, the President approved the person selected through that process, nominated that person, and this Senate confirmed that person generally in an expeditious manner—I hope because of the confidence of my colleagues in the impartiality and the merit orientation of the process we had used.

I suggest to my colleagues and to the President that maybe a system analogous to this could be more broadly utilized at both the district court and the circuit court level in order to reduce the instances of the impasse in which we currently find ourselves.

A second recommendation: There are some scholars who are now looking at the issue of the judiciary and its relationship to the executive and legislative branches, and they are beginning to suggest that possibly we should move away from a lifetime appointment of Federal judges at the district and circuit court levels—not at the Supreme Court level—and to establish a fixed term such as 12 years rather than the current lifetime appointments. That 12-year term would be nonrenewable. This would have the benefit of persons knowing that the person appointed, nominated, and confirmed to the Federal judiciary at other than the Supreme Court level would serve an extended term but would not be permanently in office. Therefore, some of the concerns particularly about the philosophical views would be reduced.

Finally, I think the President should be encouraged to reexamine what has become I think an unfortunate pattern and which has elevated the importance of the circuit courts, and it has elevated the attention given to the nominees for the circuit court, and that is the practice that almost all of the recent nominees to the U.S. Supreme Court were nominated directly from their service in a circuit court. In fact, every U.S. Supreme Court Justice since

1990 came out of the circuit court. I think serving on the Federal circuit court is a perfectly appropriate preparation for the Supreme Court. What I disagree with is that the entire Supreme Court should be made up of persons with that background.

This Nation has been well served with Supreme Court Justices who had a variety of backgrounds, including people such as Hugo Black who had been a member of the Senate before he was appointed to the Supreme Court; Earl Warren, who was Governor of California before being appointed to the Supreme Court; persons who came from an academic background, such as Felix Frankfurt, or from the active practice of law, Louie Brandeis.

I encourage the President, when there is another opportunity to appoint a Supreme Court Justice, to look more broadly than has become the pattern at least since 1990.

With those comments I turn briefly to a discussion of the issue of the loss of manufacturing jobs and what we might do to put a tourniquet, to a degree, on that loss.

A very fundamental question facing our Nation is, How can America maintain its standard of living substantially higher than the rest of the world, during a period of globalization of the economy where so much emphasis is going to what parts of the world can produce a product at the lowest unit cost. There are some things that we need to do in order to revise our trade policy. Many of them were discussed by the Senator from West Virginia. I particularly emphasize the importance of having the context of trade, issues such as labor, human rights, and environmental protection, become part of the trade negotiation. I am not suggesting the way to do this is by writing all those provisions into each trade agreement; rather, that we look to organizations such as the International Labor Organization, if not the oldest international organization in the world, an organization to which most countries belong and have accepted the labor protocols of, the International Labor Organization, to determine which of those protocols are appropriate to a specific trade agreement; include that, and then either through enhanced enforcement by the protocol itself, which I think is the preferable approach, but failing that, through mechanisms of the trade agreements, to see those standards become reality.

Beyond changes in our trade law, we need to look at what is going to be required in America to make us as competitive as possible. I particularly reference two things: One, we have to have the best educated, the most productive workforce in the world if we are going to be able to compete globally and maintain our standards of living. John Adams was instructive on this point as well. John Adams urged the widest possible support for education: Laws for the liberal education of youth, especially for the lower classes of people, are so extremely wise and useful that to a humane and generous mind, no expense for this purpose would be thought extravagant.

I agree with that assessment of John Adams and add to it the importance of training for adults who are finding their current skills are less in demand and need to either enhance those skills or to add new skills to their capabilities.

Finally, before I conclude, we need to make a greater investment in our infrastructure. Our roads, bridges, water and sewer systems are critical to our economic productivity. They are deteriorating. This Congress will have an opportunity soon to deal both with adequate funding of education, particularly for retraining of adults and to enhance our capability to provide a modern set of support systems for our economy.

The PRESIDING OFFICER (Ms. MURKOWSKI). The Senator from Kansas.

Mr. BROWNBACK. Thank you, Madam President. I am being joined by my colleague from Kansas, Senator ROBERTS, my colleague from Illinois, Senator FITZGERALD, and Senator NICKLES will join us in our time period to talk about the judicial crisis we have in this country and the difficulties that have been created now by an unprecedented act of the filibustering of circuit court judges. I will take a narrow look at this as an issue that has been building for the last 40 years, and what has happened during that 40-year time period that the crisis in the court has developed.

We stand on the shoulders of greatness. It was with courage and honor and convictions and convictions in religious beliefs that our forefathers formed this union of States we now call the United States of America. Indeed, the foundation of our country was formed with an understanding that there is a recognition of a higher moral authority. It is over our mantle, the one right here that I look at which says, ''In God We Trust.''

Yet if we are to continue down the precedent set in 1962—and I will go into that—it will be likely that in the near future we will have to take these words down and remove them as being illegal. This body itself committed a criminal act under a determination made by the Ninth Circuit Court of Appeals when we opened up and said the Pledge of Allegiance; a criminal activity because in 1954 President Eisenhower, the great Kansan, with a legislative body inserted, the unbelievable words, ''one Nation, under God.''

The Ninth Circuit Court of Appeals, to which two of the nominees would go, has declared that unconstitutional. It would be one thing if we said this is just an unusual aberration, but what we have to say and see is that this is a continuation of a 40-year march that the court has been on to purge any recognition or acknowledgment of God in the public square.

We are on 40 years of judicial activism in this regard. I will go through that. The Ninth Circuit is applying the endorsement test, first articulated in the 1985 school prayer case of Wallace v. Jaffree. Let's be honest about the logic behind the test. It is an absolute demand that religious ideas and language be thoroughly eliminated and cleansed from government activities. If consistently applied, the endorsement test basically drives God out of public school and out of our public life.

For too long we in this body have been silent and stood by while the courts have slowly chipped away at our responsibility to this Nation. And today we see the effects of our apathy.

At this critical time in our Nation's history, the Senate stands locked in a controversy surrounding the confirmation of judges. But this stalemate also underscores the large issues at stake and the serious choices we face as a nation. If we look at the judicial trends for the past 40 years, the courts have increasingly veered off course. As far as religion is concerned, the courts have been on a relentless drive to remove God from the public square. It started in 1962 in Engel v. Vitale when 39 million students were forbidden to do what they and their predecessors have been doing since the founding of our Nation, publicly calling upon the name of the Lord at the beginning of each school day as we do in this body.

The following year in the School District of Abington Township v. Schempp, the Court held that Bible readings in public schools also violate the first amendment. In 1992, in Lee v. Wiseman, prayer was removed from graduation exercises. And in 2000, in the Santa Fe Independent School District v. Doe, prayer was removed from being said at football games.

None of these restrictions were affirmatively adopted by any legislative body. The legislative bodies, either at the Federal or State level did the opposite. The Congress added the phrase ''under God'' in 1954 to the Pledge of Allegiance, and did so with the explicit intention of fostering reverential patriotism—nothing more, nothing less. It was done to reflect the values of the American people that were as valid in 1954 as they are today. Yet this year, the Court will continue to decide these issues, irrespective of what the American people believe in and want.

Along the way during this 40-year time period, the Court also discovered the constitutional right to abortion and more recently struck down State anti-sodomy laws.

As the Court has sought to remove God from the public square, we should examine the impact it has had on our culture, that amorphous atmosphere that helps form our souls and our identities. The culture, the following charts demonstrate, has clearly deteriorated. More and more Americans are slipping into depression, alcoholism, and suicide. Our Nation's schools are plagued with students who not only fall behind in educational standards but who are suffering from societal

problems that we have allowed to take place in this country.

Prior to the two major cases outlawing prayer in 1962 and 1963, our students enjoyed more stability. Since then, there has been more violence, sexual activities in schools, which have had corrosive effects on our culture.

For example, look at this chart showing suicides increased dramatically for teenagers between 1960 and today, nearly tripling the age bracket of suicide for children in our schools. Similarly, drug use has gone up significantly since the 1960s. Alcohol use also went up among those between the ages of 12 and 17, as this chart shows.

Here are examples of societal consequences since the 1960s. Since the passage of Roe v. Wade, legalizing abortions, abortions have increased dramatically. By the 1990s, abortions, private sources show, have more than doubled during that period of time. We are at 1.5 million a year. Bill Clinton called for abortion to be safe, legal, and rare. It is none of the three.

We see a dramatic increase in divorces that have taken place in this country since 1960.

This chart goes back to 1940, but from 1960 forward we are at a point in the 1990s where one in every two marriages end in divorce in America. Is that a healthy culture? We have seen same trends in violent crimes taking place. From 1960 to where we are today, we have seen more than a doubling, tripling of violent crimes taking place.

I ask the simple questions of my colleagues: Is there a direct correlation? Did the removal of prayer in the classroom or prohibitions on other public displays of religious convictions lead to the kind of moral decay reflected in the charts? Did the removal of honor and recognition of a higher moral authority impact our children? Or is it mere coincidence that our culture has declined as the courts deliberately and quietly shifted this country away from our motto, ''In God we trust.''

However one may interpret the empirical data and whatever conclusions one may draw of the cause and effect, we cannot ignore the key principles in the Constitution and under the establishment clause. While it may seem like inherent contradiction, Americans believe it both appropriate and necessary for government to limit abuses of religious liberty while at the same time making the effort to support sound religious convictions.

I am joined by several of my colleagues in the Senate who want to go further in making points about the judges who are being appointed. One thing is consistent with the judges, and that is they are people who have, in many cases, strong convictions, strong religious convictions, and they are being tested and tested out because of their faith. Is that where we are going with this removal of God from the public square? This is a dangerous precedent and dangerous way we are going.

I yield the floor to my colleague from Kansas, Senator ROBERTS.

Mr. ROBERTS. Madam President, I thank my distinguished friend and colleague for yielding. This is one of those times where perhaps everything has been said but not everyone has said it. I am not sure what I can add to this debate, but I will give it a try.

Our citizens of Kansas have watched the Senate's action, or rather inaction, on the President's nominees. I would like to quote from the Wichita Eagle, one of our fine newspapers in Kansas which simply editorialized:

> The party that does not control the White House is trying to control the ideological makeup of the federal courts, by misusing the Senate's advice-and-consent function to stall votes on the president's judicial nominees.

The Topeka Capital Journal also observed:

> The federal judiciary is heading to a train wreck.

I suspect by the time we get to the end of this and these kind of delay tactics, people will crawl out of train wrecks faster than we get this solved. I hope that is not the case.

It is not just the local newspapers that are expressing their views on these issues. Many constituents have written and called my office. They are expressing their frustration on the Senate's treatment of this process. This is a time that the process of the Senate, normally not a very high profile issue, has become a high profile issue.

Kansans are pragmatic and understanding people. They understand that some Senators oppose the President's nominees on ideological grounds. They also understand that those Senators are entitled to that position and answer to their own constituents for their actions. However, they do not appreciate the abuse of the Senate's procedural tools to allow the minority to dominate the majority. They want us to give these nominees a simple up-or-down vote. That is the whole issue. They want these nominations decided on the merits, not blocked by some procedural maneuver.

That is what this all comes down to. All of the rhetoric and support of these delaying tactics would have you believe the four nominees are ''out of touch,'' or ''out of the mainstream.'' Those opposing the nominees would have us believe they have not had a sufficient opportunity to question the nominees or have not received enough information to form an opinion. The facts are that through hearings that have been held, and in one case over 2 years have passed and the nomination simply remained blocked.

Additionally, if my colleagues truly believe they do not have enough information despite these hearings and despite the answers that are provided by the nominees, the answer is simple. They do not have to vote for the nominee. They can simply vote no, if we could just have a vote. So despite all of these protestations to the contrary, this comes down to ideological obstructionism.

Now, intuitively the logic that a judicial selection should be based or influenced by a nominee's ideology leads one to believe that judges should or will rely on their own personal beliefs rather than on the law when rendering their decisions. I find this remarkable and completely off the mark. I am certain that if each of these nominees receive an up-or-down vote, each would be approved by a majority vote and they would vote according to the law. They said that over and over again.

My question is, How is justice served when justice is delayed? If you deliver solid and qualified judges to our court system, that is more important than litmus test politics. We are just simply not doing our job.

Let me talk about trust. This continued delay does not foster the public's trust in our government's process to simply get the job done.

Let me talk about cost. Taxpayers spend $5.1 billion for the Federal judiciary every year. The American people are paying for fully staffed courts and are getting obstructionism and vacant benches. Reckless behavior such as this is irresponsible and a waste of taxpayer dollars.

Let's talk about delay. Let's really talk about delay. Court delays are becoming the norm. We all know that. We read about something egregious in the newspaper and wonder why you cannot get a court decision or at least some justice out of the situation. All of the court circuits facing these judicial emergencies are averaging 4- to 5-month—4- to 5-month—delays. And these delays are on top of a process that, from the original filing in district court to the final decision on appeal, takes 24 to 28 months—over 2 years.

OK, let us talk about results. What does an overtaxed judiciary really mean to Americans? It means that cases take longer to resolve, lives are disrupted and inconvenienced further, and real people must wait indefinitely in limbo as justice in their cases remains undetermined.

In over two centuries of Senate history, why, judicial nominations have been both approved or refused. No filibuster was necessary to defeat a nomination. The reliance by those who oppose these nominations of this procedural tool to handicap the process is simply unprecedented. The use of the filibuster essentially grants the minority veto power, hence controlling which nominees will even be given the chance—just the chance—for an up-or-down vote, much less confirmed.

Now the Constitution explicitly states seven circumstances in which a supermajority vote is warranted by one or both Chambers of Congress. The advice and consent of Presidential nominations by the Senate is not one of these special circumstances. In fact, Alexander Hamilton states in Federalist 76 that the Senate's role is to refuse nominations only for ''special and strong reasons'' having to do with unfit characters. At some point, after

the issues and merits of the nominee have been debated, we have an obligation to render a decision, whether it is yea or nay, and not let the matter hang in the balance unresolved and unfinished.

These competent, well-qualified judicial nominees deserve an up-or-down vote. The people of Kansas and the United States deserve a full—a full—judicial bench.

I thank my colleague for yielding the time.

The PRESIDING OFFICER. The Senator from Kansas.

Mr. BROWNBACK. I thank the Chair.

I now yield to the Senator from Illinois for 7 minutes.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. FITZGERALD. Madam President, I thank both my colleagues from Kansas. I appreciate the remarks that were just made by the chairman of the Intelligence Committee.

I would like to go back to some of the statistics that have been cited in this debate. I guess I have been very troubled to hear on the radio this morning, on call-in radio, the figures being cited over and over again that were offered last night on the other side of the aisle.

We kept hearing that they had only blocked four judges. Well, that is simply not true, and I think it is very important that the American people know that is not true.

I have in my hands a chart that was prepared by the nonpartisan Congressional Research Service that shows that of the Presidents going back to Carter, in 1977, through August 1, 2003, the Senate has blocked a higher percentage and a higher number of judges who were nominated by President Bush than any other President in the Nation's history—or at least going back to 1977. And I am sure nothing was going on prior to 1977 like what is going on today.

The fact is, according to this survey, President Bush has nominated a total of 264 people to serve on the district and appellate courts in this country. As of August 1, 2003, only 144 of them have been confirmed. That is only 54 percent of the number of nominations made by President Bush.

Now we need to break that down. Of district court nominees, President Bush, as of August 1, has nominated 185 nominees to the district court. Only 117 of them have been confirmed. That means the Senate had rejected or not acted on 68 of those district court nominees.

With respect to the appellate courts, as of August 1, the President had nominated 79 appellate court judges and the Senate, as of August 1, only confirmed 27 of them. That is only 34 percent of the total. So that means 52 of President Bush's nominees to the appellate courts have been blocked by the Senate.

My friends on the other side of the aisle have done something very clever. They have just arbitrarily decided they are only going to talk about judicial nominees who have been filibustered and blocked on the floor of the Senate and they are not going to talk about those whose nominations have been blocked in other ways, such as in committee. Thus, the American people have been given a misleading impression overnight. They have been misled into thinking the Senate has only blocked four nominees for the appellate courts. Well, it has been far more than that.

As of August 1, it had been 52. I do not know what the figure would be right as of today, but I would have to tell you, if you compare it to the previous Presidents, the treatment of President Bush's nominees has been deplorable.

Going back to President Carter, he nominated 61 appellate judges; 56 of them were confirmed. In other words, Carter, in 4 years, only had five appellate court nominees who did not make confirmation; 91 percent of his nominees were confirmed. President Reagan, who was a Republican President, served while there was a Democratic Congress. He had 81 percent of his appellate nominees confirmed. The first President Bush had 77.8 percent of his appellate court nominees confirmed. President Clinton had 56 percent of his appellate court nominees confirmed.

If you get down to this President, George Bush, he only has had, as of August 1, 34 percent of his appellate court nominees confirmed. I am very concerned about what this means for our country. It could mean that a minority in the Senate is usurping for itself the power to control the Federal judiciary.

Under our Constitution, the President is supposed to appoint the judges with the advice and consent of the Senate. We have some idea what the Constitution meant by that because Alexander Hamilton addressed the issue in Federalist Paper No. 76. He said the Senate's role is to refuse nominations only for ''special and strong reasons'' having to do with ''unfit characters.''

I do not even think anyone has made the argument that the nominees who have been blocked in the Senate in this Congress have been unfit. I think the arguments against their nominations have been more ideological; simply the other side does not agree with these people, suspects they may be conservative.

Many of President Bush's nominees have been pro-life. I am concerned there may be a litmus test that is being applied on the other side, that they are simply not going to allow pro-life judges on our appellate courts. That is very troubling because that is upsetting our constitutional order that our Founding Fathers have made.

The key point here is, I do not want the American people to come away with the impression that only four of President Bush's nominees have been blocked. The number is far higher. It is probably a total of over 100. Probably about 120 have been blocked. As of August 1, 68 district court judges have been blocked and 52 appellate court judges. So this whole thing about just four judges having been blocked is really nonsense, and we ought to set the record straight.

The PRESIDING OFFICER. The Senator has used 7 minutes.

Mr. FITZGERALD. Thank you, Madam President. Having used up my time, I will now yield the floor to my distinguished colleague, Senator BROWNBACK from Kansas.

The PRESIDING OFFICER. The Senator from Kansas.

Mr. BROWNBACK. Thank you, Madam President. I thank the Senator from Illinois.

Madam President, how much time remains on this side?

The PRESIDING OFFICER. Five minutes remain on the majority side.

Mr. BROWNBACK. Thank you very much.

I thank my colleague from Kansas and my colleague from Illinois for the comments they have made in this debate in which we have been engaged for some period of time and I think make both cogent and important points to put forward.

I want to double back around and finish on the comments I started on about this being a 40-year debate. For some of us who might have been up for a while, it may seem like 40 years already since last night.

But this has been a 40-year debate, and we have engaged and embarked on a great debate about which these judges are front and center, and it is potentially a collision course, some may say, between those who believe in God and that He has a role to play in the cultural and moral fabric of this Nation and those who prefer to sanitize our public institutions of any reference to God.

We should at least allow the vast majority of Americans who believe in God to honor Him in public, as our Founders did, and not be forced to conceal Him from the public square.

The four nominees currently being filibustered all believe in God, as do 90 percent of the American public. Should they be excluded from the appellate courts because of their faith? Their deeply held convictions just happen to mirror those of George Washington, most of the Founding Fathers, as well as some of the greatest Americans in our history—Abraham Lincoln, Susan B. Anthony, Dwight Eisenhower, and Martin Luther King, Jr. Would any of them be able to get on this court today through this litmus test? I doubt it.

If the issue here is this body has not had sufficient opportunity to debate the merits of the candidates, then let's go ahead and debate and move to a final vote.

Those who wrote the Constitution, which is the oldest working constitution in the world, remain the best guide to its clear meaning. America's

Founding Fathers, by and large, did not believe government must be neutral toward religion. George Washington, in his Farewell Address, often quoted, gave the clear view, ''Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports.''

The Founders supported the public recognition of religion because religion and morality are, in Washington's words, the ''firmest props of the duties of men and citizens.'' When Washington addressed the new Nation for the first time as President, he led the country in public prayer, something we have never failed to do since, and yet removed 40 years ago from our public classrooms.

Therefore, I submit to you today that we should not stand idly on issues of judicial nominations. The Framers of the Constitution feared tyranny from the judiciary more than from the other two branches. They placed deliberate limitations on the judiciary in order to ensure the integrity of the judicial system. As a result, the Federalist Papers reported that under their plan, ''the Judiciary is beyond comparison the weakest of the three departments of power. . . . [and] the general liberty of the people can never be endangered from that quarter.''

Would that be an agreed-to statement today? I think not.

It is our duty to ensure the legislative integrity of our culture. Indeed, it is written in the Constitution that to do anything less is to walk away from our responsibility to this Nation, a responsibility that was recognized and affirmed by our Founding Fathers.

Madam President, as we conclude on this side of the aisle for this 30-minute section, I would just note to my colleagues on the other side of the aisle that this is going to continue to be an issue. We will get these judges through at some point in time, whether it is this session or we have to go back to the public and have another vote in the 2004 election cycle.

This will be a front and center issue. As the courts and the culture are becoming increasingly tied together with the difficulties we have had in this society, this will be taken to the public. I do not doubt that this will be, if not the top issue, one of the top three issues. They are going to be out in the public. I think this is a bad idea policywise, what is taking place in the blockage of these judges. I think it is bad politics.

But this is going to take place and this fight will continue. If we do not get it done now, we will continue to press forward, and it will be taken into the election cycle, and we will let the American public look and see: Do they think this is the way judges should be handled by the Senate? As these calamities of judicial blockage keep mounting up, it will become clearer and clearer to the public what is taking place here.

This is a very important fight. It is one about which a lot of people care deeply. It is one that a lot of my—when people come up to me in Kansas and talk about issues, these are front and center issues they talk about. They are concerned about these issues and have been for some period of time. And they are wondering: What are you doing? What about this activist court? Why are you not getting these judges on through?

This is something that does touch the public. We can do it the way it should be done; we can get a clear vote up or down or we can take it back out to the public in the next election cycle. One way or the other, this is going to occur. And I would suggest that the best way for this society, the best way for this Government, the best way for this culture is for these to come forward here, be vigorously debated, and then voted on up or down. I think the public is now coming to a very strong point on this.

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

Mr. BROWNBACK. Thank you very much. I yield the floor.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Nevada.

UNANIMOUS CONSENT REQUEST

Mr. REID. Madam President, I ask unanimous consent that the Senate stand in recess from 4:15 to 5:15 today. This is so that all Senators can attend a closed briefing in secure room No. S–407, the briefing to be by Ambassador Bremer, the American administrator in Iraq.

Another American was killed today, along with 25 Italian peacekeepers in Iraq. The Senate Intelligence Committee is no longer functioning, so it is more important than ever for this body to review the direction of the American war in Iraq, especially in that we have appropriated in special funding this year some $163 billion. I so move.

The PRESIDING OFFICER. Is there objection?

Mr. BROWNBACK. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. REID. Madam President, the Senator from Vermont is going to take 1 minute of the time of the two Senators from Washington. I would ask unanimous consent that following his statement, which would be 1 minute, the two Senators from Washington divide their time, and the first to be recognized is the junior Senator from Washington, followed by the senior Senator from Washington.

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

The Senator from Vermont.

Mr. LEAHY. Madam President, I agree, this can be an issue and probably should be an issue in the election, but let's make sure it is an issue on the facts. There is this discussion we heard on the floor this last hour or so of the great vacancies. That is balderdash.

The fact is, there are more Federal judges sitting right now than at any time in history. We have been told that we are blocking 130. There are only 40 vacancies, approximately 40 vacancies in the whole country. Let's get our numbers right. This number is right. We have confirmed 168; we have blocked 4. We confirmed 168; we blocked 4. That is the fact.

It is hard on the other side to hear that, after they blocked over 60 of President Clinton's nominees by one-person filibusters, but it is a fact. We confirmed 168; we stopped 4. They stopped 61.

Thank you.

The PRESIDING OFFICER. The Senator from Washington.

Ms. CANTWELL. Madam President, thank you.

I rise to join my colleagues in what has been for now some many hours a very robust debate on our judicial nominees and the process by which this body should follow their advice and consent process for the President.

I think it is clear to the other side of the aisle—and it is very interesting that the two Senators from Washington are here with the two Senators from Kansas. I can imagine that we would rather talk about many other issues, particularly high unemployment in our states and how to get America moving again, and particularly in the aerospace manufacturing area. But the bottom line is, this body does have a role on advice and consent. And since the 1940s, the Senate rules have allowed cloture votes on nominations, and we have exercised that. So that is what this debate has been about.

My colleagues have continued to point out that these numbers reflect what that debate has produced as far as our working together in our constitutional role. I do want to say, though, that there is a very worthwhile point to this debate, and I would say to my colleagues on both sides of the aisle that perhaps if we wanted to even extend this debate beyond the 30 hours, we should do so because what is really at question here is the nominees the President is putting before us and whether our country, at a critical time, is going to stand up and continue to protect the privacy rights of individuals who are being threatened, those privacy rights that exist in our Constitution and are actually being challenged by our own Government.

I believe that we are at a critical time in our country's history, and that is why it is so important for the Senate to do its job. That job is to give the American people a judiciary that represents the mainstream views of America, that protects their constitutional rights, and that does not represent a clear threat to 30 years of settled law protecting a woman's right to choose.

I believe the real issue that we should debate, because it is critical to the American people, is not the fact that we have confirmed 168 Bush judges; the issue is that this Administration has nominated 4 individuals

who Senators believe fail the test. Over 40 Senators believe that they will not act to protect our constitutional rights and to uphold our Constitution.

Each of these nominees—Priscilla Owen, Charles Pickering, Miguel Estrada, and William Pryor have records that indicate a determination to interpret the law not as it is but as they want it to be.

Over the next decade, Federal judges will be making critical decisions about the right to privacy and how both Government and business should respect that right to privacy. We are at the tip of the iceberg of an information age where businesses may have access to your most personal information and exploit that; where the health care industry has access to your most personal information; where Government has established a process of eavesdropping and tracking U.S. citizens without probable cause. Government has even used and developed software that can track one's use of Web sites and information on their personal computer without their consent or knowledge.

And of course, a woman's right to privacy in her choices about her body, even after 30 years of established, settled law, continues to be threatened.

I voted against these four individuals, and I will continue to oppose them. I oppose them because I believe ensuring that our judiciary is independent and committed to protecting our constitutional rights is increasing in importance and that these four cannot fill that role. It is increasing in importance because with one party in control of both the Congress and the Executive branch, and an independent and balanced judiciary is the only remaining check to ensure that our core constitutional protections are upheld.

America is a great democracy, but it is an even brighter beacon to the rest of the world because our citizens trust our judiciary to protect their rights!

Now that as a result of the Patriot Act, Government can obtain a warrant to search your home without your knowledge; can obtain a subpoena to track your use of the Internet without showing probable cause; and can obtain a secret wiretap to eavesdrop, the judiciary must serve as a check on that power.

I know some of my colleagues want to try to address some of these issues, and we will have many opportunities in the future to correct some of this overstepping by those in our Federal Government. But in a September 2003 report, the Justice Department clearly acknowledged that new powers granted under the PATRIOT Act were not simply being used to fight terrorism and espionage.

The report ''cites more than a dozen cases that are not directly related to terrorism in which Federal authorities have used expanded power [under the PATRIOT Act] to investigate individuals, initiate wiretaps and other surveillance and seize millions in tainted assets.''

The Government has already deprived two U.S. citizens of their constitutional rights and held them as enemy combatants subject to secret trial, and they can basically deprive legal immigrants protected by the Constitution from this arrest and detain them without charges.

Just yesterday, the New York Times reported that even in our intelligence reauthorization bill, there is language significantly expanding the role of the FBI to get information from car dealers, travel agents, post offices, casinos, and others without going before a Federal judge.

I know it is easy to want to believe that these issues are all about fighting terrorism and are not hurting people.

Madam President, I can tell you, I believe strongly in the war on terrorism. In my State, we have seen three important cases that have been successfully prosecuted. In 2000, agents apprehended Ahmad Ressam, an individual who had plans to blow up landmarks on the west coast. Last year, the FBI in my region was also successful in tracking down individuals who wanted to build a terrorist training camp in Oregon. The lead individual in that case, James Ujaama, will be providing information that I hope will lead to the extradition of an extremists cleric based in London. And a group of men in Portland actually pleaded guilty to traveling to Afghanistan to fight against Americans after September 11.

I firmly believe it is possible to fight the war on terrorism and prosecute terrorists and still uphold the constitutional rights of Americans. But to make sure that balance is right, the Senate must do its job to ensure that nominees to the federal court will interpret the law, and not use their personal views to rewrite it.

Americans are genuinely concerned about the erosion of their rights. Earlier this year in the Senate, we hosted a forum in which two individuals from my State, Nadin Hamoui and Mako Nakagawa, both testified about their experiences. Both described being awakened in the dead of night in their family homes by armed law enforcement who pointed guns at their parents, herded sisters and brothers into waiting vehicles and took them away for a long detention with no access to due process. The eerie part was that their stories occurred sixty years apart, in 1941 and 2001.

In Washington State, the echo of internment of Japanese Americans during World War II and the damage that it did is still very real, and hearing these two stories makes us aware of just how much our respect for liberty in this country can be overcome by fear.

It has never been more important to have a judiciary that vigorously protects our constitutional rights and particularly our rights to privacy. As a perfect example, just this past week, the Supreme Court agreed to hear arguments on whether prisoners at the United States Naval Base at Guantanamo Bay are entitled to access to civilian courts to challenge their open-ended detention. An independent judiciary has the courage to review Government assertions of power, and that is what we are talking about here: whether these nominees would live up to the demands of that independent judiciary.

These are good individuals. They are earnest. They are hard working. But there have been fundamental questions raised about their records and about whether they have impartially judged their cases.

Charles Pickering, we all know, has been involved in a case where he picked up the phone and intervened with the Department of Justice in an attempt to reduce a sentence mandated by Federal guidelines.

Priscilla Owen has been repeatedly had her opinions chastised by members of her own court who have called them ''nothing more than inflammatory rhetoric'' and ''an unconscionable act of judicial activism.'' The San Antonio Express News actually called the nomination—or the renomination, I should say—of these two individuals, Owen and Pickering, a ''misguided'' and ''major disappointment.''

Mr. Pryor, again, I am sure a well-meaning individual, sought to limit the Violence Against Women Act—and a fellow Republican attorney general had this to say about him:

> I have great questions about whether Mr. Pryor has the ability to be nonpartisan. I would say he was probably the most doctrinaire and most partisan of any attorney general I dealt with in 8 years.

Are these the individuals we want to trust with lifetime appointments to protect our constitutional rights and to uphold those rights?

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

Ms. CANTWELL. Madam President, how much time have I used?

The PRESIDING OFFICER. The Senator has used 11 minutes. There are less than 10 minutes remaining.

Ms. CANTWELL. If my colleague from Washington would allow, I would like to continue.

Mrs. MURRAY. How much more time does the Senator need?

Ms. CANTWELL. Three minutes.

Mrs. MURRAY. I yield 1 more minute to my colleague from Washington.

Ms. CANTWELL. I thank my colleague. Madam President, in voting against these individuals, the Senate is doing the job the American people expected us to do.

In order to continue to have this great democracy, we must ensure we have vital checks on this administration's power. The American people are expecting their judiciary to be independent, to respect precedent, and not to prejudge the issues before them. The American people think we need a fair and balanced judiciary to counterbalance the executive and legislative branch, and we need to give them that.

These four individuals have demonstrated records of reaching beyond the law in order to reach their preferred ideological outcome. The Federal judiciary will not rise or fall on the fate of these four individuals, but in order to be a great democracy, in order to continue shining as the world's brightest beacon for individual rights, we need to have an independent judiciary, Without the important check that this Senate provides by doing our job in advising and consenting with the President on these issues, that will not be possible.

I yield the floor.

The PRESIDING OFFICER. The Senator from Washington.

Mrs. MURRAY. Madam President, how much time do I have?

The PRESIDING OFFICER. Eight minutes.

Mrs. MURRAY. Madam President, the majority believes that the Senate should spend 30 hours discussing what the New York Times calls a manufactured crisis on judges. While I believe our time would be better spent helping laid-off workers by extending unemployment benefits, I am happy to talk about the confirmation of judges. I am happy to talk about how these lifetime appointments affect the rights and freedoms of every American, and I am happy to talk about our impressive record of confirming 98 percent of the judges this majority has brought to the Senate floor.

I want to be clear that by spending 30 hours talking about four judges who already have jobs, we are not helping the 3 million Americans who do not have jobs. This marathon is the type of political grandstanding that, frankly, makes Americans scratch their heads and conclude that politicians just don't get it. We should be spending our time on the urgent needs facing our citizens in employment, health care, transportation, and completing our work on putting this Federal budget together. But the majority has decided that this is the most important issue we can discuss for 2 days, and they control the floor.

I wish to talk about four things: The importance of the Senate in confirming judges, the progress we have made in the past 3 years, the success we have had in confirming judges in Washington State, and the job crisis that the majority doesn't want us to discuss.

First, I want to put this discussion in context because the judges who serve on the Federal bench affect the lives and liberties of every American. These are lifetime appointments. This is not just a nomination to a commission or to an ambassadorship. This is a lifetime appointment for a Federal judge whose rulings over the next 30, 40, maybe more years, will have ramifications for every single American.

As Senators, we are elected to serve our constituents. We are asked to confirm judges whose decisions can change U.S. history. They can shape the lives of Americans for generations to come. In addition, we expect Federal judges to provide the proper checks in our system of checks and balances that was outlined in the Constitution. Without it, our system does not function properly. It is our job to ensure that each nominee has sufficient experience to sit in judgment of our fellow citizens; that they will be fair to all of those who come before the court; that they will be evenhanded in administering judges; and that they will protect the rights and the liberties of all Americans.

To determine if a nominee meets those standards, we have to explore their record, ask them questions, and weigh their responses. That is a tremendous responsibility and one that I take very seriously.

In the Senate, we have made great progress in confirming the judges President Bush has nominated. Look at these figures. The Senate has confirmed 168 judicial nominees of President Bush to have come before the Senate. In 3 years, we have only stopped 4—4 people whose records raise the highest questions about their abilities to meet the standards of fairness that all Americans expect.

Let me repeat that: 168 judicial nominees. That is a confirmation rate of 97.7 percent. We have confirmed 168 judges. That is more confirmations than during President Reagan's entire first term. So for this year, we have confirmed 168 judges.

Today, 95 percent of the Federal judicial seats are filled. That is the lowest number of vacancies in 13 years. There are now more Federal judges than ever before.

When it comes to circuit court judges, we have confirmed 29. That is more appeals judges than Clinton, the first President Bush, or Reagan had by this point in their administrations.

I have to point out that while the majority is complaining today about our 98-percent confirmation rate, it was a different story during the Clinton administration. Back then, Republicans used many different roadblocks to stop the confirmation of judges nominated by President Clinton.

During Clinton's second term, 175 of his nominees were confirmed and 55 were blocked from ever getting votes. During those years, the majority used the committee process to ensure nominees they disagreed with never came to a vote. Fifty-five nominations sent over by President Clinton never received consideration. So I think the Senate has a pretty impressive record at this time of confirming judges. That is clear in a 98-percent confirmation rate, and 95 percent of the Federal judicial seats are filled today. It is the lowest number of vacancies in 13 years.

I wish to talk for a minute about the process we use in Washington State to confirm judges. We have worked out a system to ensure Washington judges are nominated and confirmed even when different political parties hold Senate seats or control the White House. For many years, I have worked with a Republican Senator and a Democratic President to nominate and confirm Federal judges. Today, with a Republican President, I am working with my Democratic colleague from Washington State on a bipartisan process to recommend judicial candidates. We developed a bipartisan commission process to forward names to the White House, and it has worked very well. Both sides have equal representation on the commission, and the commission interviews and vets those candidates.

It worked for Senator Gorton—a Republican—and I when we were forwarding names to President Clinton, and it is working for Senator CANTWELL and I as we both recommend names to President Bush.

I am proud that during President Bush's first 3 years, we have confirmed two excellent judges through this bipartisan commission process. We confirmed Ron Leighton, a distinguished trial lawyer in Tacoma who is now a U.S. district court judge for the Western District of Washington in Tacoma.

We have confirmed Lonny Suko as a district court judge for the Eastern District of Washington State. He is a distinguished lawyer and U.S. magistrate judge who has earned the respect of so many in his work on some of eastern Washington's most difficult cases.

Currently, we are in the process of getting a nomination hearing and confirmation of Magistrate Judge Ricardo Martinez for a vacancy on the U.S. District Court for the Western District of Washington.

For over 5 years, he has served as a magistrate judge for the United States. Before that, he was a superior court judge for 8 years, and he was also a King County prosecutor for 10 years.

Judge Martinez has the impressive credential of being named the first drug court judge in Washington State and worked tirelessly to ensure the success of this program which uses treatment services as an alternative to incarceration.

I am looking forward to his hearing and confirmation fairly quickly.

I am here to tell you that in Washington State, we are making real bipartisan progress in confirming judges. It is a process that I believe serves the people of Washington State well.

Mr. ALLARD. Will the Senator yield for a question?

Mrs. MURRAY. I have very little time left, and I want to finish my statement. I thank my colleague.

The time we are spending discussing our 98-percent confirmation rate could be used to address much more pressing issues. The majority is spending 30 hours to talk about four people who already have jobs. I think we should spend that time talking about the 3 million Americans who cannot find jobs.

The PRESIDING OFFICER (Mr. ENSIGN). The Senator's time has expired.

Mrs. MURRAY. Mr. President, I conclude by saying in my home State of Washington, 70,000 people have been laid off. They want this Senate to deal with unemployment insurance extension, which we need to do before we adjourn.

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

The Senator from Colorado.

Mr. ALLARD. I wonder if the Senator from Washington would yield for a question and we would divide the time against each of us; time would go against her in responding to the question and my asking the question would go against the Republicans.

Mr. REID. At this stage I would object.

The PRESIDING OFFICER. The objection is heard.

Mr. REID. If the Senator wants to ask a question, use it on his time. We have people who have prepared all-night speeches and have been cut too short.

Mr. ALLARD. That was just a suggestion, but obviously she does not want to respond to the question.

Mr. President, today my colleagues and I are trying to put an end to the nomination logjam. All we are asking is for a simple up-or-down vote on these highly qualified nominees now. Carolyn Kuhl, Priscilla Owen, and Charles Pickering must receive a vote. Today, our Nation is facing a judicial crisis. Currently, there are 22 emergency judicial vacancies and 12 of these are on the court of appeals. It is simply irresponsible for us to ignore this growing crisis.

Sticking our heads in the sand like an ostrich and ignoring it, as some of my colleagues would like us to do, will not diminish the seriousness of this crisis and make it go away.

I have an article from the Washington Post written by George F. Will on February 28, 2003, entitled ''Coup Against the Constitution.'' I ask unanimous consent that that article be printed in the RECORD.

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

[From the Washington Post, Feb. 28, 2003]

COUP AGAINST THE CONSTITUTION

(By George F. Will)

The president, preoccupied with regime change elsewhere, will occupy a substantially diminished presidency unless he defeats the current attempt to alter the constitutional regime here. If at least 41 Senate democrats succeed in blocking a vote on the confirmation of Miguel Estrada to the U.S. Court of Appeals for the D.C. Circuit, the Constitution effectively will be amended.

If Senate rules, exploited by an anti-constitutional minority, are allowed to trump the Constitution's text and two centuries of practice, the Senate's power to consent to judicial nominations will have become a Senate right to require a 60-vote supermajority for confirmations. By thus nullifying the president's power to shape the judiciary, the Democratic Party will wield a presidential power without having won a presidential election.

Senate Democrats cite Estrada's lack of judicial experience. But 15 of the 18 nominees to the D.C. court since President Carter have lacked such experience, as did 26 Clinton circuit judge nominees who were confirmed. And 43 of the 108 Supreme Court justices (most recently Byron White, Thurgood Marshall and Lewis Powell), including eight of the 18 chief justices (most recently Earl Warren), had no prior judicial experience.

Sen. Charles Schumer opposes Estrada because his mind is, Schumer says, a mystery. And because the Justice Department refuses to release papers Estrada wrote during his five years (four of them in the Clinton administration) in the solicitor general's office. The department, emphatically supported by all seven living former solicitors general (four of them Democrats), says that violating the confidentiality of department deliberations would have a deleterious effect on those deliberations. Anyway, the papers Schumer seeks contain not Estrada's personal views but legal arguments supporting the litigation positions of the U.S. government.

Estrada, whose nomination has been pending for almost two years and who has met privately with any senator who has asked to meet with him, answered more than 100 questions from the Judiciary Committee, and unusually large number. Only two of 10 Judiciary Committee democrats exercised their right to submit written questions to Estrada for written answers. Schumer did not.

Schumer says, ''No judicial nominee that I'm aware of, for such a high court, has ever had so little of a record.'' Actually, he is aware of at least two nominees to a yet higher court—Gov. Warren and Sen. Hugo Black—who had no record comparable to Estrada's 15 briefs and oral arguments (10 of them victorious) in cases he argued before the Supreme Court.

Schumer says Estrada would not cite ''three supreme Court cases in the past you disagree with.'' Actually, he was asked to cite three ''from the last 40 years,'' a transparent attempt to force him to discuss Roe v. Wade. But because abortion-related cases still come before courts, Estrada could not discuss Roe without violating the American Bar Association's Code of Judicial Conduct, which says prospective judges ''shall not . . . make statements that commit or appear to commit the nominee with respect to cases, controversies or issues that are likely to come before the courts.'' Which is why Justice Ruth Bader Ginsburg, declining to answer certain questions at her confirmation hearing, said, ''It would be wrong for me to say or preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide'' (emphasis added).

When Boyden Gray was White House counsel for the first President Bush, Sens. Edward Kennedy and Joseph Biden—both now former chairman of the Judiciary Committee, and both still on it—warned him that any nominee would be rejected if the White House asked the nominee questions about specific cases. And a Judiciary Committee questionnaire, which every nominee must complete, sternly asks: ''Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue, or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such a case, issue or question?'' (emphasis added).

Alexander Hamilton wrote in Federalist Paper 76 that the Senate's role is to refuse nominations only for ''special and strong reasons'' having to do with ''unfit characters.'' The American Bar Association unanimously gave Estrada its highest rating, and Estrada's supervisors in the solicitor general's office gave him the highest possible rating in every category, in every rating period.

Given the cynicism and intellectual poverty of the opposition to Estrada, if the Republican Senate leadership cannot bring his nomination to a vote, Republican ''control'' of the Senate will be risible. And if the president does not wage a fierce, protracted and very public fight for his nominee, he will display insufficient seriousness about the oath he swore to defend the Constitution.

Mr. ALLARD. Now some of my colleagues have proudly said they have acted on 98 percent of the judicial nominations sent to the Senate for confirmation. I would just simply like to point out that if we would only accept a 98 percent success rate, say, on flight safety, there would be 1,740 flights a day that would not land safely. Five hundred major organ transplants would be performed incorrectly and more than 4 billion letters would be mishandled by the U.S. Postal Service this year. Ninety-eight percent, when we are talking about district as well as circuit court, simply is not good enough.

On a personal note, I ask my colleagues, what would they want from their veterinarian performing a 98 percent success rate on their pet? My colleague is a veterinarian from Nevada. I am a veterinarian. That would not be acceptable to my colleagues. At that particular rate, I do not think we would be in business very long. Some in this body may believe 98 percent is good enough, but clearly it is not good enough.

I point out one example of the new judicial nomination double standard in the Senate that resulted in an outstanding nominee, Miguel Estrada, not being given a fair up-or-down vote.

In March of 1995, President Clinton nominated Carlos Lucero to be the first Hispanic judge to be on the Tenth Circuit Court of Appeals. Carlos Lucero was a Coloradan, the State I represent. After only 3 months, Mr. Lucero was nominated, confirmed, and was seated on the bench of the Tenth Circuit.

Prior to his confirmation, Mr. Lucero had no judicial experience yet enjoyed a well qualified rating from the American Bar Association.

Miguel Estrada was considered well qualified. He was to be the first Hispanic ever to sit on the U.S. Court of Appeals for the DC Court. He argued 15 cases before the U.S. Supreme Court, was a law clerk for Justice Anthony Kennedy, and graduated magna cum laude from Harvard Law School.

Let us compare Carlos Lucero's nomination to Miguel Estrada's nomination. President Bush nominated Miguel Estrada to be the first Hispanic judge to be on the District Circuit Court of Appeals in May of 2001. He received a highly qualified rating from the American Bar Association, yet he waited more than a year for a hearing. After waiting for more than 2 years for a vote, he finally asked that his name be withdrawn.

The point I am making is, how can we expect well qualified judges to be

willing to serve on the Federal court if they have to go through a 2-year process and they have to put their careers on hold at the time?

Now tell me that this is not a double standard. Tell me that in a case where there are two nominees equally qualified, with the same rating by the ABA, there was not a double standard being imposed by Democrats on Miguel Estrada.

This double standard has been recognized in my home State of Colorado. On a chart beside me, I have two editorials, one from the Denver Post, a newspaper that endorsed Al Gore for President, and the other from the Rocky Mountain News. The Denver Post said:

The key point—

Talking about Miguel Estrada—

is that there should be a vote. . . . A filibuster should play no part in the process.

The Rocky Mountain News says:

The Democrats have no excuse. . . . Keeping others from voting their consciences on this particular matter is simply out of line.

I also have an editorial from the Chicago Tribune entitled ''Squandering Miguel Estrada,'' on September 7, 2004. I ask unanimous consent that it be printed in the RECORD.

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

[From the Chicago Tribune, Sep. 7, 2003]

SQUANDERING MIGUEL ESTRADA

Presidents tend to nominate to important federal judgeships candidates who share their philosophical views, and those of the voters who elected them. So it comes as no surprise that many of President Bush's judicial nominees have conservative backgrounds. Those nominees are evaluated by the Senate, which is supposed to approve or reject them.

Last week, though, Democratic senators who are slavishly devoted to a clutch of liberal interest groups succeeded in driving away a superb nominee, Miguel Estrada, a brilliant lawyer and native of Honduras who would have been the first Hispanic jurist on the most important appellate court in the country, the one based in Washington, D.C.

Faced with a Democratic filibuster that kept the Senate form voting yea or nay on his nomination, Estrada graciously asked the president to withdraw his name. Estrada has a family to raise and a career to manage. He can no longer wait for elemental fairness to suffuse the United States Senate.

Estrada had received the highest possible rating from the American Bar Association. But he also is a conservative. The knowledge that he someday would make a superb candidate for a Supreme Court vacancy marked him as a nominee the liberal interest groups and their puppets in the Senate had to eliminate by any means necessary. And so, for the first time in the history of the nation, a president's nominee to a federal appellate court has been defeated not by a straightforward vote of senators, but by a filibuster.

Never mind that 55 senators stood ready to confirm Estrada. Republicans couldn't muster 60 votes to break the Democrats' filibuster. The confirmation vote never occurred.

Partisans will note that, during Bill Clinton's presidency, GOP senators played games with some of his nominees. That was no less scurrilous than this year's chicanery. As the Tribune argued during Clinton's tenure, the only fair way to treat a controversial choice for a judgeship is ''to debate the nomination fully and then vote to confirm or reject'' the nominee.

By failing to do that in Estrada's case, Democratic senators have squandered a promising judicial career before it could begin. They also have rewritten the Constitution, which says a simple majority of the Senate is enough to confirm a judicial nominee. If it takes 60 votes to break a filibuster, that is the number presidents now will need whenever the party out of power decides to throw a hissy fit over a nominee.

With their fundamentally unjust treatment of a good man, Senate Democrats have handed Republican candidates, from the White House down, an excellent issue for voters to consider during the 2004 election cycle.

As the Tribune reported Friday, the emboldened Democrats are filibustering two more of Bush's nominees and have indicated the will employ the tactic against others as well. All to deny still more nominees the up-or-down votes they deserve. Miguel Estrada was denied that simple justice by the United States Senate.

Mr. ALLARD. Mr. President, the time has come for the Senate to vote on these four highly qualified nominees.

I now yield to the esteemed Senator from Idaho to make a few comments.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAPO. Mr. President, I appreciate the opportunity our majority leader has given us to debate the issue of judicial nominations and the question of whether it is appropriate under our Constitution to have a filibuster of a judicial nomination by the President.

I believe we face a constitutional crisis. There are a lot of numbers that have been bandied back and forth between the various sides in this debate. I am going to try to make a little sense out of those in a few minutes, but I want to start with the Constitution of the United States, which in article II says that the President shall nominate, and by and with the advice of the Senate, shall appoint judges.

This Constitution does not provide a supermajority vote for the nomination, for the advice and consent process in the Senate. Our Founding Fathers were very capable and very good at pointing out those circumstances where they believed more than a majority vote was required for this interaction between the Senate and the President established in our Constitution.

In a number of different places in the Constitution, whether it is ratification of treaties or impeachment or Presidential veto overrides or the other occasions where our Founding Fathers believed the Constitution required more than a majority vote and instead a supermajority vote, they were very specific about laying that out.

With regard to judges, they did not lay out a supermajority requirement. Instead, it was stated—and until this Congress—that our Founding Fathers and the Constitution intended the advise and consent process in the Senate to require a majority vote and not to be ''filibusterable.''

We have seen a lot of debate on a lot of different numbers and I want to try to clarify some of these. One of the very common responses to us is: Well, we have stopped only 4 judges by filibuster this Congress and yet under the last Presidency, under Bill Clinton, over 60—I have heard different numbers, 55, 60, but whatever it is—judges were stopped by the Republicans.

It is critical for people to understand that we are talking about two very different things. All judges nominated by any President must go to the Judiciary Committee and must make it through the Judiciary Committee. In that process, under every President, a number of the judges do not make it.

In fact, we have a chart that shows under President Bush No. 1, 54 of his nominations did not make it through the committee or were voted down by the Senate.

Under President Clinton, our number, as we analyze it, is 41. Now I have heard the number 55 and the number 60, but somewhere between 41 and 60 or some other number in that category did not make it through the committee.

Actually, one of these nominees was voted down on the floor. The others did not make it through the committee. They do not make it through the committee often for a number of reasons. The point is that in the committee, there is a majority vote. It is the majority rule, as the Constitution requires, for these judges to make it through the process. Even if the committee does not act on these nominees, if the majority of the Senate wants to bring them forward, there is a discharge petition that can bring them forward.

The point is, it is important to understand the distinction between judges who are stopped in the normal course of the majority voting process of the Senate as they work through the committee and then on to the floor, and what we are debating today.

Let us go to the next chart. Today we are debating whether we should change what has never been done before. This number is the number of years in which the Senate, Republicans and Democrats, refused to uphold a filibuster against a judge. For the last 214 years, both Republicans and Democrats in the Senate have refused to uphold filibusters against judges.

Now, we are going to hear and have heard over the last number of hours a lot of debate about that as well. The Republicans have been accused of filibustering Democrat judges and Democrats have been accused of filibustering Republican judges over the years, and they would have everyone believe it is a common practice for the Senate to accept the filibustering of judges.

The reality is that although there have been efforts to try to filibuster judges in the past, until this Congress neither party has tolerated it because both parties recognized the intent of the Constitution that once a President's nomination gets to the floor, the

President is entitled to a vote. Whether the Republicans or the Democrats tried to filibuster a judge, both parties in the past have ultimately come together to stop that filibuster from preventing the intent of the Constitution from being accomplished.

Let us get a little bit of history on this. The cloture rule in the Senate has been applicable to nominations since 1949. Since that time, cloture has been filed on only 35 nominations, meaning all the rest of the nominations basically made it through, once they got to the floor of the Senate, to a final vote. Of those 35 times that cloture had to be filed, 17 of them were judicial nominations, 18 were other executive nominations.

Of those 17 times since 1949, when we have had cloture on judicial nominations, cloture has been defeated on the first try in 11 of the 17 tries. Of all the other cases, cloture was defeated by the second try.

Now, people need to understand what cloture is. Every time there is a cloture vote, it does not necessarily mean there is a filibustering. It simply means that at that point, the Senate is not ready to vote. It may mean they want to wait a little longer before a vote is taken. But when we see a cloture tried again and again and the announcement that as many times as it wants to be tried it is going to be stopped, that is a filibuster. We are seeing that now on four judges, with a threat of it on seven more.

Let us put up the other two charts. There has been a lot of talk about how the Republicans stopped more of President Clinton's judges than the Democrats did of President Bush's judges. This number is the number of President Clinton's judicial nominations that reached the floor that were voted on and confirmed and the number that were filibustered. None of President Clinton's nominations was filibustered. There were some cloture votes. We can argue among ourselves whether or not that was a filibuster, but the point is that none of the efforts in the Senate against President Clinton was allowed to proceed to stop his judges from getting a vote. They all got a vote.

Let us look at the next chart. The next chart is the number of nominations of Presidents in the last 11 Presidencies where, when the candidate got to the floor, they were denied an up-or-down vote. Out of 2,372 nominations that have come to the floor during the last 11 Presidents, zero were filibustered. Zero were stopped from having a vote once they got to the floor of the Senate.

In this Congress, we have seen that happen four times, and it is now being threatened on seven more judges. A new trend, a new precedent, in American history is being set in the Senate and the American people need to pay attention to it because regardless of how one passes the numbers back and forth, the fact is that the precedent is now being set to require that not only does a nominee have to make it past the committee but they have to be subjected to the filibuster rule in contravention of the clear intent of the U.S. Constitution.

This is all leading up to a battle over a potential Supreme Court nomination. It will be very unfortunate for this country if the Senate, in this Congress, changes the history of our treatment of this critically important provision of our Constitution as we move forward in the analysis and handling of our responsibility on the advice and consent on judicial nominations.

Mr. ALLARD. Mr. President, I thank the Senator from Idaho for his comments.

I yield 10 minutes to the Senator from Oklahoma.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. INHOFE. I thank the Senator from Colorado for yielding to me.

Mr. President, I want to share an experience I had at 5:30 this morning. One has lots of experiences at 5:30 in the morning on the Senate floor and in observing what went on during the night. There was something that occurred to me that I want to share, and I hope I can do it in this period of time.

There are two reasons this has been taking place, that they do not want to confirm these judges. One is ideology, philosophy. I hate to say it but unless one is pro-abortion and unless they are anti-gun, they do not want that person on the bench. But there is another reason we have not talked about, and that reason is just a reason of obstruction. We have been watching obstruction in all forms, but I want to share something and I hope people understand that this directly relates to the nominees for the judicial vacancies. I want to get the point across that it is happening to other nominees as well.

I chair the Environment and Public Works Committee. We had a person who was a nominee of this President, Gov. Michael Leavitt from Utah, one of the most highly regarded individuals in this country and certainly one of the most highly qualified ever to be nominated to a position of Administrator of the EPA.

We sat there and recognized how everybody loved this guy and yet they dragged it on and obstructed for days and weeks, just to drag it on out. So it is happening with many of the nominees.

Now, Governor Leavitt is a very kind and decent person and I really believe the most qualified nominee to be Administrator of the EPA we have ever been able to act upon. The way he was treated was just absolutely shameful. It took 56 days to finally get the nomination, five times longer than those who preceded him as Administrator, even though he had overwhelming bipartisan support.

I do not think anyone has questioned that the motivation of the delay was partisan Presidential politics. They set a new standard, new precedent, for an EPA Administrator. They really were not talking so much about him as they were trying to talk about the environmental policies of this President.

If my colleagues will look at some of the people who supported him, we had many people, including my ranking member, Senator JEFFORDS. He said it has nothing to do with qualifications of the Governor. At this time, I would say that qualifications really do not seem to be an issue on judicial nominations. It has been said over and over again, and later if I have time within my timeframe I am going to get into that, but this goes on and talks about various Democrats praising Governor Leavitt for this nomination and yet they would not confirm him.

Senator NELSON, who is a former Governor of Nebraska, served with him as Governor. He said: I believe nearly everyone, if not everyone, with whom Governor Leavitt worked in the NGA—that is the National Governors Association—would state that they had a favorable impression of him. I wholeheartedly support Mike Leavitt to serve as EPA Administrator.

We heard the same thing from our old friend Bill Richardson with whom many of us served in the House of Representatives. He is currently Governor of New Mexico. He praises his virtues. He has worked effectively with other Governors regardless of party, and he went on to say he is probably the best nominee who has ever been put forth to be Administrator of the EPA.

So he is highly qualified and nobody would deny that, and yet they turn this thing into trying to attack the President on his environmental record.

I have to quote from one person, Gregg Easterbrook. I have not quoted him on this floor before. He is a liberal Democrat. He is a senior editor of the liberal New Republic. He says in an op-ed piece in the Los Angeles Times: The Democrats are not as interested in Bush's environmental record as they are attacking President Bush personally. He says: Most of the charges made against the White House are baloney—these are his words—and made for the purposes of partisan political bashing and fundraising. He also contends that environmental lobbyists raise money better in an atmosphere of panic. He goes on to explain the real reason this issue was going on. This man was subjected to a lot of things, including 100 prehearing questions, and later 400 questions prior to the hearing. This has never been done before.

Then we had an experience that has never happened in the history of this Senate. We went back as far as Jennings Randolph in the middle sixties. It never happened in the history of this committee. The Democrats boycotted the committee. They did not show up. We have 10 Republicans and Democrats. We have to have a majority there and two members of each party, at a minimum. So they boycotted and did not show up.

Time went on and we started looking at how long it took from the time of

the nomination, to the hearing, to the confirmation. In the case of William Riley, it was 13 days; the case of Carol Browner, 10 days; in the case of Governor Whitman, it was 13 days. Yet it took 56 days for this person to be confirmed. Finally, they did confirm and the vote was 88 to 8.

I suggest today if we had the vote on Priscilla Owen, she would be sitting in the Fifth Circuit right now; and Miguel Estrada, the DC Court; William Pryor, the Eleventh Circuit; and Charles Pickering, the Fifth Circuit.

For a minute I will dwell, if the manager will give me a couple extra minutes, on Miguel Estrada. I saw something happening that I thought was significant. I will refer to something that happened to me February 26, 2003, a year ago, when we were talking about the confirmation process.

Mr. ALLARD. I am happy to extend an additional 2 minutes to the Senator from Oklahoma.

Mr. INHOFE. We had a group in Oklahoma at that time that was there from San Luis Potosi, a sister city in Mexico. We have a sizable Hispanic community in Oklahoma. I was mayor of Tulsa, and I recall how excited the people were each year when they saw people striving to achieve, Hispanics in this country.

I was standing before the crowd and said:

Como acalde de la cuidad de Tulsa, yo quiero decir, ''Bien venidos, bien venidos a la cuidad. Creemos que la cuidad de San Luis Potosi es la cuidad mas hermosa de todas las cuidades del mundo.''

(Translation)

As the mayor of the city of Tulsa, I want to say, ''Welcome, welcome to the city. We believe the city of San Luis Potosi is the most beautiful city of all the cities in the world.''

I saw the looks on their faces, realizing we were participating in their culture. They are looking at Miguel Estrada saying, Why won't they give him a chance to reach the top? Why is it that he does not get a chance for high office, he or any other Hispanic?

I tried to answer. I believed there might be a way of garnering support to make this reality. I said:

Muchos Hispános estan escuchando ahora . . . y yo quiero decir.

Por descrácia, hay personas en el senádo que no quieren escuchar a ni una palabra de la verdad.

Yo invito a la communidad hispána para llama a sus senadores para insistir en los derechos de Miguel Estrada y en la confirmación de juéces de los Estados Unidos.

(Translation)

Many Hispanic Americans are listening right now . . . and I want to say:

Disgracefully, there are people in the Senate that don't want to listen to even one word of the truth.

I invite the Hispanic community to call their senators to insist on the rights of Miguel Estrada and on the confirmation of the judges of the United States.

People were calling in but it did not get the message across to the people on that side of the aisle that there must be some other reason that they do not want Miguel Estrada to be confirmed.

Congress is a powerful institution and it is necessary to have the ability to collect and challenge much of what the President does, but when it comes to the courts and to interpreting laws and regulations, politics needs to get out of the way. Justice delayed is justice denied. I believe we are in a position to do some things and turn this around and get some of these people confirmed.

My guess is residents of California, who had their constitution gutted by a three-judge panel in the Ninth Circuit, only to have a larger panel of the same circuit reinstate their constitutionally authorized gubernatorial recall election, think it is pretty important who sits on the Ninth Circuit.

I had an experience this morning debating one of our fine Senators, Mr. LAUTENBERG. I said at that time this is about ideology. I don't think anyone—after listening to all the debate that has gone on overnight—does not realize if you are not pro-abortion, if you are not anti-gun, you will be in opposition, and we will not get confirmation. It is wrong. All we want is an up-or-down vote on these fine nominees.

Mr. ALLARD. Mr. President, I will wrap things up on our side. Before I do that, there are a couple of questions I would like to pose to my colleagues who are now in the Senate. I understand they are going to take some time to speak on their side of the aisle.

First, I pose a question to Senator DORGAN, who is the Senator from North Dakota. Senator DORGAN stated there would be no foot dragging on President Bush's nominees.

The PRESIDING OFFICER. The Senator needs consent to pose questions to other Senators.

Mr. ALLARD. I am speaking under my own time.

The PRESIDING OFFICER. It still requires consent to pose a question to other Senators.

Mr. ALLARD. I have a question I would like to ask of Senator DORGAN, if I might.

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

Mr. ALLARD. That is, he quoted that we are moving expeditiously on the President's nominees, refusing to return in kind the foot dragging delay of so many of President Clinton's nominees.

I ask him to respond to that question under his own time.

I also have a question to pose to the Senator from Iowa and give him an opportunity to respond on his own time. That question is, What has happened to change your view, when he wanted a vote regardless of the outcome?

I quote:

If you want to vote against them, let them vote against us. That is their prerogative. But at least have a vote.

This was made September 14, 2000. I ask both Members to respond to those statements. I ask them what has changed since those comments were made.

When they get their time, they can respond to those questions.

Let me wrap this up. I had a press conference this morning at 3:30, maybe 4 a.m., with the small business interests of this country. The point was made that delay in the judicial process is a problem for small business. How the courts function does have an impact on our economy. Lawsuits have an impact on our economy and how rapidly the courts respond.

We have a crisis in the circuit courts, the courts of appeal. We need to fill the vacancies so cases that go before the circuit courts such as civil rights cases dealing with racial discrimination, sex discrimination, age discrimination, religious discrimination, and the Americans With Disabilities Act can be handled in an expeditious way. These are cases impacting small businessmen in this country. We need to have our commercial disputes resolved in the circuit courts. There are contract disputes, insurance coverage disputes and trademark infringement issues in those courts. There are a lot of regulatory cases, for example, in the DC Courts, on environment, health, and safety standards, labor court enforcement, challenges to the Federal rules.

In the DC Court, the crisis we have on the DC Circuit Court is especially important as it applied to the small business community in this country. We do have a crisis. We have a crisis in the DC Circuit Court, which is 25 percent slower than 2001, another 58,000 days more than 2001, a crisis in the Ninth Circuit, the Sixth, and the Fifth Circuit.

The point is we need to get these nominees to the circuit courts passed through the Senate. It is unprecedented. Never in the history of the Senate have we not moved forward on judicial nominees when we had the majority of the Senators supporting that nominee.

I yield the floor.

The PRESIDING OFFICER. The Senator from Iowa.

UNANIMOUS CONSENT REQUEST—S. 224

Mr. HARKIN. I ask unanimous consent the Senate proceed to legislative session and proceed to consider the bill to increase the minimum wage, Calender No. 3, S. 224; that the bill be read a third time and passed; and the motion to reconsider be laid upon the table.

Mr. ALLARD. I ask unanimous consent that the Senator modify his request so that just prior to proceeding as requested, the three cloture votes would be vitiated, and the Senate would then immediately proceed to three consecutive votes on the confirmation of the nomination with no intervening action or debate.

The PRESIDING OFFICER. Does the Senator so modify his request?

Mr. HARKIN. No, I do not modify my request.

Mr. ALLARD. Then I object to his request.

The PRESIDING OFFICER. The objection is heard to the original request.

Mr. HARKIN. There again, I think we see what this is all about. We want to respond to the real needs of our people in America. We want to increase the minimum wage and the Republicans keep objecting to it. They will not let us bring it up for a vote. But they want to bring up four judges for lifetime appointments for a vote. So we see the difference.

We are trying to work on behalf of the American people to meet the real needs of people unemployed and people who need an increase in the minimum wage. The Republicans will not bring it up. That is the difference here.

Obviously, what we have, I called it the theater of the absurd earlier. There has been a play running for several years at the Kennedy Center called ''Shear Madness.'' It has now come to the Senate floor and is playing here now, ''Shear Madness.'' You can watch it free here. You do not have to pay to go to the Kennedy Center to see it.

First of all, I thank the police, the court reporters, other Capitol employees, who have had to spend long hours here through the night so that we can waste time, waste taxpayers' money, engaging in this ridiculous charade. I am told that the police out here are putting in 16-hour shifts, 16-hour shifts just so we can come out here for this ridiculous charade.

I am told our court reporters have to do 20-minute increments rather than the 10-minute increments they normally do. I am not a court reporter, but I think having that thing strapped around your shoulders and working for 20 minutes gets pretty tiring.

Does anyone on the other side think about these people? They have families. They have other things they need to do. How about our police working 16-hour shifts out there? Anyone on the other side of the aisle ever think about what is happening to them because of this charade we are putting on? We think about them.

I might say to the police and other people putting in all the overtime, while we are here with all this charade, do you know what is going on in the other part of the Capitol, downtown with the administration? They are trying to take away your overtime pay protection. Watch the little shell game with this hand on the judges, and with the other hand they are trying to take away your overtime pay protection. That is what this is all about. Tune in and watch this charade.

But do you know what else is going on in the other part of the Capitol? They are trying to take away your Social Security. They are trying to do away with your Medicare provisions. That is what is going on in another part of the Capitol.

Don't take my word for it. Here is something out of Congress Daily this morning: Enlisting the support of health care industry, House Republicans accelerated efforts Wednesday to build outside support for the emerging Medicare prescription drug bill, and quotes a Republican from Virginia who said this new business coalition is absolutely critical in whipping Members just before a vote.

They have been critical all along. It works from the groundwork. It is all about winning elections at home. Everyone understands this is a political process.

This is on the Medicare prescription drug bill. He said the coalition that they are putting together is broader than the drug companies, and it includes representatives ranging from construction companies to Caterpillar.

This is the coalition the Republicans are putting together to destroy Medicare as we know it. They are putting together a coalition of business, drug companies, construction companies, et cetera. Where are the seniors? Where are the elderly in their coalition? Not to be heard from. And they are going to do away with Medicare as we know it. They are going to privatize it.

Here is another one from November 6, Newhouse News Services, talking about Social Security. It quotes a Josh Bolton, Director of Bush's Office of Management and Budget: In the long run, Social Security cannot meet its commitments. Bolton would switch the system from government-guaranteed benefits to private investment accounts that would probably, but not positively, generate as good a benefit as Social Security now promises but can't deliver.

Now, the administration is saying that Social Security cannot survive. It is a fact that the tax cuts passed by this Congress and signed by this President, most of which went to the wealthy in our society, if those amounts of money that go out to those tax cuts had instead been used for the Social Security system, Social Security would be solvent for the next 75 years. But now they are saying we do not have enough money for Social Security; we cannot meet our obligations. Of course not. They opened the gates through the Treasury and let all the money go to the wealthy in our country with that tax program they had.

That is what this is about. Get your mind off of that and look at this charade we are putting on today.

I will respond to my friend from Colorado, and he is my friend. He is a great Senator who just quoted me a little while ago, remarks I made on the Senate floor a couple years ago about bringing up Bonnie Campbell. Here is a list of 63 judges who were blocked at that time, Clinton nominees, one of those being Bonnie Campbell from Iowa. I point out 63 here and only 4 we have blocked.

Here is the difference. The Republicans say they were stopped in committee. Yes, the Senator from Colorado quoted me accurately. I did ask unanimous consent to bring Bonnie Campbell out of committee to the floor. They objected. The Republicans objected. Now, Bonnie Campbell had a hearing. Nothing was raised about her. Nothing that was bad or anything in her background—nothing. She was absolutely qualified to serve as a circuit court judge, but Republicans would not even let her out of committee.

Here is what the Republicans say. It is wrong to stop someone in the Senate with a filibuster or an extended debate. That is wrong. But it is all right if we stop them in committee, which is exactly what they did.

So, yes, I asked unanimous consent to bring it out of committee, bring it to the floor. You bet I did. They objected.

Now, they are trying to say, why don't we do now what they were unwilling to do? Why should we change the rules, I ask my friend from Colorado? We will play by the same rules you played by. But, no, now you on the other side want to change the rules.

As I said this morning, my favorite line, a refrain from Finian's Rainbow that I bring up at times like this. It goes like this: Life is like cricket. We play by the rules. But the secret which few people know that keep men of class far apart from the fools is to make up the rules as you go.

That is what they are trying to do. Of course, I tried to bring it up. They objected. But now they want to change the rules and have a different playing field.

Mr. ALLARD. Will the Senator yield?

Mr. HARKIN. Or someone mentioned January 5, 1995, I offered an amendment on the floor of the Senate that would have set up a procedure to close cloture. We would have had a vote, then a couple weeks would have to go by, have another vote, a couple weeks go by, and have another vote. Finally, you get down to 51 votes.

I still believe in that, that after a month's period of time, after extended debate, there ought to be 51 votes and move legislation.

Mr. ALLARD. Will the Senator yield?

Mr. HARKIN. I will in a second.

Guess what happened. I offered that amendment. Guess how many Republicans supported it. Zero. Zero. Not one Republican supported it.

Now what I hear they want to do is they want to change the rules to prevent cloture on judges, lifetime appointments. But on legislation—on legislation—no. They want to continue to be able to filibuster legislation. Well, come on. Give me a break. If you want to stop filibusters, stop it for everything, not just for judges.

Now, my friend from Colorado, I know wants to ask me a question, and I do not know how much time I have, but I will be glad to yield for a question.

Mr. ALLARD. I will make it short. The question I have for the Senator from Iowa, my good friend—and we have worked together on many issues—is, Will you now support the Frist-Miller proposal? It is a bipartisan proposal, a step in the direction that you proposed several years back.

Mr. HARKIN. I say to my friend, if they would modify it to look like what

we did in 1995. My amendment in 1995 covered everything. It covered legislation. It covered judges. It covered everything.

If you put that forward, you have got my vote. But, no, what you want to do on that side is only have it pertain to judges, and not to legislation.

No. I am sorry. If you want to end the filibuster, do it for everything, not just for what you think is right. Let's do it for everything.

So I say to my friend—and he is my friend; he is a great Senator—I know we have a disagreement about this, but I am just saying, what I hear from the other side is they want to pick and choose. They want to be able to say, if you stop a judge in committee, that is fine, but you cannot stop him on the floor. And that is what they did. They stopped the judges in committee.

So when you hear Republicans come out here today or last night or however long this charade is going to go on—when they beat their breasts and say, oh, my goodness, I have never or I will never vote to filibuster a judge on the floor, check the record on that person and see what they did when they were held up in committee. Oh, it was all right. That was a hold. That was not a filibuster. That was a hold. Fancy words, different words—same result.

So what the rules have been in the past, the game, the rules we have played by in the Senate are good enough for today, and if you want to change the rules, change them for everything. Do not just pick and choose one little thing at a time. That is my point to my friend from Colorado.

I know the Senator from North Dakota wants to speak, and I am going to yield to him. But I just again point out that while this charade is going on here, the administration is at work trying to cut Social Security benefits. They are at work trying to come up with a Medicare prescription drug bill that benefits our drug companies and not our seniors. They are at work trying to take away overtime pay protection for 8 million working Americans. They are at work stopping an increase in the minimum wage. They are at work stopping any increase in an unemployment insurance extension. That is the game that is being played here.

I yield the floor to my esteemed colleague and friend from North Dakota.

The PRESIDING OFFICER. The Senator from North Dakota.

Mr. DORGAN. Mr. President, I have not had the opportunity to listen to all of this debate.

Mr. HARKIN. An opportunity?

Mr. DORGAN. I am not sure I would consider it an opportunity, had I had the time. I know people watching this, perhaps on C-SPAN, would take a look at all this and say: Well, this is a bunch of windbags in blue suits. They talk and they talk and they seem to disagree, and when they are done talking, they have not said very much.

There is some truth to the fact that much of what goes on in this Chamber is without great merit and without great consequence. There are times when we do things—and often when we do things together—that have significant impact on the future of this country and on the direction of this country. This is not one of those moments, I might say.

This 30 hours is 30 hours that are designed to make a point, a point without much validity. And I will explain why that is the case. But it is, in my judgment, of very little consequence.

My dad used to say, never buy something from somebody who is out of breath. Do you know something? There is a kind of breathless quality to my colleagues. My colleague from Colorado just asked me a question kind of breathlessly, and I have watched others sort of out of breath here coming to the floor of the Senate talking about how unfair this process has been, how we are blocking judges.

Look, maybe it is time for just a few facts—just a few. You have seen them before. This is not a memory test, but it will take very little time to commit to memory. Mr. President, 168 judges confirmed—168 confirmed—and 4 have been blocked. We do not apologize for blocking four judges we don't want to be on the Federal bench.

The Constitution says there are two steps to giving someone a lifetime appointment: One, the President shall nominate; and, two, the Senate shall approve. It is called advise and consent. The roles are equal. This is not a circumstance where the President has certain prerogatives that we do not have. The roles are equal. To put someone on the Federal bench for an entire lifetime, the President nominates and then we give our advice and consent. Mr. President, 168 times this Senate has said yes, and on 4 occasions it has said no.

Why are we here for 30 hours? Because the majority party is apoplectic. They are having apoplectic seizures about these four.

Do you know something? When my son was about 10 years old, he ordered from a magazine an ant farm. When he did it, I described it on the floor of the Senate one day. I had no idea what an ant farm was, but it was two pieces of glass hooked together on the ends, very narrowly, and then you put sand in it. They also sent you a little vial with ants. And they said in the instructions that you put the ants in the refrigerator to slow them down a little bit, and then you take the cap off and you throw those things in that little glass container with sand. And then it said: Just watch, and you will be entertained by this ant farm.

So we slowed them down. We put these old ants in the refrigerator. Then we poured them in this little glass with the sand, and then we watched—a day, a week, 2 weeks. It was fascinating. Every morning you would wake up, and those old ants had been working. They took the sand from this side, and they would move it to this side. The next day you would wake up, and they moved the sand back. Do that about 2, 3 weeks and you realize there was a lot of activity going on but they were not going anyplace. Nothing was happening.

It was all an empty exercise. And do you know what? At times the Senate reminds me of that, and especially in this 30-hour period it reminds me of that. We can move things back and forth, we can vent and breeze and wheeze, and it does not change the facts.

The facts about judgeships are these: 168 we have supported, which means we have the lowest vacancy rate since the mid-1980s. Why do we have the lowest vacancy rate since the mid-1980s? Because we—yes, we—have approved 168 judges, at a far higher rate than happened under the Clinton administration when the Republicans controlled this body. I am not and will not be apologetic to anyone under any circumstance for this record.

Now, with respect to these four, do we have a right to decide there are four people whom we do not want on the Federal bench? You bet your life we do—not only a right, but we have an obligation. If we decide this candidate or that candidate is not worthy of a lifetime appointment, we, in my judgment, have an obligation, and that obligation, under advise and consent, is to weigh in with our opinion.

Mr. ALLARD. Will the Senator from North Dakota yield?

Mr. DORGAN. I will not yield, and I will not do so because the Senator from Colorado asked a question on his time and said he would not allow me to answer on his time, so I will not allow him to ask questions on our time.

I would be very happy, however, by consent, to spend a full hour with the Senator from Colorado or any other Senator, for that matter, just back and forth with two or three of us asking and answering questions. I would enjoy that opportunity.

But having said all that, let me explain that this 168 to 4 is, in my judgment, a lot of shadow boxing. It might be fun for some. I am sure it is not fun for those who have to spend their time for the next 30 hours—the doorkeepers and the members of the police, and others, the security, and the folks at the desk, and the folks who do the service that is performed here to keep the records of the Senate—they have to be here 30 hours. If it makes people feel better doing this, they have a right to do it. I will not complain about it. They have a perfect right to do this.

But let me tell you what I have a right to do as well. I have a right, at least as one Member of this Senate, to wish—to wish—just for a moment that I were in control of this agenda. And I will tell you what I would do today if I were in control of this agenda. I would bring something to the floor of the Senate that deals with the subject of jobs.

I know what I would want to talk about today. I would want to have

some legislation on the floor, and I will tell you what it would be about. Huffy bicycles.

Let me tell you about Huffy bicycles. Huffy bicycles have 20 percent of the market in this country for bicycles—20 percent. They used to be made in America. They were made in Celina, OH, made by 850 good workers, 850 union members in a plant in Ohio. They made $11 an hour in wages plus benefits. And they made a great bicycle, sold at Wal-Mart, Sears, Kmart.

Do you know what this bicycle had on the front, right underneath the handlebar? It had a picture of an American flag on a decal, a decal for the Huffy bicycle—an American flag, American made. God bless them.

But then it became too expensive to make Huffy bicycles in America. Mr. President, $11 an hour was too much to pay workers. So do you know where these Huffy bicycles are made now? In China. Do you know why? Because they get paid 33 cents an hour. And do you know what they did when they moved the Huffy bicycles to China? They laid off all those workers in Ohio—850 of them—who now work 2 jobs, 3 jobs to make ends meet, and some do not work at all.

What they did, when they went to China and started producing these bicycles, was they took off that American flag decal right underneath the handlebar and they changed that American flag to a picture of the globe—the globe. Well, God bless the globe. But I happen to care a great deal about jobs in Ohio—American workers who get up in the morning and say goodbye to their family because they are going to a job that they love: I make Huffy bicycles. No, I don't make a fortune; I make $11 an hour, but I work hard, and I do a good job. And then I am told one day my last job will be to replace the decal on the front of the bicycle from a flag to a globe before they fire me and move the jobs to China.

I want to talk about that. If I were running this place, we would be talking about legislation to address this question of whether American workers ought to be told: You must compete with 33-cent-an-hour labor. And if you can't, tough luck; you lose your job.

We are talking about four jobs this morning that my colleagues on the other side of the aisle are upset they were not advanced to the Federal bench. I am talking about 850 people in Ohio who used to make Huffy bicycles, and proud to do so, who discovered they were too expensive at $11 an hour. Huffy wanted to make bicycles for 33 cents an hour.

I would like to talk about that on the floor of the Senate and have policies dealing with international trade on the floor of the Senate. And that relates to jobs, not just relating to 850 people, but it relates to millions of jobs.

Three million people had to tell somebody in their family they lost a job in the last few years. These are people at the bottom of the economic ladder. These are people who know about secondhand, second-shift, second jobs. They are the ones who lose their jobs. We ought to talk about joblessness in this country and the fact that our economy is expanding but the job base is not.

Last month we had good news, and good for us, good economic growth. Do you know what happened? We lost manufacturing jobs again last month, 50,000 of them. I suppose if you wear a suit, it does not matter much, and if you serve in the Senate, you will not notice it much. But I guarantee you, if you were one of those last month who had a good manufacturing job, who had to come home and tell your spouse and your family, ''I have just lost my job; no, not because I am a bad worker but because I can't compete with 12-year-olds working 12 hours a day being paid 12 cents an hour''—and yes, that happens. Yes, that happens. And I can show you where and tell you when. So I would talk about that. That is what I would have on the agenda.

While I am at it, while I am halfway irritated about what we are not doing, let me also talk, just for a moment, about something I discussed yesterday. At 11 o'clock last night in a conference committee in the basement of this Capitol, I lost this issue, and I am a little irritated about that this morning.

This is a picture of a young woman, a young Christian woman from this country, and her name is Joni Scott. She came to see me 2 days ago. Do you know why? Because her Government has levied a $10,000 fine against her. Do you know why? Because the Government discovered she went to Cuba, and she went to Cuba in order to deliver free Bibles to the Cuban people with her church group.

So this young woman, named Joni Scott, took Bibles with her church group, went to Cuba, and distributed free Bibles in the country of Cuba. And when she came back to this country, do you know what her country said to her? We have got the Department of the Treasury, with an organization called OFAC, Office of Foreign Asset Control, and they sent her a notice and said: You are fined $10,000. You must pay a $10,000 fine. Why? Because you went to Cuba.

Mr. President, we ought to talk about that today. I had an amendment on the conference committee last night. The amendment passed the Senate. The amendment passed the House of Representatives. It was bipartisan. Republicans and Democrats voted for it in the Senate and the House, to say: Let's not enforce this travel ban against Cuba. It is not fair to the American people. That is an attempt to slap around Fidel Castro, and by doing that, we are injuring American people's right to travel.

Well, we went to conference last night, and this bipartisan approach—in both the Senate and the House—was kicked out. Why? Because the White House threatened to veto the bill if it was in it. This bill still stands. This young lady has a $10,000 fine. I have written to the Treasury Department saying: How dare you? How dare you?

But it is not just her. It is farmers from my State who want to sell farm products into Cuba. The Farm Bureau is denied a license to travel to Cuba to promote farm exports. It is about using food as a weapon. That is what the administration wants to do with Cuba; it is about embargoes. This does not make any sense.

So if I were running this place today—and I am not, unfortunately—I would be talking about that. I would be talking about the ability of our farmers to sell into that marketplace and, why on Earth will you not give a license to a farm group to go to Cuba to promote agricultural sales while you penalize a young lady who goes to Cuba to hand out free Bibles?

Is there anybody here who thinks this makes any sense? Have we lost all bases of common sense? Or will someone at some point stand up and say, let's do the right thing here?

So instead, we are here 30 hours. It started with Fox News and the majority party combining so that at 6 o'clock they could do a live news shot. They are excited about it. They want the people to talk in the Chamber. It is all in a memorandum: We need to do this. And they are very excited. Britt Hume is very excited to have on his show a live shot of the Republicans walking into the Chamber. And for 30 hours we talk about judges.

It is fine. They have a perfect right to do that. I do not disparage that right at all. I say, however, it certainly is not the topic that is on the minds of most of the American people. There is so much misinformation about this subject that ricochets around this Chamber.

We are told by our colleagues: You are filibustering; that has never been done. I don't know where they get that. Do they just not do the basic research? I do not understand that. Do they just not do basic research at all?

Tell me about Abe Fortas. Many years ago, was there a filibuster? Of course there was. Tell me about Richard Paez. Tell me about all the cloture votes we have had to cast around here because Republicans forced us to have cloture votes.

Why do you have a cloture vote? Because there is a filibuster, in order to break a filibuster. And I could go through, but my colleagues already have, name after name after name where there has been a filibuster by the Republicans.

Then let me just indicate, finally, that my colleague from Iowa indicated there are many men and women who never even got a hearing. That is a filibuster by one person demanding the Judiciary Committee refuse to even give a hearing to candidates. Yes, for the Ninth Circuit, but for judgeships all around this country.

So I know we are going to vent out here for, I suppose, another 12—I guess 12 hours. And it will amount to nothing. We ought to be talking about jobs and a range of things that are very important to the future of this country.

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

PRAYER

The PRESIDING OFFICER. The hour of 12 o'clock noon having arrived, the Senate, having been in continuous session since yesterday, pursuant to the order of the Senate of February 29, 1960, will suspend while the Chaplain offers a prayer.

Today's prayer will be offered by our guest Chaplain, RADM Robert F. Burt, Chaplain of the U.S. Marine Corps and Deputy Chief of Navy Chaplains.

Mr. REID. Mr. President, I ask that the time be equally charged against both sides during the prayer.

The PRESIDING OFFICER (Mr. GRAHAM of South Carolina.) Without objection, it is so ordered.

The guest Chaplain, RADM Robert Burt, offered the following prayer:

Let us pray.

Almighty God, Lord of our universe, creator, sustainer, protector, and comforter, source of our hope, bless us with Your divine presence and fill us with Your joy.

Lord, thank You for these servants of our great Nation. Help them today to sense the support and prayers that go out on their behalf, not just here in this room, but all over our Nation as citizens lift them up before You and sincerely pray for them every day. Answer those prayers, O God, and fill these Senators with Your spirit and power.

Lord, we lift together this Nation up before You and pray that You would continue to pour out Your rich blessing upon us. Bless our citizens spiritually, financially, physically, and emotionally. Bless our military personnel and their families. Lord, continue to use these Senators as instruments and channels of Your blessing.

May they remember ''never to become weary in doing good, for in proper time they will reap the harvest.'' Bless each Senator, bless their families, bless the States they represent, and, most of all, bless our Nation and its commitment to the pursuit of freedom and liberty not only within our own borders, but also to so many nations that desperately need our help.

We ask these things in Your awesome and holy name. Amen.

The PRESIDING OFFICER. The Senator from New Hampshire.

Mr. GREGG. Mr. President, I believe the regular order is that we now have half an hour on our side.

The PRESIDING OFFICER. The time until 1 o'clock will be evenly divided.

Mr. GREGG. Mr. President, first, I thank the guest Chaplain for that very fine prayer which brings us back to reality in a way that is appropriate.

There has been a tremendous amount of excellent discussion today about the issue of the process of approving those four judges who have been nominated to the circuit courts of appeals, and the whole issue of the filibuster and how filibusters work into the process of the Constitution and the management of this Senate. It has been appropriate. It has been good. It has been enlightening, I hope, to those who have taken the time to listen at whatever hour they happened to listen.

I heard some extraordinary discussions which have been historical and legal and factual and informative. The question of whether or not a filibuster is appropriate is critical, and the constitutionality of using a filibuster relative to the Executive Calendar and the approval of judges is a very legitimate question in my mind.

I think when you look at the Constitution and the language of the Founders, they were fairly precise people in how they designed this Senate when they decided to be precise. And on the issue of advise and consent, they were precise. They said it would take a supermajority to approve treaties, but they were silent on the issue of supermajority relative to justices, and, therefore, in my opinion, I think it is fairly evident that, as far as they were concerned, they expected a majority for the purposes of approving justices and, therefore, a filibuster is inconsistent with that.

Really the filibuster, and the issue of the filibuster which has received so much appropriate attention today and which is obviously why we haven't been able to get to a vote, is systematic of the bigger issue, which is why is the opposition evolving relative to these justices?

We have to remember—and I think it is important for people to focus on this because there have been a lot of charts and signs up talking about the number of judges approved—that we are dealing with the circuit court of appeals level of the judiciary. We are not dealing with district judges. The vast majority of the judges who are approved by this body, who are nominated by any President, are district court judges. They are the trial judges. What we are dealing with, however, is the people who take a look at what happened in the trial and decided whether law has been adequately applied to the trial and who basically interpret the Constitution and the laws of the land and have, therefore, a huge impact, obviously, on how our society functions.

Fewer and fewer cases make it to the Supreme Court. More and more cases are decided on the issue of the question of their constitutionality, the implications of the broader law involved by the appeals level of our justice system. Therefore, when we look at the circuit court of appeals appointments, we are looking at an extraordinarily important position within the structure of our governance as a nation, a governance which is based on the issue of the protection of law. You can't have a democracy unless you have a structure of jurisprudence which is fair, honest, and applied consistently with principles developed over years.

Therefore, to look at all the judges out there and say 168 or 200 or 5,000 have been approved is irrelevant to the question. The question is, what is the circuit court issue; what has happened with the circuit court? We know in the circuit court area there have only been 29 approved, and there are presently 4 pending who are subject to a filibuster right now, which means they can't get a majority vote. There are going to be two more, it looks like, who are going to be subject to that same filibuster, who won't get a majority vote, and that will be followed by, it appears, another six subject to a filibuster and, therefore, cannot get a majority vote. So we have 12 compared to 29.

Twenty-nine have been approved. That is a very high percentage of the circuit court justices who have been basically blocked from getting an up-or-down vote as should apply under our form of structure, our Constitution, in my opinion.

There has been a lot of discussion about that point. But what is the real implication? What is this fight over getting to a vote really about? It is about who these justices are and what they represent, because this is a new radicalization of the issue of judges and their appointment to the circuit court.

The use of the filibuster at this time is symptomatic of that radicalization, and it is the radicalization of the nominating process which is the real issue at hand and on which the American people should be willing to focus.

It appears—not appears—it has occurred now that a litmus test has been put in place for the purposes of approving members to the circuit court, a litmus test that really has no relationship to the judicial temperament, experience, fairness, or expertise of the nominee who has been brought forward. It is a litmus test totally outside the bounds of what has traditionally been the way in which we evaluate a justice nominated to the circuit court. It is a litmus test based on the justice's personal and religious views, not the justice's judicial actions.

This is a huge departure from what has been the traditional method by which we have evaluated and confirmed judges in this country.

First off, the litmus test as an approach is wrong. I was a Governor. I appointed judges. I never asked one judge what his or her view was on any issue. What I wanted to know about a justice I was going to appoint was: One, were they honest beyond a question of a doubt; two, were they smart; three, were they fair; and four, have they life experience that is going to give them some sensitivity toward the people who would be coming before their court.

What their views were, I believed, was inappropriate to ask, but that was my position. Clearly, it is not the position of the minority in this body. The minority in this body decided there

must be a litmus test which every justice appointed to the circuit court has to jump over.

I could possibly accept that if that litmus test was tied to whether the justice was honest, whether the justice was fair, whether the justice was intelligent, or whether the justice had the life experience that was appropriate to go on the court. But that is not the litmus test. The litmus test now is whether or not the justice nominated to the position has an individual belief, not a judicial view, which is inconsistent with the view of one Member—just one Member—of this body. It is a staggering event representing a fundamental change in the way in which we appoint justices and nominate and confirm and evolve a judiciary.

Under this philosophy, it is very likely that any person who comes to this body who subscribes to the Catholic faith and subscribes to it as laid down by the leader of the Catholic faith and by the catechisms of the Catholic faith, even though they may, as a justice, have made it very clear they do not allow that faith to determine their decisions—and in one case we have a classic example of that, and that is Justice Pryor—that justice will not be allowed to be confirmed because his personal views—not his judicial actions, not his judicial review process—but his personal views will not have passed the litmus test simply because he happens to maintain a religious belief.

That is an extraordinarily dangerous precedent to set in this body, and it will fundamentally change the character of this Nation over time if it is allowed to continue, to say nothing of the prejudice that it reflects.

Since I have been in this body, I have voted for a lot of judges. When President Clinton was here, I voted for Justice Breyer to the Supreme Court. I voted for Justice Ruth Bader Ginsburg to the Supreme Court. These were two Justices I absolutely knew did not subscribe to my political philosophies, but they were honest, they were fair, they were smart, and they had life experience that was appropriate.

Had I applied a litmus test coming from the other side of the aisle, I could have easily said no, and we could have filibustered those judges, but that was not appropriate. That is not the way to proceed.

Unfortunately, my time is up. I would like to spend more time on this issue. Two of my fine colleagues wish to speak. I think this is the essence of the issue we are confronting today. The filibuster is symptomatic of it. The essence of it is we are radicalizing the manner in which we appoint justices, and we are allowing that radicalization to be based on personal beliefs rather than judicial action, which is fundamentally wrong.

Mr. President, I now yield 5 minutes to the Senator from Nevada.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. ENSIGN. Mr. President, that was an excellent statement by the Senator from New Hampshire. I wish to go further with some of the issues about which he was talking.

Our Constitution specifically spells out only five instances where a supermajority is required and moving to consideration, and approval of the President's judicial nominees is not on that list. This list includes treaties, impeachment, expulsion of a Senator, overriding a Presidential veto, and adoption of a constitutional amendment.

The spirit of our Constitution should mean something. It is in defense of our Constitution that we are taking these 30 hours. It has been said we are wasting our time. Defending our Constitution is not wasting the Senate's time. It is critical to this Senate.

What the Senator from New Hampshire was just talking about—the Supreme Court nominees for whom he voted, even though they were different ideologically from him—if this process is allowed to continue, it is going to be 12, we know already, appellate nominees who are going to be blocked by filibuster—12 out of 41. If this is allowed to continue, we know next year it is going to be worse, and when the next Supreme Court nominee comes up, if it is Ruth Bader Ginsburg or Breyer or Rehnquist, those people would not be approved in the climate in the Senate today. Highly qualified people will not be able to make it on to the Supreme Court.

Do my colleagues know what that is going to do to the process? Good people are not even going to be part of the process. When the President calls them and says: I would like you to consider this, they are going to say: Go see somebody else.

The Judicial Conference is a nonpartisan entity that acts as the principal policymaking body for our court system, and it has declared 12 judicial emergencies on the circuit court of appeals. The President is doing his job by sending us the nominees. It is our time to do our job.

The Ninth Circuit, which serves my home State of Nevada, is the largest and busiest circuit court of appeals in this Nation and is also the most overturned court in the country. In 2001, it took 30 months in the Ninth Circuit for a case to go from original filing in the district court to the final decision on appeal. That is 5 months longer than the average court of appeals.

In the Ninth Circuit in the 1996–1997 session in the middle of the Clinton Presidency, the Supreme Court found it necessary to review 28 cases in the Ninth Circuit. Of those 28 cases, it overturned 27 of them. By the way, this was one-third of the Supreme Court's docket that year.

We know about some of the outrageous cases in the last year or two from the Supreme Court. Let me mention a couple of them. We know the Ninth Circuit is the one that is trying to overturn the Pledge of Allegiance, saying that God should not basically be part of our country or part of our Government, or the name ''God.''

The Senate took up a resolution which then-Senate majority leader TOM DASCHLE brought to the floor, and every Senator voted to condemn what the Ninth Circuit had done. This is the circuit to which Carolyn Kuhl is nominated. We need to get good people on the Ninth Circuit. It is absolutely critical for us to do that.

I feel passionately that we need to fix the process. We need to fix it for when the Democrats are back in power so that good people get an up-or-down vote. They shouldn't be blocked simply for ideology from getting an up-or-down vote. If a Senator disagrees with them, vote them down, but give them an up-or-down vote. A minority of Senators should not be able to block the process for judicial nominees as part of the advise and consent clause.

So let's work together. Let's reach across the aisle and say: Let's fix the process. Otherwise, as we go into the future, this tit for tat, this payback is going to continue to get worse and worse, and it is truly a threat to our constitutional Republic.

I close with this: We appeal to the other side. We are going to try to offer a resolution to fix what is going on here, and we encourage them to join us so this doesn't just get worse as the years go by.

I yield the floor.

The PRESIDING OFFICER. The Senator has used his 5 minutes. The Senator from Texas.

Mr. CORNYN. Mr. President, may I inquire how much time remains on our side?

The PRESIDING OFFICER. Twelve minutes.

Mr. CORNYN. Mr. President, I yield myself 7 minutes, and I yield the senior Senator from Texas the remaining 5 minutes of our time.

Mr. President, I have been either in the Chamber or watching the Chamber from other parts of this building as this debate has gone forward since early last evening. I happened to be watching from my office just before I came to the floor most recently when the Senator from Iowa, Mr. HARKIN, made a couple of comments to which I want to respond.

First, I want to say what I agree with. I agree with him that the people who work so diligently in this Chamber and elsewhere, in the cloakroom, the people who report what we say for the CONGRESSIONAL RECORD, how much I and the rest of us appreciate their faithful and dedicated service. Some of us got a few hours sleep last night. I am not sure all of them did. I just want to say for all of us how much we appreciate their service.

There is something else he said that I disagree with very strongly, and that is where my colleague from Iowa charged the Republicans in this Chamber, the bipartisan majority really—it is not just Republicans—but charged those of us who believe this debate is

important with ''sanctimonious hypocrisy'' for our attempts to uphold the Constitution for what we believe to be the unconstitutional obstruction of President Bush's nominees.

There is a lot about this debate that I think folks at home watching TV or listening on the radio may have a little bit of trouble getting their head around, their brains around, because some of it involves arcane rules of the Senate and the Constitution. There is one thing that folks back home understand, and they understand hypocrisy, sanctimonious and otherwise.

I think it is worth noting, indeed I think it is important to note, comments that have been made by those who are now on the other side of this debate, what they said a few short years ago on this very self-same subject.

My mother used to say that the test of one's character is whether you are the same person in public as you are in private, and I think using something close to that test, we could ask whether the speeches that a Senator gave 5, 6, or 7 years ago are consistent with the position they publicly take today.

In that spirit, I would offer this: On March 1, 1994, the Senator from Iowa said: I really believe that the filibuster rules are unconstitutional.

That is the same Senator who accused those of us who believe that the same thing he professed in 1994, when he called us sanctimoniously hypocritical for what we are doing today—he happened to agree with us in 1994 but has obviously changed his position today.

Senator LIEBERMAN of Connecticut on January 4, 1995, said: The filibuster rule, there is no constitutional basis for it. It is in its way inconsistent with the Constitution. One might almost say it is an amendment to the Constitution by rule of the U.S. Senate.

Then there was the minority leader, at a time in 1995 when he said: The Constitution is straightforward about the few instances in which more than a majority of the Congress must vote. The Founders concluded that putting such immense power into the hands of a minority ran squarely against the democratic principle. Democracy means majority rule, not minority gridlock.

Then there are the comments of the distinguished legal counsel, Lloyd Cutler, who served as White House Counsel both to President Carter and President Clinton, who said: Nothing would more poorly serve our constitutional system than for the nominations to have earned the approval of the Senate majority but to be thwarted because the majority is denied a chance to vote.

I would like to agree with the comments made by Senator LIEBERMAN, Senator DASCHLE, Senator HARKIN, and Mr. Cutler just a few short years ago, but obviously their position has changed, or I should say their position has changed because majorities have changed. They find themselves in a different posture today than they found themselves in then, and it is no longer convenient or expedient for them to claim that majority should rule.

I submit they were right then and they are wrong now. I do not know of a nicer way to put it. It is hypocrisy to take inconsistent positions based on expedience where they should be made on principle.

What we are fighting about today is a fundamental principle. My colleague from Iowa said he wondered what the moral demarcation line was between holds and committee inaction on the one hand and filibusters on the other hand. I have an answer for him. I think it is a great question. The answer is: The line of moral demarcation is the Constitution and majority rule. That is where the moral demarcation line is, and there have now been four unconstitutional filibusters.

The PRESIDING OFFICER. The Senator has consumed the time yielded to him.

Mr. CORNYN. I yield the floor to the senior Senator from Texas.

The PRESIDING OFFICER. The Senator from Texas.

Mrs. HUTCHISON. I thank the Senator from Texas, my colleague, for being here most of the night, as most of us were, and for carrying this debate as a distinguished member of the Judiciary Committee who is maybe the only Member of the Senate—I am not sure—he is the only Member I know who has been a member of a supreme court of his State, Texas, and the attorney general of his State. I am very pleased that he has been such an active participant in this debate.

I wish to talk a little bit about the issue of the filibuster as it pertains to judges. We have had a lot of debate about what is a filibuster and did one occur, previous to this, a filibuster on a judicial nominee.

Well, there is an argument about one, and that is Justice Abe Fortas who was promoted to Chief Justice and was turned down by the Senate. ''Turned down'' might not be the right words, but whether or not there was a filibuster is in debate.

There is no debate that there have been no other filibusters of judicial nominees because Members of both parties have tried very hard not to filibuster until 2002 because they know it is the nuclear option. Once it starts, it is going to promote partisanship in this very important constitutional responsibility.

I want to read a letter from former Senator Robert Griffin, who was a Member of the Senate during the Fortas debate. He quotes an Associated Press piece which, in discussing the nomination of Justice Abe Fortas to replace Chief Justice Earl Warren, said:

> Republicans filibustered the nomination and Johnson backed off.

Here are his words:

> Whether intended or not, the inference read by many would be: Since the Republicans filibustered to block Justice Fortas from becoming Chief Justice, it must be all right for the Democrats to filibuster to keep President Bush's nominees off the appellate courts. Having been on the scene in 1968, and having participated in that debate, I see a number of very important differences between what happened then and the situation that confronts the Senate today.
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> First of all, four days of debate on a nomination for Chief Justice is hardly a filibuster.

Now, we are talking about people who have been nominated for over 2 years, who have had numerous cloture votes. That is a big difference. He goes on to say:

> While a few Senators, individually, might have contemplated use of a filibuster, there was no Republican party position that it should be employed. Indeed, the Republican leader of the Senate, Everett Dirksen, publicly expressed his support for the Fortas nomination shortly after the President announced his choice. Opposition in 1968 to the Fortas nomination was not partisan. Some Republicans supported Fortas; and some Democrats opposed him.
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> When on October 1, 1968, a vote was taken on the first and only cloture motion, the count was: 45 in favor of the motion [for cloture] and 43 against. Of course, those opposed to the nomination were jubilant, not only because the count fell far short of the ⅔ then required to impose cloture but, after reviewing the leanings of the absentees, we were more confident than ever that we had, or would achieve, majority support for our position [against Justice Fortas]. Of course, it also demonstrated that the White House could not produce the showing of a majority in favor of the nomination. Even if four days of debate were to be characterized as a filibuster, it could not be claimed that our debate was thwarting the will of the majority. Needless to say, that picture stands in stark contrast with the tactics employed these days by Senate Democrats.

President Johnson the next day withdrew the nomination.

The difference here is, there was not a partisan filibuster. There was not a majority that could be counted, and if anyone knows former Senator Lyndon Johnson, who was President of the United States, they know he was a vote counter. The Senator, now President Johnson at the time, withdrew the nomination because he did not have the majority vote for the nomination. So there has not been this kind of partisan filibuster. Both parties have refused to allow it to happen for good reason, and I would hope it would end today as well.

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

The Senator from Vermont.

Mr. LEAHY. Mr. President, this has been interesting, and I think for the public who might be watching, they may want to know what they are getting for their $100,000 to $150,000 of taxpayer's money that is being spent in this filibuster and those staff members who have lost any ability to have time for themselves and their families.

So I thought I might boil this down to its essence. Have filibusters been used before on Executive Calendar nominees, including judicial nominees to the lower courts, as well as to the

Supreme Court? Of course they have. No matter how much my friends on the other side say no, of course they have. They know that.

The CONGRESSIONAL RECORD is open for all to read, and we do not even have to go back to ancient history for this. Three years ago, there were even two simultaneous Republican filibusters on the Senate floor against Richard Paez and Marsha Berzon, two of President Clinton's nominees. In fact, here is a list of Republican filibusters of nominees. It is a pretty long list.

I do not think we have to remind our friends on the other side of the aisle about the dozens more that were blocked not through votes in the open, on the Senate floor, but through holds by anonymous Republican Senators. In fact, these were filibusters by one or more anonymous Republicans. If one or more Republicans objected to one of President Clinton's nominees, they never got a vote. They never got on the floor. They never got out of committee. One actually did get out, and then by a party line vote he was voted down. That was the African-American chief justice of the Missouri Supreme Court.

So what happened in these one-person anonymous filibusters by the Republicans? Not 4 people being held up, it was 63 of President Clinton's nominees. Sixty-three of President Clinton's nominees were blocked by the Republicans by a one-person anonymous filibuster.

So are filibusters, including judicial nominees, rare? Sure, they are. And, incidentally, these are the Clinton circuit court nominees blocked by the Republicans during 1995 to the year 2000. As we can see, it is a pretty large number: James Beatty, Rich Leonard, Jorge Rangel, Robert Raymar, Barry Goode, Alston Johnson, James Duffy, Elena Kagen, James Wynn, Kathleen McCree Lewis, Enrique Moreno, James Lyons, Allen Snyder, Kent Markus, Robert Cindrich, Stephen Orlofsky, Roger Gregory, Christine Arguello, Elizabeth Gibson, Bonnie Campbell, Andre Davis, Richard Paez, Marsha Berzon, H. Lee Sarokin, and Rosemary Barkett.

The Senate's rules are intended to protect against abuses by the majority that at any given time controls the Senate. I have been here eight times in the majority, eight times in the minority. So the majority and minority go back and forth all the time. In this case, the Senate's rules protect against abuses of power—we have a system of checks and balance—especially by a White House that is so bent on controlling all the levels of power. They even want the Senate to change their rules, rules that have governed this body for over 200 years.

Now, should filibusters be used sparingly? Of course. And they have been used sparingly. But unlike the times of the recent Republican filibusters where 63 of President Clinton's nominees were stopped, we have used this very sparingly against a President who wants to run roughshod over other safeguards built into our system of government and into the very rules and practices of the Senate and its committees.

By using it sparingly, all this talk—you know, it is almost ironic to see my Republican friends with a straight face say how terrible this is and spend $150,000 or so of the taxpayers' money to tell us how terrible this is, after they stopped, by using 1-person filibusters, 63 of President Clinton's nominees.

Let us put the chart up there, if we might. Here is what we have done. We did not stop 63, as they did. We have stopped four. We have confirmed 168, and we stopped 4. There is even a T-shirt floating around which says: We confirmed 168 of President Bush's nominees and what did we get for it? When you look at the back, it says: All I got was this lousy T-shirt.

So this year, with breathtaking arrogance and a certain disdain for the past and certainly an unwillingness to be honest about the history of the Senate, we have seen a systematic dismantling of the Judiciary Committee's own rules. One by one, Republican majorities have changed, bent, and even broken the longstanding rules and practices that are intended to protect the rights of Senators to defend the rights of their States and their constituencies. These are the very same rules they used—some would say abused—when there was a Democratic President.

Would filibusters be necessary at all if the President lived up to the Constitution's injunction that he seek not only the Senate's consent but also its advice in selecting candidates for the independent Federal judiciary? Remember, the Federal judiciary is not supposed to be an arm of the Republican Party or the Democratic Party. Of course, it is supposed to be independent. It is a real question: Is there a clear way forward without the need to prevent the confirmation of any judicial nominee? The President has the ability to stop all of this. None of this impasse would be necessary if the President actually followed advice and consent.

If the President did what other Presidents of both parties have done, where they have tried to be a uniter, not a divider, if the President, who has declared his disdain for what he calls judicial activism, had nominated people who were not judicial activists, if he had tried to unite and not divide, none of this would be happening.

Instead of working with the Senate to name mainstream nominees to our courts, he has chosen instead to try to politicize the courts. He and his aides have unabashedly declared that they are out to remake the federal judiciary in the image of ideological activism. Our courts are foundational to our system. Our independent judiciary is the envy of the entire world.

In deference to groups on the far right, he has nominated judicial activists who cannot help but raise questions about their impartiality and their capability to administer justice for all.

What we need is an independent judiciary. Time and again, Democratic Senators have acted in good faith to fill vacancies that Republicans kept open for years when there was a Democratic President. Time and again they have blocked, by one or two anonymous Republican holds, Democratic nominees of President Clinton's from going forward.

We have filled those. That is why we are able to get 168 of the President's nominees through. We have stopped four. Come on. Is this worth spending the taxpayers' money? Perhaps not. Maybe, though, they believe it is worth it to send out fundraising letters.

The public's priorities v. the Republican leadership's priorities: During this 30-hour talkathon, the Republican leadership of the Senate again is following a script laid out for it by a White House intent on bending all other branches of government to its will. This is a White House intent on establishing some sort of unitary government and intent on removing the checks and balances among our three branches of government that are a foundation of the American system. In furtherance of this script, in these rare final hours of this year's legislative session, the Republican leadership has decided to abandon work on the real priorities of the American people. They are obstructing those priorities, in favor of repetitive speeches about promoting these four controversial nominees to lifetime positions as federal judges—four people who already have good, well-paying jobs—is more important than the three million Americans who have been struggling to find any jobs at all.

The Republican leadership has already overshot the Senate's adjournment date by more than a month. We have already had to enact three continuing resolutions to keep the Federal Government operating because the appropriations bills that the Congress needs to pass have not been enacted. It is now more than five weeks after the fiscal year began and we should have completed all 13 appropriations bills, but the Republican Congress has enacted a total of only four out of 13.

The remaining annual appropriations bills include the funds that go to improve our schools. The funds that NIH uses to advance our medical knowledge in fighting disease and illness. The resources used by EPA to enforce our clean air and water laws. They include appropriations for our veterans and for law enforcement.

Yesterday evening as the Republicans gathered to accommodate the programming requests of a certain television network, the senior Senator from West Virginia was trying to get the Senate to do its work. Senator BYRD, as the ranking Democrat on the

Appropriations Committee, was searching for the Republican leader and urging the Senate to complete its work on the appropriations bill that funds services for our military veterans. He asked that the Senate continue that work so that we could finish Senate consideration of this important bill and proposed that we do so in just two hours. The Republican leadership objected. He renewed his request when the Republican leader did appear on the floor but was, again, rebuffed by Republican objection. Those few minutes may turn out to be the most telling of this entire so-called debate. Republicans chose to sacrifice the work of the Senate, the priorities of the American people and the interests of our veterans to a partisan political stunt.

In one of their many press conferences on this diversion, on November 6, the Republican leader committed to ''complete the appropriations process'' before beginning this charade. Even the junior Senator from Pennsylvania, agreed with that and said: ''The leader's right. What we're about to embark in next week, after the appropriations process has run its course, is to enter into a debate. . . .'' Well, when given the chance to honor that commitment last night, the Republican caucus chose partisan theater over the work of the Senate.

There is the unfinished business of providing a real prescription drug benefit for seniors. There is the Nation's unemployment and lack of job opportunities that confound so many American families. With millions of Americans having lost their jobs in the last three years, the Republican Senate is, instead, insisting on spending these final days of this session on a handful of highly controversial judicial nominations that divide the Senate and the American people and ignoring the needs of the almost 10 million Americans who are out of work, including those more than three million Americans who have lost their jobs since President Bush took office.

There are the corporate and Wall Street scandals that concern so many of those who have invested and placed their trust and financial security at risk in our securities markets. While we are listening to Republicans pontificate about a handful of highly controversial judicial nominees, some Republican has an anonymous hold on S. 1293, the Criminal Spam Act of 2003. This is a bipartisan bill that can do something about the worst spam abuses. Earlier this week, the Washington Times reported that spam is doing more damage to our economy than hackers or viruses. A few weeks ago the entire Senate joined in adopting a version of S. 1293 to the Burns-Wyden bill and we joined to pass that bill. Now some Republican has turned around and under cover of anonymity is holding up the bipartisan bill that can be enacted before adjournment this year that can stem the tide against the worst abuses and fraudulent conduct that is gumming up our internet economy and communications. This is the type of anonymous Republican hold that was likewise responsible for holding up more than 60 of President Clinton's qualified nominees to the federal judiciary from 1995 through 2001.

There is the need for Congress to continue the federal highway programs that build and repair our roads and highways and bridges. There is the need to perform real oversight of the U.S.A. PATRIOT Act and to provide real oversight for the war in Iraq. Just as Republicans objected to the Senate Judiciary Committee investigating the factors that led to September 11, Republicans are now objecting and preventing a full investigation by the Select Intelligence Committee of what led the Bush administration to contend that Saddam Hussein had weapons of mass destruction and was about to use them against the United States and that we had to embark earlier this year on a preemptive war.

Nor has the Senate taken any action on the misrepresentations made to us by Bush administration officials about their efforts to gut Clean Air Act enforcement. When they appeared and testified before us, they declared that their policies would not affect enforcement of the Clean Air Act and ongoing cases. Over the last two weeks we have seen how far from the truth that testimony was.

For the last three years this Administration has run roughshod over environmental protection and the Republican Senate has done nothing to stem the tide. They have catered to special interests in rolling back protections for clean water, clean air, toxic cleanups and public health. The Senate should be focusing attention on these attacks upon the environment and these rollbacks, but nothing could be farther from the agenda of the Republican Senate leadership.

Forty-two environmental rollbacks by the Bush administration that have been announced on Friday is the number the Senate should be working on. There have now been more environmental rollbacks than there are vacancies throughout the entire federal judiciary. The Bush administration's announcement that they are halting enforcement actions against industrial polluters under the New Source Review provision of the Clean Air Act flatly contradicts the assurances by Justice and EPA officials to the Senate last year. The toxic pollutants that will cause asthma and heart disease for our children and grandchildren is apparently of little interest to the Republican leadership of the Senate. That would be worthy of serious inquiry, debate and Senate action.

Last week the House passed by an overwhelming bipartisan margin the Advancing Justice through DNA Technology Act of 2003, H.R. 3214. This landmark legislation provides law enforcement with the training and equipment required to effectively, and accurately, fight crime in the 21st Century. More specifically, the bill would enact the President's DNA Initiative, which authorizes more than $1 billion over the next five years to eliminate the backlog crisis in the nation's crime labs, and to fund other DNA-related programs. It also includes the Innocence Protection Act, a death penalty reform effort I launched three years ago with Senators and Congressmen on both sides of the aisle.

The House vote was a major breakthrough in finding solutions to the flaws in our justice system. I understand that Republican Senators are now blocking action on the bill in the Senate. This bill is the result of extensive, exhaustive negotiations among Democratic and Republican leaders in the House and the Senate. It has broad support, both in the Congress and across the country and deserves the Senate's immediate attention and passage.

We have shown that the death penalty system is broken, we know that the reforms in this bill will help, and we know that every day we delay action may be another day on death row for some innocent people. These mistakes in our system of justice carry a high personal and social price. They undermine the public's confidence in our judicial system, they produce unbearable anguish for innocent people and their families and for the victims of these crimes, and they compromise public safety because for every wrongly convicted person, there is a real criminal who may still be roaming the streets. This matter is also being stalled by Senate Republican inaction.

The Senate has yet to take up the Anthrax Victims Fund Fairness Act of 2003, S. 1740, which Senator DASCHLE and I introduced with a number of other Senators because we are concerned that the citizens harmed by the anthrax letters addressed to Senator DASCHLE and to me in October 2001 are the forgotten victims of the aftermath of September 11. They, too, should have access to the Victim Compensation Fund. The Senate has yet to consider the September 11th Victim Compensation Fund Extension Act, S. 1602, which must be passed before we adjourn or hundreds of families who suffered on 9/11 will likely be left out in the cold without the compensation Congress and the American people intended to provide. Nothing will take away the pain and loss of September 11 and its aftermath for the victims but we owe them the Senate's attention before we adjourn.

New rules for Republican nominees: Rather than consider those important matters, why would the Republican leadership insist on rehashing the debate on the handful of judicial nominees on which further Senate action is unlikely? When they were considering the judicial nominees of a Democratic President in the years 1995 through 2000, they showed no concern about stranding more than 60 of President

Clinton's judicial nominations without hearings or votes. They did not demand an up or down vote on every nominee but were content to use anonymous holds to scuttle scores of qualified nominees. Indeed, they stood cavalierly by while vacancies rose from 65 in January 1995 to 110 when Democrats assumed Senate leadership in the summer of 2001. They presided over the doubling of circuit court vacancies from 16 to 33 during that time.

Indeed, the Republican leader at that time famously came to the Senate floor to defiantly declare that the Senate had confirmed too many of President Clinton's judicial nominees as far as he was concerned. That was when the Senate was considering less than half as many judicial nominees and had more than twice as many judicial vacancies as there are today. During those days the Republican leader said he only had one regret, one apology regarding his obstruction of President Clinton's judicial nominees: ''I probably moved too many already.'' Four years ago, toward the end of the third year of President Clinton's term, a year in which only 34 judges were confirmed, the Republican leader left no doubt that Republicans and the Republican leadership were unrepentant about their delays and obstruction of scores of qualified judicial nominees when he proclaimed: ''Getting more federal judges is not what I came here to do.'' That Republican leader would not schedule votes on President Clinton's judicial nominees when vacancies were much higher and growing in the summer of 2000 and, ironically, sought to use appropriations bills as an excuse. The Senator from Mississippi said: ''[S]pending bills must move first. . . . Until we get 12 appropriations bills done, there is no way any judge, of any kind, or any stripe, will be confirmed.'' Of course, now the Republican caucus shows little interest in completing the Senate's work on appropriation bills, even though we are no longer in the summer but four months later in the year, well past the deadline and already into the next fiscal year without having even had the Senate initially consider these fundamental legislative matters. As I have noted, just last evening the Republican leadership rebuffed Democratic efforts to complete action on appropriations for our veterans, which could have been done in two hours.

In those years, the Republican chair of the Senate Judiciary Committee repeatedly argued that 67 vacancies in the federal judiciary was ''full employment'' as far as he was concerned. He wrote in USA Today in September 1997, when there were more than 100 judicial vacancies, that there was no judicial vacancy crisis and that the 742 active judges were sufficient. Over the last three years, Democrats have cooperated in confirming 168 judges nominated by this President, including 68 this year; we have reduced judicial vacancies on an expanded federal judiciary to 40; and we have 837 active judges, the most in U.S. history. We have 40 percent fewer vacancies than what Republicans used to call ''full employment'' for the federal judiciary and almost 100 more active judges than just a few years ago when Republicans were content to delay and obstruct President Clinton's nominees and argue that there was no problem.

So why do Republican partisans insist that the Senate now devote its time to rehashing the debate on some of this President's most controversial nominees to the independent federal judiciary? Is it merely coincidence that the Republican leadership has chosen to schedule these proceedings for the week of the Federalist Society's National Convention in Washington? Perhaps this is to give Republicans the opportunity to preen and posture while such an important segment of their base activists are in town. Perhaps it is to give the Republican leadership another chance to make false arguments about judicial nominations. Perhaps it is to give some a platform for baseless and McCarthyite accusations against Democratic Senators. Or perhaps it is to distract from the real concerns that affect Americans every day. Newspapers this week report that this exercise is precipitated because of a ''brewing rebellion by conservative activists.'' Reportedly partisan diehards ''are accusing the Senate GOP leaders of going too easy'' and apparently when Republicans appear on conservative radio talk shows ''they are often barraged with questions'' about why the GOP is not successfully ramming every judicial nominee through the Senate that they control. Apparently this dissatisfaction has even begun to affect Republican fundraising and, according to the Washington Post, ''a recent mailing [by a conservative group] to raise money for candidates yielded empty envelopes'' from those who had formerly contributed. Let us hope that this is not the real reason for this grandstanding. Let us hope that when something begins to affect Republican fundraising, it is elevated to the top of the agenda—the public, the responsibilities of the Senate be dashed.

Mr. President, 168 nominees have been confirmed. If the Republican leadership has staged this vote in order to try to persuade the American people that Democrats are obstructing the President's judicial nominees, they are going to have to stray far from the facts, because the facts show that the Senate has made dramatic progress on judicial vacancies when and where the Administration has been willing to work with the Senate. Indeed, last week the Senate confirmed the 168th of this President's judicial nominees 100 of them, confirmed by the previous Democratic-controlled Senate, in just 17 months. We could confirm several more if the Republican leadership would just schedule the votes. There are other nominees who were reported unanimously by the Judiciary Committee and are just waiting to be confirmed. The number of confirmations could easily total 170 or more if the Republican leadership were truly interested in filling vacancies. Of course, more progress might undercut the partisan message that some are trying to peddle. Maybe that is why for weeks at a time the Republican leadership in the Senate has repeatedly refused to schedule votes on judicial nominees who will be approved, and have chosen is choosing, instead, to focus on the handful of the President's most extreme and divisive nominees.

The truth is that in less than three years' time, the number of President Bush's judicial nominees the Senate has confirmed has exceeded the number of judicial nominees confirmed for President Reagan, the ''all time champ'' at getting Federal judges confirmed, in all 4 years of his first term in office. A handful of the most extreme and controversial nominations have been denied consent by this Senate in the proper exercise of its duties under the rules. Only four. One-hundred-sixty-eight to four. That is in stark contrast to the more than 60 judicial nominees from President Clinton who were blocked by a Republican-led Senate.

McCarthyite smears: If this show is being staged to give some a platform for repulsive smears that Democrats are opposing nominees because of their religion, Republicans will have entered a realm of demagoguery, repeating false allegations and innuendo often enough to hope that some of their mud will stick.

Before they do that again, I would refer them to what the distinguished Senator from Louisiana, Ms. LANDRIEU, said this morning, because if this was not almost ridiculously contrary to the facts, there is one part in this whole debate that should be troublesome to both Republican and Democratic Senators, and that is the religious McCarthyism that has crept into this debate. The distinguished predecessor of mine, Ralph Flanders of Vermont, stood up on this floor and brought a halt to a member of his own party, Senator Joseph McCarthy, because of the smears he was making, the unsubstantiated smears he was making on people. Now, some of my friends on the right and some of my friends in the Republican Party have been making this smear. They are saying if you are opposed to these people, you are anti-Catholic or anti-Christian. If it was not so hurtful it would be humorous.

I first heard this when a radio talk show said I was anti-family, anti-Catholic. On Sunday morning, they asked my press secretary about it. He said: The Senator did not hear it because he was at mass with his wife of 41 years.

We should not sink to something that we know is not so. Slanderous accusations have already been made by Republican Senators, and ads run by a group headed by the President's father's former White House counsel and

a group whose funding includes money raised by Republican Senators and even by the President's family when they falsely claimed that judicial nominees were being opposed because of their religion. These contentions are despicable and unfounded. Other Republican members of the Judiciary Committee and of the Senate have either stood mute in the face of these McCarthyite charges, or, worse, have fed the flames. Such accusations are harmful to the Senate and to the Nation and have no place in this debate or anywhere else.

Just a few weeks ago, President Bush rightly told the Prime Minister of Malaysia that his inflammatory remarks about religion were ''wrong and divisive.'' He should say the same to members of his own party. Today, Republican Senators have another chance to do what they have not yet done and what this Administration has not yet done: Disavow this campaign of division waged by those who would misuse religion, race and gender by playing wedge politics with it. I hope that the Republican leadership of the Senate will finally disavow the contention that any Senator is being motivated in any way by religious bigotry or for racial or gender-based reasons.

This week rumor is that the Republican public relations machine will be cranking overtime to try to make Democratic Senators appear anti-woman. Led by Senators MIKULSKI, FEINSTEIN, BOXER, MURRAY, LANDRIEU, LINCOLN, CANTWELL, CLINTON, and STABENOW, it is hard to see how Democrats can be subjected to such allegations with a straight face, but that is what the rumor is.

The facts are that under Democratic leadership, the Senate confirmed 100 judicial nominees, including 21 women, nominated by President Bush in just 17 months, including four to our Courts of Appeal. During the 107th Congress, President Bush nominated only 18 women to district court seats, out of 98 district court nominees (18 percent), and only 8 women to circuit courts out of 32 circuit court nominees (25 percent). This year Democrats have supported the confirmation of 12 additional women nominated to the Federal bench, including three to our Courts of Appeal. This President's nominees have included only one woman in each five judicial nominees. The 33 women judges confirmed represent 20 percent of the 168 judges confirmed.

By contrast, nearly one of every three of President Clinton's judges are women. Of course, the Republicans who controlled the Senate and the Judiciary Committee during the Clinton Administration also blocked 18 women nominated to Federal judgeships by President Clinton. Women who were blocked from getting Senate action on their judicial nominations include Kathleen McCree-Lewis, Elena Kagen, Elizabeth Gibson, Helen White, Christine Arguello, and Bonnie Campbell, all of whom were nominated to the circuit courts. These six outstanding women lawyers were not extreme or ideologues. They were outstandingly qualified women lawyers whose nominations were blocked anonymously by Republican Senators, without explanation, without a vote, without accountability.

Records of activism: On important issues to the American people—the environment, voting rights, women's rights, gay rights, Federalism, privacy rights, equal rights, civil rights and more—too many of this President's nominees have records of activism and advocacy. That is their right as American citizens, but that does not make them qualified to be judges. As a judge it would be their duty to impartially hear and weigh the evidence and to impart just and fair decisions to all who come before the court. In their hands, we entrust to the judges in our independent Federal judiciary the rights that all of us are entitled to enjoy through our birthright as Americans.

The President has said he is against what he calls ''judicial activism.'' How ironic, then, that he has chosen several of the most committed and opinionated judicial activists ever to be nominated to our courts.

The question posed by his controversial nominations is not whether they are skilled and capable advocates. The question is whether—not for a 2 year term, or a 6 year term, but for a lifetime—they would be fair and impartial judges. Could every person whose rights or whose life, liberty or livelihood were at issue before their courts, have faith in being fairly heard? The President has chosen to divide the American people and the Senate with his highly controversial nominations. If Republicans want to clean the slate and start fresh, we should do so with nominees who unite the American people, nominees who can be supported by a strong bipartisan majority in the Senate.

We are also hearing the claim by Republicans that the filibuster of a judicial nomination in unprecedented. Republicans themselves filibustered the nominations of Judge Richard Paez and Marsha Berzon as recently as 2000. They previously filibustered the nominations of Judge Rosemary Barkett and Judge H. Lee Sarokin. Of course, while in the majority, Republicans took full advantage of the secret hold and of their control of the agenda to prevent a vote on 63 nominations by not scheduling hearings and votes on them. Many of those now claiming that Senate filibusters are unprecedented participated in them and voted against cloture just a few years ago.

Indeed, as the Senate's own website notes in an articled entitled ''Filibuster Derails Supreme Court Appointment,'' the 1968 nomination of Abe Fortas to be Chief Justice was filibustered with the help of Republicans: ''Although the committee recommended confirmation, floor consideration sparked the first filibuster in Senate history on a Supreme Court nomination.'' The attempt at cloture on the Fortas nomination was rejected by the Senate.

In addition, Republican Senators turned the filibuster of President Clinton's nominees and of legislation into a destructive art form. A nomination to be Surgeon General, Dr. Henry Foster, was defeated by a Republican filibuster, ambassadorial nominations were filibustered and bill and bill was filibustered as Republicans obstructed the work of the Senate and the legislative agenda. For Republicans to claim foul now, after their use of the filibuster tactic, may earn them the political equivalent of an Oscar, Tony or Grammy.

For 3 years I have asked the President and Senate Republicans to join with us to fill the vacancies on the Federal courts with qualified, fair, non-ideological judges. Democrats have bent over backwards to support a record number of nominees. When the White House will work with all Senators, we have been able to identify and confirm judges quickly and by consensus. When the President has chosen to select ideological activists and try to pack the courts, we have opposed a handful of his most extreme nominees.

The Federal courts should not be an arm of the Republican Party, nor should they be an arm of the Democratic Party. The Senate should continue to honor its constitutional responsibilities to this third branch of our Federal government and to the American people whose rights are protected by our Federal courts. No President, with or without the complicity of any current majority in the Senate, can be allowed to relegate the Senate to the role of rubber stamp.

The PRESIDING OFFICER. The Senator from New York.

Mrs. CLINTON. Mr. President, I thank the Senator from Vermont for his exemplary leadership on these issues. During a very difficult time in the Senate's history, he has continued to deal with the challenges and criticism in his usual humorous, self-deprecating way. It is a real example for all Members.

I, like many of my colleagues, have been following this debate not just for the last hours but for the last months. It is troubling for the two views being presented here to be so diametrically opposed about what the history is, what the facts are, what the law is, what the Constitution says and demands.

My friends on the other side of the aisle have chosen this opportunity to try to garner public attention for their perspective, which is that somehow the Democrats, acting in what we believe is the highest sense of duty, our understanding of the Constitution and the law, have drawn a line. We have seen this hour after hour now in the Senate, in the big chart that says 168. That is how many of the President's nominees

have already been confirmed. Those men and women are sitting on our Federal benches. They are making decisions that affect our lives. I voted for virtually all of them. They would not have been my choices. I would not have nominated some of these people in that 168 number, but they passed the test. They passed the test of judicious temperament. They passed the test of being people who understood the critical role of what it meant to be a judge in a free society like ours.

So what is this really about? We got some hints from some of our colleagues on the other side of the aisle. This is about trying to gain political partisan advantage and also increase fundraising. I was amused to read a story about how some of their more extreme supporters sent back empty envelopes when solicited for funding for the Republican Senate campaign committee. Those contributors said: You are not tough enough. You need to make a big issue out of it.

So, in obedience, the Republican leadership decided to do that. That is their choice. They can dominate the floor on whatever issue they choose. It is a shame they keep the attention on this issue to the exclusion of so many other important issues such as the economy, education, homeland security, what is happening in Iraq, and should happen. But that is their choice. That says a lot about their priorities as they respond to the music played by the most extreme of their privileged contributors.

It is somewhat disquieting for those who have a memory longer than 24 hours, or longer even than 2½ years, to see the distortions that have been presented with great passion and conviction. But, nevertheless, beating on the table does not necessarily mean what you are saying is true.

I am concerned, too, about the misleading way that the treatment of nominees during the Clinton administration has become a mantra on the other side of the aisle. I think 168 to 4 shows the Democrats in the Judiciary Committee and here on the Senate floor have shown great deference, 98 percent deference to the President's nominees and the will of the majority. That is certainly not something that nominees by President Clinton or the Democrats on the Judiciary Committee and in this body received when the shoe was on the other foot.

I am a little bewildered by this because time and time again my friends on the other side overlook the history of how extremely qualified men and women from all walks of life, all races and ethnic backgrounds, were treated under the Clinton administration.

The other side suggests that there were no mistreatments because there were so few, if any, filibusters. That is what they claim. Here are the pictures of the circuit court nominees blocked by Republicans. I know many of these people personally. I have the same feelings about them that I know some of my colleagues on the other side have about the nominees from their State. I know what they and their families have been put through for months, for years. And why was that? Because the way they were treated was done essentially in secret.

I give the other side great credit. They did not come out in the open like we are. They did not come out and debate the merits and demerits of the nominees from the current administration. What happened is, these distinguished men and women never even got a hearing. They never got to appear before a committee in most cases. They never got a vote out of a committee. The Judiciary Committee, under Republican leadership, became a judge buster. You could not get out of the committee. You could not get to the Senate floor. So, of course, there could not be a filibuster because they never had the opportunity.

I have a little chart that shows the difference in how nominees were treated, that clearly demonstrates we had 63 nominees, 23 circuit court nominees, 40 district court nominees. They are represented by apples on my chart. We grow a lot of apples in New York so I am partial to apples.

These 63 well-qualified, distinguished lawyers and judges were stiffed. They were not even given, in many instances, the decency of a committee hearing. They were left hanging out there, twisting in the wind, by a Republican majority that decided: We do not want to have to stand up and say why we will not confirm these people because if we have to talk about it publicly, everyone will see through us and it will be demonstrated conclusively that this is not about the Constitution or the law. This is about blocking well-qualified nominees from a Democratic President from having lifetime tenure on the Federal bench.

So, 63 qualified people were blocked. We have blocked 4 for a variety of reasons. We have been publicly willing to go on the record and say, for the world to hear, they are lemons. We cannot support these people. They do not have the temperament, the quality that should sit on the Federal bench.

I find this sad. That is the word I would use. Neutral, nonpartisan experts agree that the Clinton administration judicial nominees were, by and large, moderate, accomplished, excellent choices. What are we given? We are given four people who, for a variety of reasons, are just waving red flags. I understand that. This is not about confirming judges. This is about exciting a base. This is about scoring political points. This is about raking the money in. I can imagine the phones are ringing over at the Republican Senate campaign headquarters. They are making so much money today because they have their hard-core base sending those dollars in. Keep standing up there, keep fighting. But I venture a guess that even a majority of those folks do not know the facts. They certainly are not going to get it from what is said on the other side of the aisle.

It is sad, it is kind of heart breaking, actually. We had an opportunity during the 8 years of the Clinton administration to nominate 63 well-qualified people, none of whom were given the decency of fair treatment. It was done under the cloak of secrecy. It was done behind closed doors. It was done with anonymous holds. It was done with no committee hearing being scheduled. You can go through the individual accomplishments of these people, and it is stunning how well qualified they were. You can look at the names. I know many of these people. Republicans blocked 15 times more judicial nominees of President Clinton than have been blocked here. It has been a little difficult for many on this side of the aisle to explain to our constituents why we did not block more of them. A lot of the people who got through in that 168 were people many Members would prefer not to be on the bench, but we could not stand up in public and say why we would vote against this person, so we voted for them. When it comes to the four we blocked, we have more than ample reason.

I regret the majority has chosen to politicize this important process. I regret that they have chosen to ignore history and to distort the facts. I regret they would decide to spend time on these matters instead of the many important issues that confront our Nation and our world. We have a lot of big challenges around the world. I am personally concerned about what is happening in Iraq, what is happening in Afghanistan. I wrote to the Secretary of Defense yesterday because of reports about potential threats from al-Qaida to hijack cargo aircraft and fly them into nuclear powerplants. We have a lot of very difficult issues facing us. But instead, my friends on the other side want to rewrite history, want to ignore the well-qualified people they blocked through every maneuver, faint, and incredible behind-the-scenes stealth they could come up with.

I will now yield the remaining time on our half hour to my good friend and colleague, Senator SCHUMER, who has been a champion on this issue.

UNANIMOUS CONSENT REQUEST—S. 1853

Mrs. CLINTON. Before I yield, I ask unanimous consent the Senate proceed to legislative session, the Finance Committee be discharged from further consideration of S. 1853, a bill to extend unemployment insurance benefits for dislocated, displaced workers; that the Senate proceed to its immediate consideration, the bill be read the third time and passed, and motion to reconsider be laid upon the table.

Mrs. HUTCHISON. Mr. President, reserving the right to object, I ask consent that the Senator modify her request so that just prior to proceeding as requested, the three cloture votes be vitiated, the Senate would then immediately proceed to three consecutive

votes on the confirmation of the nominations, with no intervening action or debate.

The PRESIDING OFFICER. Will the Senator from New York modify her request?

Mrs. CLINTON. No, Mr. President.

Mrs. HUTCHISON. Then I object.

Mr. REID. Mr. President, before the junior Senator from New York speaks, I want to spread on the record the entire Democratic Caucus's appreciation for his stalwart service during the last many hours. The Senator has been here now for his fifth shift. On behalf of all the caucus, I extend my appreciation.

UNANIMOUS CONSENT REQUEST

Mr. REID. I ask unanimous consent the Senate stand in recess today from 4:15 to 5:15 so we can all go upstairs and find out what is happening from Ambassador Bremer, our No. 1 person in Iraq on the war in Iraq. It seems to me the fact that we talked 23 hours instead of 24 hours should not have any bearing on the outcome of the proceedings, but it would help every Senator, Democratic and Republican, to be able to give their full attention to the proceedings in the secret room upstairs. I so move.

Mrs. HUTCHISON. Mr. President, reserving the right to object, I certainly understand the sentiments of the distinguished deputy leader. We do all want to be able to do that, and we will be able to go in shifts. All Members are very interested in what is going on and very pleased that there is action by the United States to make sure that we do everything possible for the stability of Iraq. But we are in a very important debate. We are debating a constitutional issue. I would have to object.

The PRESIDING OFFICER. The objection is heard.

The Senator from New York.

Mr. SCHUMER. Mr. President, I thank all of my colleagues for the debate. I repeat something I have repeated in the five other times I have been here. We have had a lot of talk, a lot of palaver. But this one sign, this one chart is more persuasive than everything that has been said. No one, except a far-right militant, extreme minority, believes that the courts are obstructed when 168 judges are approved and four are not approved. Say whatever you will, that fact is transcendent. That fact is dominant.

I thank my colleagues on the other side for giving us the opportunity to repeat it over and over.

Now, we have been engaged in a lot of sophistry, a lot of arguments that do not make a difference. The lead argument is that there should not be filibusters. Last night, I talked at some length about all the filibusters that have gone on before. By the way, if you believe that the Constitution prohibits filibusters, you certainly believe it prohibits them not only for the judicial branch but the executive branch. Of course, that would be interpreting the Constitution because there are no words in there that say it. So my colleagues on the other side who are so worried about those who expand the law are doing it themselves.

I make another point today. We have heard this morning a little bit of a shift in the themes from my colleagues. Majority should rule. Just give them a vote. That is all we want, they say. If we want to give every nominee a vote, how is it different preventing the vote by speaking on the Senate floor or preventing the vote by refusing to bring the nominee up in the committee?

Did Annabelle Rodriguez get a vote? All she wanted was a majority vote. No. Did Clarence Sundram or John Bingler or Robert Freedberg or Lynette Norton or Legrome Davis or Robert Raymar or Robert Cindrich or Stephen Orlofsky get a vote? Nope, these are President Clinton nominees who were not brought before the committee.

What is the rule? That when the President nominates someone, all the other side is saying is, majority vote. Here is a list of 63 people who did not get that majority vote. If the Constitution is telling us every nominee should get a majority vote, why didn't it apply to these 63 as well as those 4?

And one other thing my learned colleague from Texas got up and said, hypocrisy is when you did one thing 10 years ago and do a different thing now. These were not 10 years ago; these were 5 years ago. I would ask but he is not here. Is it hypocrisy for the members of the Judiciary Committee on the other side, who never called these people for a vote, who deprived them of the principle of a majority vote, not to bring them up and now complain they want a majority vote for these four? I am not sure either measures up for hypocrisy. That is a strong word. But what is good for the goose is certainly good for the gander.

The whole issue of majority vote——

The PRESIDING OFFICER. Time controlled by the minority is consumed.

The Senator from Pennsylvania.

Mr. SPECTER. While the Senator from New York is on the Senate floor, I ask him to respond to a question, and that is, Does he consider this Senator a far-right extremist militant?

Mr. SCHUMER. Is this on the time of the Senator from Pennsylvania?

Mr. SPECTER. Yes.

Mr. SCHUMER. Please repeat.

Mr. SPECTER. It was argued a few moments ago with a chart, 168 to 4 that only ''a far-right extremist militant'' would say that was an insufficient record.

So my question to the Senator from New York is, Do you consider ARLEN SPECTER a far right extremist militant?

Mr. SCHUMER. I do not, in answering his question. But sometimes he has occasional lapses in his very fine judgment. And this is obviously one of those.

Mr. SPECTER. Well, I do not know how the Senator from New York can say there is a defect in judgment when I have not asserted anything yet. All I asked, Mr. President, was a question as to whether he considered ARLEN SPECTER a far right extremist militant. And he said, no, but sometimes there are lapses in my judgment.

I will ask a followup question to the Senator from New York. In the absence of any assertion or statement of judgment, where are the lapses in my judgment at the moment?

Mr. SCHUMER. I will say to my colleague, I heard him speak on this before, and when it comes to the issue of judicial nominees, where my colleague has usually quite good judgment, in recent months he is sort of edging way over to the right side, for reasons I am not sure of. But his normally sound and moderate judgment, in my judgment, when some of these nominees came up, has abandoned him, at least in this moment.

I say to my colleague, any nominee who believes that Lochner—and my colleague is very erudite, so I do not even have to describe to him what it is—who says that Lochner was correctly decided does not belong on the bench, in anyone's book, and, my guess is, really in his heart of hearts, does not belong on the bench in the book of the Senator from Pennsylvania. I know he will dispute that, but seeing his record, I have admired his record. And a judge who believes that property rights, that zoning is taking——

The PRESIDING OFFICER (Mr. BUNNING). The Senator from Pennsylvania has the floor.

Mr. SCHUMER. I was responding to the question.

Mr. SPECTER. Mr. President, I do thank you for your intervention. I had not wanted to interrupt the Senator from New York by calling for regular order, which would be in order when the comments go beyond—far beyond the scope of the question. But I thank the Chair for his intervention.

I would ask the Senator from New York another question, and ask him to be as restrained in time as he can be because we only have a half an hour, for I was concerned the last answer might use up the entire half hour.

When the Senator from New York made the comment that he questions my judgment, did he disagree with my judgment when President Clinton nominated Berzon to be a Court of Appeals judge for the Ninth Circuit and I joined with Democrats to get her confirmed?

Mr. SCHUMER. As I said—and I will try to be brief; and I know neither the Senator from Pennsylvania nor I is known for brevity on the floor——

Mr. SPECTER. Mr. President, that calls for a yes or no answer.

Mr. SCHUMER. As I said, normally I think the judgment of my colleague is a good one. Berzon, in my judgment, the nomination of Judge Berzon, she was quite far to the left. But I spoke about this last night. I believe, at least, because President Clinton, by and large——

The PRESIDING OFFICER. The Senator from Pennsylvania is not privileged to ask a question of the Senator

absent consent. The regular order is that the Senator from Pennsylvania has the floor.

Mr. SCHUMER. I ask unanimous consent that he be allowed to continue asking me questions.

Mr. SMITH. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. SMITH. I would like to speak.

Mr. SPECTER. Mr. President, the Senator from Oregon will have time to speak. We are in a 30-minute sequence. I would follow up the question to the Senator from New York: Did he disagree with my judgment on agreeing for the confirmation of Judge Paez, along with the Democrats, nominated by President Clinton?

Mr. SCHUMER. Mr. President, there was no—do we have unanimous consent? I did not hear.

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

Mr. SPECTER. Mr. President, I withdraw the question.

The PRESIDING OFFICER. You withdraw the question.

Mr. SPECTER. We will proceed with the debate.

The PRESIDING OFFICER. Thank you.

Mr. SPECTER. We have quite a number of people here who are already prepared to speak, and we will go on in regular order. But I asked the Senator from New York those questions because I think his assertion, when you hold up the chart with 168 to 4 and then say that only a far right extremist militant would question that, is grossly in error. I sought to illustrate it by asking the question as to whether ARLEN SPECTER fits that bill of a far right extremist militant.

The reality is that the 168 to 4 does not tell the picture. It is a misconstruction. Beyond the 4 who have been rejected by the filibuster by the Democrats, there are 5 others who are currently being filibustered; there are 14 others pending where the filibuster is imminent. President Bush has had only 63 percent of his appellate judges confirmed, whereas in similar circumstance for the past three Presidencies, there have been 91 percent confirmed.

So the chart, which has been seen more often than the most activist commercials, simply is misleading. These filibusters have gone very deeply into the heart of the nomination power of the President. The tradition has always been that the President gets substantial latitude in selecting judicial nominees. And where you have a challenge in ideology, the Democrats have, in this proceeding, gone to a new level in filibustering circuit judges. It simply has never been done before.

Last night, the Senator from Illinois made a comment that all the Republicans were doing here was theater. And I spoke shortly thereafter, and I agreed with him that this is theater. But it happens to be factual theater, and the theater is being utilized for a very important purpose; that is, to acquaint the American people with what is happening in the Senate on the politicization of judicial nominees.

I outlined in some detail yesterday, and will summarize it only briefly, the business of it being difficult when the party in the White House is different from the party in the Senate, which is what happened during the last 2 years of President Reagan's administration, and all of the administration of President George Herbert Walker Bush, where the percentages were very low. Then, in the first 2 years of President Clinton's administration, the percentages were high because he had a Senate controlled by his own party. And when President Clinton made nominations in the last 6 years, the percentages again were low. So the fault has been attributable to both parties when one party controlled the White House and the other party controlled the Senate.

But what has happened here more recently has been a new low. It has been a new low because for the first time there has been a filibuster of a circuit judge, which had never happened in the preceding 216 years of the Republic. And what we are doing here in this marathon—aptly named; it is not a filibuster, it is a marathon—is to call the attention of the American people to what has happened.

I related the filibuster sequence back in 1987, which is worth repeating, because it illustrates the point about how these proceedings are effective in telling the American people what is going on.

In 1987, there was a filibuster by Republicans on campaign finance reform. Senator BYRD was the leader of the Democrats. At about 2 a.m.—one early morning—Senator Dole, the Republican leader, called us all back into the cloakroom, a few feet to the rear of where I stand now, and said he would request that no Republican Senator go to the floor, so as to compel the Democrats to maintain a quorum—51 Senators—because in the absence of a quorum on the floor, any Senator may suggest the absence of a quorum and then there is no further business to be transacted.

Senator BYRD then responded with a motion to arrest absent Senators, and the Sergeant at Arms, Henry Giugni, was armed with the warrants of arrest. The Sergeant at Arms started to patrol the halls, and the first Senator he found was Senator Lowell Weicker. Sergeant at Arms Henry Giugni was about 5 feet 6 inches and 150 pounds. Senator Lowell Weicker was 6 feet 4 inches and 240 pounds—in fact, still is 6 feet 4 inches and 240 pounds. The Sergeant at Arms decided not to arrest Senator Weicker, which I think was a wise decision.

I note the Senator from Connecticut, Mr. DODD, smiling. He was Senator Weicker's colleague at the time from Connecticut and I think would confirm the wisdom of not arresting Senator Weicker.

So then the Sergeant at Arms started to knock on Senate doors. It is interesting how, when you tell a story, there is so much more attention paid to what is going on. People are snoozing here generally during this marathon.

At any rate, Henry Giugni went to knock on doors, and he knocked on Senator Packwood's door, and Senator Packwood foolishly answered the door. Then Senator Packwood was carried, feet first, in through that door. I was in the Chamber at the time. They carried him feet first.

This is a true story. You do not get many true stories out of Washington, but this is a true story. Even the pages think it is funny. It was really funny that night. It attracted a lot of attention. And that is what we seek to do here today, is to attract attention, because if the American people focus on what is going on with this filibuster, of the politicization of the judges, we think we can end it. And we are trying to make C–SPAN the channel of choice, to replace Jay Leno in the late hours.

There are many people who are surfing as we speak. It is amazing how many people will even watch C–SPAN or get to C–SPAN inadvertently in surfing. And I would urge them to continue to listen because what is happening here is substantively important, and I think even more interesting than the soaps, or at least stay tuned for the next 20 minutes, until after Senator SMITH and Senator SUNUNU have had an opportunity to speak.

I want to cover one other subject very briefly before yielding to my colleagues, and that is the subject of the quality of the nominees who have been filibustered. I will cite only one in the interest of time, and that is Miguel Estrada.

This is a young man who was born in Tegucigalpa, Honduras. He came to the United States as a teenager. Really, it is the great American story. He went to Columbia, where he was Phi Beta Kappa and magna cum laude, and that is a considerable achievement. He then went to the Harvard Law School where he was magna cum laude and on the Harvard Law Review. That is a unique achievement.

He then was a law clerk to two distinguished Federal judges, one of whom was on the Supreme Court of the United States. He then had a distinguished career as a practicing lawyer. Then he went to the U.S. Attorney's Office in the Southern District of New York. And I can tell you from my own experience as an assistant DA, that is a very valuable experience. Then he was an Assistant Solicitor General and had really a remarkable record.

He was rejected by the Democrats on a filibuster and ultimately withdrew, and it was really because he was potentially a Supreme Court nominee. And the reasons given: the reasons were that he was a stealth candidate. But any fair analysis of his responses to other nominees' would demonstrate

that he answered the questions at least up to the standard level, and then the Democrats objected to his nomination because he refused—the administration refused to turn over memoranda he had written as an Assistant Solicitor General. But if those memoranda are to be turned over under that circumstance, every lawyer who is an Assistant Solicitor General or an assistant DA or in any legal position would be chilled by the prospect of having such memoranda disclosed at some time in the future when that individual was subject to the confirmation process.

Now, it is my hope that these proceedings will produce something useful by way of focusing the attention of the American people.

I was on a radio program in Fargo, ND, for about 25 minutes earlier this morning, and these ideas have been spread across the country. It is my hope that the American people will communicate with the Senators on both sides of the aisle, both Republicans and Democrats. I think when the American people focus on this issue, there will be great pressure to change, to take politics out of the selection of Federal judges.

I now yield to my distinguished colleague from Oregon, Senator SMITH.

I ask the Senator, how much time would you like?

Mr. SMITH. Ten minutes.

Mr. SPECTER. Done.

Mr. President, how much time remains?

The PRESIDING OFFICER. Thirteen minutes 20 seconds.

The Senator from Oregon.

Mr. SMITH. Mr. President, for those of you who may still be watching this debate, I know the suggestion has been made by our friends on the other side that essential work is not being done. This time, I assure you, what is being done is a lot of work, and it is being done currently in conference committees.

What we are doing here, I think, is also very important. In terms of dialog and debate in our democracy, we have an important issue before us. You have seen the sign. It says: 98 percent. All these judges have been confirmed. It is important not to get locked into that number because what is being missed is whether we are upholding our oath to the Constitution only 98 percent of the time or 100 percent of the time.

In my view, my reading of the Constitution, it is that supermajorities are provided for in our Constitution in cases of Presidential vetoes, expelling a Member, and other areas.

Mr. President, I listened to my friend from Connecticut last night. He made a very good speech. He talked about his boyhood and sitting here in the time of his father. I am sure he was listening to great civil rights debates, and the filibusters went on and on in terms of civil rights.

But I will tell you, based on my reading of the recent book on Lyndon Johnson's life, by Robert Caro, ''Master of the Senate''—central in the fight among Democratic southerners and Democratic northerners, along with Republican northerners—there was the frustration over the issue of the filibuster. Hubert Humphrey and Clinton Anderson of New Mexico repeatedly began each session trying to change the rules on filibuster because they knew if they could not change them, then Senator Russell would make it impossible for them to break the veto and deny the African-American community civil rights in this country.

What is the difference between that fight over a filibuster when it comes to a legislative issue such as civil rights versus an executive appointment or Executive Calendar issue such as we are dealing with today?

Well, I suggest that what has happened ever since the defeat of Robert Bork is each side is upping the ante and we are exalting now single-issue politics in our country in a way that I think truly disserves our country.

There is an old maxim in the law that justice delayed is justice denied. It is a fact that many justices or judges have been confirmed, but the real potential exists not just to delay justice—and thereby deny justice—but to dumb down justice in our country. Let me tell you why I believe that this could happen.

Right now, we are seeing the winnowing out of anyone in the law who is learned, well written, well spoken, and whose views are well revealed to the American people. I remember as a new lawyer listening to the debate in the Senate over Robert Bork. I remember as a law student, prior to that, particularly enjoying the writings of Laurence Tribe and Robert Bork. These two great legal scholars would debate in their writings over the word ''liberty'' and the proper role of judges in enforcing and providing for liberty.

You couldn't find two scholars with more polar opposite positions than Tribe and Bork. But, I loved their readings. I had the feeling when I would read them that I was a part of the contest of ideas. I remember the feeling when Robert Bork was defeated that, doggone it, I would sure have given them Laurence Tribe if they would have given us Robert Bork. Because I knew the writings of our country's legal journals would be all the better if the judiciary could attract the best and the brightest.

Now we are saying as the Senate, if you have strongly held views, you had better check them at the door. And, if you don't do that, you had better not expose them. We are saying to the judicial branch of Government—we, the Senate, the legislative branch—we don't want the best and the brightest; we want the mediocre, we want the mushy middle; we want those who are just going to go along and get along.

I think we also disserve the marketplace of ideas when both parties ratchet up these politics. This is what has happened. The difference between the filibuster as it relates to the Legislative Calendar and the Executive Calendar is simply that we, the legislative branch, are now attacking the judicial branch.

American justice will be the poorer for this because, you watch, when we have a Democratic President and a Democratic majority in the Senate—this will happen again—watch the filibusters come up. That is unfortunate because we have elections for a reason. This is an ebb and flow in American politics that is important.

Am I suggesting we get rid of filibusters? I am not, but I am suggesting we have escalated this too high. I believe we are exacting single-issue politics, I believe we are delaying justice, and I believe we are dumbing down justice in America.

The unspoken word here is the single issue of a woman's right to reproductive choice. The word is ''abortion.'' Every one of us has wrestled with that issue. I truly believe and I understand why a woman doesn't want the Government part of such a decision. I also believe there are times when life is so viable and so obvious that the law ought to protect that life.

As I looked in the mirror and then presented myself to the people of the State of Oregon, I had to say: You know, I am pro-life. I am pro-life with exceptions, but I am pro-life. My State is pro-choice. But, they had a right to know my position. I told them. Ultimately, I was elected anyway. I promised them I would not have a single-issue litmus test on judicial appointments.

I am here to tell the people of Oregon, I have kept that promise. I voted for President Clinton's nominees who were pro-choice because I believe we should not let single-issue interest groups rule the day on an issue so constitutionally fundamental to the future of justice in our country. But that is what is happening here. That is why this time is so important, that we spend it debating and hopefully resolve this issue.

Mr. President, I will not take more time. My colleague, Senator SUNUNU, deserves to be heard.

I pray, I plead, I hope we can get beyond this as it comes to executive appointments, the Executive Calendar, because we are disserving America with this process that has now ratcheted up to a new level that is constitutionally dangerous.

I yield the floor.

The PRESIDING OFFICER. The Senator from New Hampshire.

Mr. SUNUNU. Mr. President, I very much appreciate the remarks of my colleague from Oregon and in particular the emphasis he placed on what the tone and the tenor of our current debate on nominees could mean for future nominees, for future qualification of those who might be interested in serving on the bench.

As elected officials, we talk all the time about tenor in politics, big media,

and advertising campaigns, and all the rest that a modern campaign involves, and the way in which the introspection and intrusiveness of that process discourage good people from running for office.

Anyone who has ever spent time looking at the political process is aware of that concern. It doesn't matter if you are running for the Senate or not; you could be running for school board or mayor or dogcatcher, for that matter; but people understand that there is a level of intrusiveness, an invasion of personal life, that discourages good people from running for office.

There is not much we can do about that as a Senator, as an elected official, but there is something we can do about this process, the judicial nomination process, the vetting process, the approval process. If we allow this current tone and tenor to remain, then, as the Senator from Oregon has described, we will not only discourage good people from wanting to serve on the Federal judiciary to bring their judgment and intellect to bear, to help provide justice to those who deserve and need justice, we will even discourage people from engaging in debate, from putting their ideas out on the table, from writing, from thinking about different ways to look at or evaluate the law.

I am not a lawyer. I am about as far from the law as one can get. I am an engineer by training, and I am proud of that fact. I understand the value of creativity, innovation, and debate, and the marketplace of ideas. When we have Members of the Senate come to the floor and say: I am voting against someone because I don't like the way they decided a case, that raises a red flag for me. If there is a specific case and a specific issue and you truly believe the way they decided the case means they are not capable, they are not fit, they are not qualified, that is fine, but let's not suggest for a minute that we will ever or should ever seek to find candidates who agree with us on every issue on every legal point.

My constituents back home won't agree with me on every issue anytime. I don't think there is a member of my family who agrees with me on every issue. And we certainly shouldn't accept that kind of bar for our judicial candidates. What we should look for are qualifications of experience, intellect, or a sound, consistent case record.

I think we have moved away from that. When we have nominees who have the support and endorsement of every paper in their State, liberal or conservative, or we have nominees for the judiciary who have received the support of 70 or 75 percent of the people in their State, liberal and conservative, or we have nominees who have demonstrated time and again, as we do, their commitment to uphold the law as written regardless of their own point of view, I think these nominees deserve the fairness of an up-or-down vote, and that is ultimately what I think is at stake here.

We can look at the numbers and discuss whether or not there has ever been a cloture vote at a particular time or a particular place on a particular nominee, and we have had cloture votes before, but what is different about the current debate is that cloture votes have never been used in a partisan way to prevent a nominee from getting that up-or-down vote on the floor. It certainly hasn't been used on the past on four, five, six, seven, or eight nominees. It is that process that I think has Members of this Senate, Democrat and Republican, and the public very frustrated.

Technically, is it within the right of the minority to force these cloture votes? Sure. It is not a question of whether it is technically within the right of a Member of the Senate or the minority to engage in this kind of obstruction. The question is, Is it the right thing to do, is it the fair thing to do?

Ultimately, it is important that we take a stand as to whether or not we believe it is right. I certainly do not. And ultimately the public will also be asked to decide whether they think this is appropriate behavior for their Senators and for their leaders in Washington, DC.

I yield the floor.

The PRESIDING OFFICER. The majority time has expired.

Mr. SPECTER. Mr. President, that is what I was about to inquire. I thank the Chair.

The PRESIDING OFFICER. The Senator from Michigan is recognized.

Ms. STABENOW. I thank the Chair.

Mr. President, every debate we have in the Senate comes down to a question of values and priorities for all of us, how we spend our time personally, how we spend our time in the Senate, where we choose to put our efforts.

I wish to speak today about where I believe we should be putting our efforts if we are going to spend 30 hours of time speaking on the floor of the Senate.

First, I remind colleagues again, lest we get lost in all of the discussion of what we are talking about, we have, since I have been in the Senate, approved 168 judges. We have confirmed 168 judges, and we have said no to 4—168 to 4. Almost every one of those 168 I voted for.

We are talking about four people who currently have jobs who want to be promoted to lifetime positions as Federal judges. What I would like to spend my time talking about today are the 3 million people who don't have jobs. Three million Americans have lost their jobs during this same time period, in the last 2½ years.

What I want to spend my time speaking about are the 162,000 people and more who have lost their jobs in the great State of Michigan, most of those in the manufacturing sector.

I am very proud of the fact that Michigan is first in the Nation in the manufacturing of automobiles. About 31 percent of all of the automobiles that are made in this country and almost 17 percent of all the trucks made in this country are made in the great State of Michigan.

I am proud of the fact that we produce about half the office furniture. Three leading office furniture manufacturers in the Nation are based in Michigan. I am proud of our tool and die makers. I am proud of everyone in our small manufacturing businesses. Most of our businesses are very small with under 20 people in auto supply and in the tool and die industry. I know they are under severe crisis today.

We are under severe crisis in Michigan and in this country as it relates to our manufacturing economy. That is worth 30 hours of debate on the floor of the Senate. That is worth 30 hours of action on the floor of the Senate.

We cannot afford to lose our ability to make products in this country. That is what we do in Michigan. I am proud of the fact that we make products, we grow products, and we do it well. Give us a level playing field for our businesses and our workers, and we will compete and win. That is not happening, and I am deeply concerned about the stories after stories I have heard.

I wish to share a couple stories today. I look at the headlines: ''2,700 jobs in danger as Electrolux considers closing Greenville refrigerator plant.'' This is in the Grand Rapids Press:

> Electrolux Home Products announced today it may eliminate 2,700 jobs at Greenville refrigerator plant and shift production to Mexico.

That is all too common a headline, and it is something that is going on in Michigan.

> Such a move would be a huge blow to the city of Greenville and Montcalm County, where Electrolux and its predecessors have long been the largest employers and among the largest taxpayers.

That is what we should be talking about: What is happening in Greenville and Electrolux.

''Ford sets a timetable for plant closings. Revitalization plan called for cutting 35,000 jobs.''

> Ford Motor Co. will close plants in Ohio and Michigan by year's end and another in New Jersey in the first quarter of next year.

It goes on:

> Another factory in Ohio will end production in the next four years.

Not four people who already have jobs, but people who right now are working hard every day, 9 to 5 or longer, to earn a paycheck so they can have a good-paying job in the United States of America and send their kids to college, to afford their health care, to afford their house, maybe a cottage up north, which is something we like to do in Michigan, maybe a boat, maybe a snowmobile—those things that allow a good quality of life in our country. We are in danger of losing that when we lose manufacturing jobs.

''Straits Steel closing sad news for plant's 180 employees.'' This comes from Ludington.

We read in the Lancing State Journal: ''Jobless rate could rise in the winter.'' There is more concern about what happens when we lose construction jobs in the wintertime.

I receive a lot of letters from people writing me and asking for help. They would love to see us spending 30 hours on the floor of the Senate not only talking but actually doing something to save their jobs and to support our manufacturers.

I would like to read you just one letter from Walker, MI:

> I am writing to you in the hope you will read my letter. What I want to write you about is how much of our industry is disappearing. Factories continue to close or lay off. Often they leave the State and, even worse, they leave the country. A lot of these are American companies, like Lifesavers plant in Zeeland.
>
> Yes, we need bankers, lawyers, doctors, and computer consultants. I am one. But that is not our strength. Our strength is in our industry, in our farms, in our shops. I live in Grand Rapids, MI, and I see a lot of construction, but it is all retail and restaurants. How can we continue to grow if we are all making only $8 to $10 an hour? Most of the time you can't even make that. Henry Ford knew that he had to pay his employees a living wage so that they could afford to buy his cars.

There is story after story coming from the State of Michigan, across the Midwest, and all across our country. They are asking for our help. With over 3 million jobs that have been lost—3 million, not 4—3 million jobs that have been lost, what is the response of the administration? We have had to fight to stop them from taking people's overtime pay. Can you imagine, 3 million people lose their jobs and what is the response? Take away the other people's overtime pay.

Then we have to fight to extend unemployment compensation for the people who have lost their jobs and are having difficulty finding new jobs. Of deep concern to me is what is happening as relates to a lack of a level playing field in China and Japan and other Asian countries. We know in the Banking Committee—and the esteemed Senator presiding today I know has expressed concerns as well as to what is happening to the currency manipulation in China and Japan. Effectively, we are seeing a tax on American goods and services sold in China and Japan, and they get a tax break here or a price break because of what they are doing. We need a level playing field.

We asked the administration to do something; join us; we know it is happening, and yet they refuse to step up and join us in the tough efforts that need to happen to give our businesses the level playing field they need to keep jobs in America.

We have seen a refusal to address the high health insurance costs. We need to create more competition with pharmaceutical drugs. We need to be working with our employers to lower health care costs, the No. 1 pressing issue that has caused layoffs, that has caused people to pay more in deductibles and premiums and has caused businesses to struggle to survive.

Let's talk about those issues that create jobs, that relate to our ability to have a standard of living that we have been accustomed to and deserve in this country. If people are willing to put in a day's work, they ought to be able to know there will be a good-paying job there so they can care for themselves and their families and they can do those things that will allow them to have the best possible life in this great country of ours.

Finally, we have seen a continual block over and over on the issue of increasing the minimum wage. An awful lot of folks working for minimum wage are women. They are women with children. They are working minimum-wage jobs, most often without insurance. They are paying for daycare. They are wanting to work and yet finding themselves in a situation that, no matter how hard they try, working 40, 50, 60 hours, they just can't make it because the minimum wage has not kept up.

So it is very concerning that we have seen a continual effort to block a simple $1.50 increase in the minimum wage for 7 million people living in the United States of America, who work hard and play by the rules and assume that if they do that, they will be able to succeed and care for their families. Seven million people need our help today with a $1.50 increase in the minimum wage.

Thirty-seven percent of those folks right now are seeking emergency food aid, and they are working. They are working, and yet they cannot make it and are having to ask for food assistance. So we over and again have asked for the support of our colleagues on the other side of the aisle to address those 7 million individuals who work hard every day and believe in America and want to be able to be successful.

So I am very hopeful that we will be able to do that.

UNANIMOUS CONSENT REQUEST—S. 224

At this time, I ask unanimous consent that the Senate now return to legislative session and proceed to the consideration of Calendar No. 3, S. 224, the bill to increase the minimum wage; that the bill be read a third time and passed, and the motion to reconsider be laid upon the table.

Mr. SMITH. Mr. President, I would ask that the Senator modify her request so that just prior to proceeding as requested, the three cloture votes would be vitiated, and the Senate would then immediately proceed to three consecutive votes on the confirmation of the nominations, with no intervening action or debate.

Ms. STABENOW. Mr. President, I would object.

The PRESIDING OFFICER. The Senator will not modify her request?

Ms. STABENOW. No.

Mr. SMITH. I would object.

The PRESIDING OFFICER. The objection is heard.

Ms. STABENOW. Mr. President, I am going to turn in a moment to my esteemed colleague from Connecticut who has been in this Chamber time and again, not only addressing the issue that brought us here but other issues as well. He is someone who has been fighting for those good-paying jobs. He is a consensus builder and problem solver and somebody who knows how to get things done. I am very grateful to be sharing this time with him today because of the wonderful leadership he brings to the Senate and the way in which his work has touched so many lives of people in Michigan as well as across the country.

In conclusion, I end as I started by saying what we do around here always relates to values and priorities. I hope we will choose to focus our time and attention on those things that affect the most people in our country, those things that are best to move our country forward and to keep the economic engine moving forward for all of us, that will at the end of the day allow us to say that what we did on the Senate floor today gave people an opportunity to work hard and create a better life for themselves and their families.

We are losing the manufacturing sector in this country. We need a sense of urgency about that. We need to act to give our businesses and employees a level playing field and address those issues that will allow them to keep jobs in this country. I hope as we are debating about 4 people, we will remember 3 million people who are counting on us to act.

I now yield time to my colleague from Connecticut.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, first, I thank my colleague from Michigan not only for her work today but her tremendous contribution in the relatively short time she has been a Member of this body. We thank her immensely for her very balanced and deliberate approach. I thank her particularly for raising the issue she has today.

While the subject matter defined by the majority is the question of judicial nominations, I think the point she has raised, that there are an awful lot of people all across this country who are—while they may be interested from an intellectual standpoint, even some maybe on a more passionate level on the question of judicial nominations, there are a significant number, the overwhelming majority, I think, of people, if asked how they would like to see the Senate of the United States allocate its time and resources, the Senator from Michigan has identified a subject matter that is of far more compelling interest to a larger number of people in this country, the issue of putting people back to work; what has happened to the closure of so many small manufacturing firms all across the United States that have seen their products no longer marketable in this country and elsewhere because of the onslaught of foreign products that have come in through misguided and failed

trading agreements we have reached, particularly with the People's Republic of China and elsewhere.

So I thank her. I suspect there are an awful lot of people across this country who appreciated the fact that she took 15 or 20 minutes to talk about the 3 million people who over the last 29 months have lost their jobs in this country and who are sitting there today wondering whether or not they are going to be able to keep that home, whether or not they are going to be able to afford their children going on to college, whether or not if they get sick they will be able to pay for that illness, if they had a job that provided health insurance for them.

So I thank her and I suspect there are an awful lot of people across this country who appreciate immensely her determination to see that those jobs, not just the jobs of some people who were unable to have a vote on the Senate floor to confirm them for a judicial nomination, will be the consideration of this institution.

I must say as well, I appreciate my colleague's kind comments about my efforts as a legislator. I try to take some pride in that. I think my colleagues on the other side know this. I work very hard to maintain my relationships with every Member. Regardless of what battle may ensue today, tomorrow is a new day and I always reach across the aisle wherever I can because I have never seen an issue in my 24 years here that had any value and merit be accomplished without it being bipartisan, ever. I defy any Member to mention a single issue of any significance that was ever adopted by this body that was not bipartisan in nature.

When we lose our ability to do that, we not only suffer as an institution but the people we seek to represent suffer terribly. So it is critically important that we make those efforts.

I have spent a lot of time over this last number of weeks trying to get something done on asbestos reform. My colleague from Michigan and my colleague from Oregon know of the efforts we made in this regard. It is terribly worrying to me that we are about to end this session. We have 700,000 lawsuits that have been filed for people who were exposed or could get ill from exposure to asbestos. Seventy thousand cases are being filed a year. There are major companies that have gone bankrupt because of the problems with exposure and the liabilities as a result of the asbestos issue. I would have hoped, maybe vainly, that we might spend some time on an issue such as that, candidly. I noticed to my colleagues the other day that while I voted against cloture on the class action reform issue, I immediately took the floor to say I am very interested in a class action reform bill and I am prepared to support one. There were issues that needed to be worked out.

I know there are businesses all across this country that would like very much to see us address the issue of class action reform. There is nothing like 30 hours' worth of debate on class action reform. There will be no 30 hours of debate on asbestos issues here, unfortunately.

So I say with all due respect—and I do respect my colleagues, all of them—that it is a reflection to some degree of what your sense of priorities is. There are a lot of issues that deserve attention, but I would ask any average American to identify for me, when given the choices to debate, whether or not we ought to do something about class action reform, something about asbestos legislation, something about joblessness, something about Medicare reform, prescription drug benefits. I have seen nothing even remotely close to 30 hours of debate in this Chamber on any of those issues at all—none, absolutely none.

So while we in the minority cannot set the agenda, the power of the majority is the power to be recognized, and the power to be recognized means you set the agenda. Even though our ranks are only separated by two Members, the division of two Members makes it possible for the majority to decide what this Chamber will do, what this institution does, on a daily basis, on an hourly basis.

The majority, in their judgment, have decided that this issue, the issue involving four judicial nominations, is far more important than anything else on which this Congress, this session, with hours away from terminating it, should spend its time and efforts.

I do not disagree that this is an important issue. I think it is an important issue, particularly where we may be asked to vote on changing the rules of the Senate to either eliminate or virtually eliminate the right to filibuster judicial nominations. That is a profound question, and I just regret that it ends up being debated at 2, 3, 4, and 5 o'clock in the morning and not something that ought to consume a serious debate in this Chamber as to the wisdom of such a potential move. I am not sure that amendment is going to be offered, or that idea will be suggested to us by tomorrow, but I have been told it will. I will come to that in a minute.

I do think it is important that people wonder whether or not this body, or politics or Congress, ever gets it. One of the questions we all face from time to time when we conduct our town meetings is: Do you have any idea, Senator, what it is like to raise a family today, with all the pressures we are under? Do any of you in Congress—I do not care whether you are Democrats or Republicans—do you have any idea what we are going through out here?

When we conduct 30 hours of debate about four judicial nominations, I sometimes think that question has a lot of merit, unfortunately.

So I wish we were spending some more time on some of these other issues. Maybe we will get to them. Hope springs eternal, and I will keep trying to work on it. I have been asked to come and spend some time to protect our interests on the floor and so I will utilize some time, as I did last night, to talk about the issue at hand.

I am terribly disappointed that we are spending the time of this institution on something such as this when we need to be spending our time, what little time we have, on so many other questions, that so many people in this country want to see us address and try to come up with some answer for. They know it is difficult.

Look, what we love about this institution is also what galls us the most about it. The beauty of the Senate is not only the manner in which we do things but also the frustrations that are evoked as a result of how we do things. Had the Founders of this great Republic sought efficiencies, they never ever would have set up this system. The last system you would ever set up, if you were trying to get the job done expeditiously, is the one we have lived with for 217 years. This is a terribly frustrating system. It will drive you to madness watching it happen, particularly this institution of the Senate.

When the Framers were debating the existence of a legislative branch—in fact, the idea was pretty much to have a unicameral system I think in the early discussions: One house, simple majority rules. I sit in the seat of a man by the name of Roger Sherman, from the State of Connecticut, who was one of those Framers of the Constitution, the only one of the Framers, by the way, to ever have signed all four of the cornerstone documents of the United States. He signed the Articles of Confederation, the Declaration of Independence, the Constitution of the United States, and the Bill of Rights. I am very proud to sit in his seat in the Senate, after 217 years.

In that Constitutional Convention, it was Roger Sherman, my forbearer in this job, who suggested, along with Oliver Ellsworth from Connecticut as well, the creation of a separate body in the Congress of the United States that we have come to know as the Senate.

The argument was about small States and large States. The fear was, for people who came from smaller States, that in the House of Representatives, since it would be determined by population, large States by population would so dominate the Congress of the United States that those who lived in smaller States would be overwhelmed. They were about to vote against the Constitution when Sherman and Ellsworth came up with the idea of a Senate, where every State, regardless of size, would have equal representation—two Senators from every State.

My colleague from New Hampshire and I from Connecticut, small States, we have two Senators; my colleague from Michigan, a large State, and from California, two Senators. It is a rather beautiful system in a way. They went beyond the idea of just small States

and large States. The seed of the notion that there ought to be a place where the rights of a minority get protected was also included in this concept.

In the House of Representatives, in which I had the privilege of serving for 6 years before coming to this body 24 years ago, the majority rules. If you are in the minority in the House—I do not know if my colleague from New Hampshire ever served in the minority in the House, but I certainly did not; I was always in the majority there—being in the minority in the House is painful because it can roll right through you. What the majority wants to do happens. That is it.

In this body, the idea was to create a place where the minority interests, including a minority of one, would have rights that you would never get in the House of Representatives. Hence the right of one Senator, if they stand up and can stand long enough and do not leave the floor, to have the right not to be interrupted, extended debate; the right to amend. It has been a wonderful balance. The rights of a majority are down the hall. The rights of a minority are here in this Chamber. We have tried over the years to see to it that those unique rights give us a sense of balance, what one of the Framers called the saucer—the Senate—in which the passions would cool, because the tyranny of a majority can be overwhelming. So the Senate was a place to say let's stop, let's take a look, let's think again about whether or not this is the right way to go.

Now, if we go back and look at the genesis of the thought process that was involved in the creation of the Constitution in this Republic, a unique event in the history of mankind, certainly they had been through an experience where a king had been overbearing. Remember, two-thirds of the population of this country in 1776 was not terribly enthusiastic about a revolution. Only about a third of the population thought that was necessary. As the tyranny of a king grew larger and people's rights were being deprived, taxations levied without their ability to be heard, they decided: We need to move away from that.

So as this system evolved and a discussion of what it would look like, the last thing the Founders wanted to do was create an executive without some checks and balances on it, an unlimited tyranny of an executive. In fact, as I pointed out last night, there is ample evidence, of course, that when it came to judicial nominations, the Framers did not want to give the right to nominate to the President. It was only an afterthought that said, on judicial nominations, they ought to go to the President, and then the Senate would provide its advice and consent.

I carry with me every day a copy of the U.S. Constitution. It was given to me by my seatmate ROBERT C. BYRD many years ago. It is a rather worn-out copy of this wonderful document, but I carry it with me 7 days a week. I read it constantly. As I get older, my appreciation for the wisdom of these people grows deeper.

It is very clear article III of the Constitution lays out judicial power, the judicial part of it. It says that people are appointed to the courts, supreme and inferior courts, and they will serve for life, during good behavior for life. It is unique. It is the only office in the country where one gets a lifetime appointment. The President does not. Members of Congress do not. A Federal judge gets a lifetime appointment. If you are appointed when you are 35 years of age and you live to be 85—50 years—unless you do something terribly wrong, you are there; you are not going anywhere.

Of course, in article II, they lay out in section 2: He—speaking of the President—shall have the power, by and with the advice and consent of the United States Senate, to make treaties, and so forth. It goes on. And by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers, and so forth, judges of the Supreme Court, and all other officers of the United States.

Does anyone really believe for a single moment that the Framers of this unique document intended that the President, the executive branch, would appoint and that it was then the duty of this body to just rubberstamp that choice? Of course not. In fact, they did not even want to give him the power to appoint to begin with because they were uneasy about someone having too much power in their own hands.

I suspect our predecessors probably had in mind what some of the more recent predecessors did with postmasterships.

I remember my father talking about the postmastership appointment. He used to say that this was a dreadful idea, to give Senators the right to appoint postmasters, because he said inevitably you would have about 100 applicants for the job. Of course, once they were confirmed, they could never get involved in politics again. So he used to say you would end up with 99 enemies who did not get the job and 1 ingrate who did who could never talk to you again.

I suspect that may have been true as well about Federal judgeships, that our colleagues in the Senate, in the earliest days, probably said: Look, we do not want the business of having to nominate these guys because inevitably we are going to pick someone and the other guys are people who are going to be upset with us. So why do we not give that to the President, let him appoint them, and then we will decide whether or not they deserve to be confirmed.

The notion somehow that one has a constitutional right to a vote—I have read this document; I read it every day—there is nowhere in this document one gets a constitutional right to a vote on anything, any more than the American people have a right to a constitutional vote on the minimum wage or on Medicare reform or any other matter I want to bring up. There is no constitutional right to that. There is certainly no constitutional right that if one gets nominated to be a judge, they have a constitutional right to be voted on. Nowhere does the Constitution give someone that, in any area whatsoever.

The idea somehow that we would only apply a filibuster to legislative matters and not judicial nominations, so one can filibuster a sense-of-the-Senate resolution——

The PRESIDING OFFICER. The time of the Senator has expired. The Senator's half hour is up.

Mr. DODD. I thank the Chair very much. I apologize to my colleagues for going a little bit. I appreciate the indulgence of the Chair.

The PRESIDING OFFICER. Does the Senator from Alabama seek recognition?

Mr. SESSIONS. Mr. President, the Senator from Alaska is prepared to speak.

The PRESIDING OFFICER. The Senator from Alaska is recognized.

Ms. MURKOWSKI. Mr. President, I thank the Senator from Alabama for this opportunity.

I join today with my colleagues in the Senate to address the judicial confirmation process and really the procedural quagmire in which we find this body right now. I take very seriously my obligation under the Constitution to provide the advice and consent to the judicial nominations of individuals who are nominated by the President to serve on the Federal bench. I have heard repeatedly over the hours the term ''rubberstamp,'' there is a rubberstamp approval. Those on my side of the aisle would automatically take the President's nominees. I do not take part of my job to mean that my vote is intended to be a rubberstamp of approval for the President's nominations to these critical judicial positions.

I am frustrated that after serving in the Senate for almost a year, and contrary to what some Members may assert, the Senate has not been permitted to vote up or down on the merits, on the qualifications of the individuals who are embroiled in this current dispute. Rather, we have been prevented, I have been prevented as a Member of the Senate, as an individual, from voting for or against a nomination by a legislative procedure, legislative procedural rules unique to this body.

We are engaged in the Senate in a historic session for not quite 24 hours, during which time we have heard about the nomination process, the qualifications of certain individuals to be Federal judges, the need for jobs, unemployment issues—a variety of compelling, interesting significant issues. I bring to this debate this afternoon a new issue and explain why legislation I have proposed, along with several other

colleagues of the Senate, to split the Ninth Circuit Court of Appeals, why this is relevant and important to the debate today.

The Senate has debated the qualifications and character of specific individuals to serve on the Ninth Circuit. As some would argue, by invoking the Senate procedures to filibuster the current judicial nominations, those on the other side of the aisle are simply trying to ensure the balance or the mainstream ideology on the U.S. court of appeals.

But there is little doubt in my mind they seek to maintain what I perceive to be philosophical bias on the Ninth Circuit Court of Appeals. For those looking for circuit courts whose actions may raise concerns about ideology and balance, I suggest my colleagues take a close look at the U.S. Court of Appeals for the Ninth Circuit. In the makeup of who is currently serving on the Ninth Circuit, the court currently has 9 judges appointed by Republican Presidents and 17 judges appointed by Democrat Presidents. I will put the Ninth Circuit record into a historical precedent, a recent historical precedent.

During the United States Supreme Court October 1996 term, the Supreme Court found it necessary to review 28 cases decided by the Ninth Circuit. These cases from the Ninth Circuit made up approximately one-third of the Supreme Court docket despite the fact that the Supreme Court has jurisdiction over 11 other Federal circuits and over Federal questions decided in courts of all 50 states.

Of those 28 Ninth Circuit cases back in 1996, the Supreme Court reversed 27. Some could argue this reversal rate is simply the impact of a more conservative Supreme Court disagreeing with the Ninth Circuit on close questions. However, most of the reversals were unanimous. In fact, six were summary reversals. The Supreme Court did not even ask for briefing or oral arguments. The Supreme Court simply reversed the Ninth Circuit on the basis of the petition for certiorari. This lopsided reversal rate has since continued since that 1996 term.

As we compare other circuit court reversal rates, it is helpful because it puts the Ninth Circuit into a context and helps us review the balance.

In 1997, of those cases decided by the Supreme Court in a full opinion, the Supreme Court reversed or vacated four cases from the DC Circuit cases and affirmed five. Balance that against the Ninth Circuit, where in that same year the Supreme Court affirmed 3 cases from the Ninth Circuit and reversed or vacated 14.

Let's go to 1998. The Supreme Court affirmed one case from the DC Circuit, vacated one case, and reversed no DC Circuit case. In comparison to the Ninth Circuit, in 1998 the Ninth Circuit was affirmed 4 times and reversed or vacated 14 times.

1999, the Supreme Court affirmed three DC district cases and reversed or vacated no cases from that court.

In 1999, the Ninth Circuit in comparison was reversed or vacated 9 times that year and affirmed only once.

In 2000, the DC Circuit was reversed once and only had one case from that court to go up to the Supreme Court that year. The Ninth Circuit was affirmed 4 times, and in the year 2000 reversed or vacated 13 times.

Over the last 3 years, one-third of all cases reversed by the Supreme Court came from the Ninth Circuit, the circuit that my State is part of. That is 3 times the number of reversals for the next nearest circuit, and a 33 times higher reversal rate than the Tenth Circuit.

I suggest these statistics are astounding in their proportion. One of the reasons the Ninth Circuit is reversed so often is it has become too large and too unwieldy. It is a simple fact. The circuit serves a population of more than 54 million people, almost 60 percent more than served by the next largest circuit. By the year 2010, the Census Bureau estimates that the Ninth Circuit will preside over a population of more than 63 million people. According to the Administrative office of the United States Courts, the Ninth Circuit alone accounts for more than 60 percent of all appeals pending for more than a year. The shear magnitude of cases brought before the court explains why it takes nearly 50 percent longer than the national average, almost 1 year and 4 months, to get a final disposition of a case in the Ninth Circuit. It takes 5 months longer to resolve a case in the Ninth Circuit than the national average for a court of appeals, and the delay increased by a full month in 2003 compared to the time it took in the year 2001. Talk about justice delayed, this is it here in the Ninth Circuit.

With such a huge caseload, the judges cannot possibly have the opportunity to keep up with the decisions within the circuit, let alone track decisions made in other circuits. I suggest that now is not the time to have vacancies on the bench in the Ninth Circuit.

One of the individuals who is the subject of these 30 hours, Carolyn Kuhl, has been waiting for an up-or-down vote to the Ninth Circuit since June 22, 2001. There are many who believe the U.S. Court of Appeals, the Ninth Circuit, is out of touch with the mainstream. This is part of the reason that I support splitting the Ninth Circuit and part of the reason the Senate must complete the pending nominations.

We only need to look back to March of this year when the Ninth Circuit decided that the Pledge of Allegiance was unconstitutional. Talk about a very graphic example of the Ninth Circuit being out of touch with mainstream America. The Senate, by a 94–0 vote, went on record expressing unanimous opposition to the Ninth Circuit decision in Elk Grove Unified School District. The U.S. Supreme Court shortly thereafter granted certiorari and briefs to be filed before the end of the year.

Another part of the problem with the Ninth Circuit is it is never able to speak with one voice. All other courts have one entity to hear full court en banc cases. The Ninth Circuit sits in panels of 11. This system injects unnecessary arbitrariness to decisions. In an en banc decision, a case is decided 6 to 5. There is no reason to think it could actually represent the views of the majority of 24 active members of the bench. In fact, there are some commentators who have suggested that a majority of the 24 members of the Ninth Circuit may have disagreed with the pledge decision. But there was a concern that a random pick of 11 members of that circuit to hear the case en banc might have resulted in the decision being affirmed.

The time has come to fill the vacancies in the Ninth Circuit and to enact legislation to split the circuit. We have heard again many times in the Senate over the course of these hours: Justice delayed is justice denied. That is most certainly happening in the Ninth Circuit. That is happening to the individuals who are pending before the Senate seeking confirmation of their judicial appointments. Filling the current vacancies would decrease the time it takes to resolve cases and would therefore provide better administration of justice.

I see the Senator from Ohio is in the Senate, and I know he was to have a share of our side's time.

Mr. SESSIONS. What is the time situation?

The PRESIDING OFFICER. The majority controls 17 minutes and the minority controls 30 minutes allocated.

Mr. SESSIONS. I yield to the Senator from Ohio for 10 minutes or so.

Mr. VOINOVICH. How much time remains?

The PRESIDING OFFICER. There are 16½ minutes.

Mr. VOINOVICH. Mr. President, today I rise to talk about this body's treatment of President Bush's judicial nominations. This is not the first time I have been forced to come to the floor to protest this treatment, but I hope it will be the last.

Over the past few years we have seen highly qualified nominees wait sometimes two years before their nomination reaches the floor of the Senate, only to see their records and reputations vilified for political purposes in the interim or to watch as cloture vote after cloture vote fails.

And where has this filibustering and posturing gotten us?

I want to underscore that one might question spending 30 hours on the issue of the Democrats using the filibuster to frustrate the Senate's right to advice and consent on presidential nominees, but we would not be here today if my colleagues across the aisle had not created a constitutional crisis with their use of the filibuster—and have

now driven us—in order to protect the Constitution to consider changing the cloture rules of the Senate.

Beyond the constitutional crisis, there is a diminishing of the third branch of Government, the Judiciary, at the hands of the legislative branch that has serious implications for the people of the United States.

We have 12 judicial emergencies on the circuit courts of appeal. The President has done his job, nominating new judges for 11 of the 12 appellate court vacancies. But the Senate has not done its job in confirming these judges.

And there is a cost associated with these vacancies. The American taxpayers spend $5.1 billion for the federal judiciary every year. The American people are paying for fully staffed courts—not for political games. When courts are vacant and cases take longer than they otherwise could, lives are disrupted; businesses can be crippled, and financial resources are drained from the productive economy.

My circuit in particular, the Sixth Circuit, is getting slower and slower as the obstruction continues. It has been plagued by political game-playing by my friends, the Senators from Michigan, who want to control who President Bush appoints to the circuit court vacancies that currently happen to exist in Michigan.

Over the last 2 years, court delays in the already-slow Sixth Circuit have increased by nearly 2 months.

In 2001, it took 28.9 months, that's over 2 years, in the Sixth Circuit for a case to go from original filing in district court to final decision on appeal.

By June, 2003, it took 30.8 months. This 2-month increase difference may seem small, but there are more than 2,000 cases in the Sixth Circuit affected by this growing delay. With 2,000 plus cases being delayed nearly 60 days, more than 120,000 extra days have been spent by both parties waiting for a decision. What a waste of resources.

I would like to draw your attention to a nominee who has faced the harshest of criticism from this body: Charles Pickering. I preface my comments on Judge Pickering, with a brief review of my civil rights record. The utility of this will be important in a few minutes.

I have always been very proud of my record on civil rights. When I was Mayor of Cleveland, we created the first Minority Business Development Center operated by a city. As a result, minority participation in city contracts rose from 1.5 percent to 28 percent in the first 2 years.

As Mayor, we also increased the amount of business the city did with minority and female businesses from less than $1 million per year to more than $90 million/year by 1989.

We recruited and promoted more minority firefighters than any other administration in the city's history. We increased minority hiring on the police force by 63 percent in 5 years.

We successfully defended our fire and police hiring program in a landmark U.S. Supreme Court case that established that prospective race-conscious relief for past discrimination is constitutional.

I also lobbied Congress on behalf of establishing a Martin Luther King Day and made sure, as President of the National League of Cities, that it was properly celebrated across America. I was one of only 2 invited to the inauguration of Martin Luther King Holiday in Atlanta.

As Governor, we established the Governors Challenge Conference, to discuss positive human relations. We established the Disadvantaged Black Male Commission, which helped achieve a 200 percent funding hike for the Commission on African American Males; the Urban Schools Initiative, to improve accountability and performance in Ohio's urban school districts; and the Cleveland Scholarship Program, recently upheld by the U.S. Supreme Court, to give scholarships for low-income families and allow them to send their kids to the school of their choice.

These are just a few of the civil rights initiatives I worked on before coming to the Senate. And yes, I broke ranks with my colleagues on this side of the aisle to support hate crimes legislation, and I have been working with one of my colleagues on the other side of the aisle on racial profiling legislation.

I mention all of this now so that people know that I would not support a nominee such as Charles Pickering if I thought for one minute that he would undo any of the progress we have made in the civil rights area, or if I thought he would treat individuals differently because of the color of their skin.

Judge Pickering has been a leader for equal rights, integration, inclusion and reconciliation in his community, church, political party, and state.

As a county attorney in the 1960's, he worked with the FBI to dismantle, disrupt and prosecute violent members of the Ku Klux Klan. In 1967, he testified against the Imperial Wizard of the KKK for a fire bombing of a civil rights activist in Mississippi. That was not easy in 1967.

In 1976, he hired the first African-American staffer for the Mississippi Republican Party.

In 1981, he successfully represented a black man falsely accused of robbing a 16-year-old white girl.

In 1985, as President of the Mississippi Baptists he presided over the first Convention session addressed by an African-American pastor and the first African-American congregation to join and integrate the Convention.

In 1988, he chaired a race relations committee for Jones County, Mississippi.

In 1991, he worked with his son and son-in-law to integrate his former fraternity at the University of Mississippi. He helped establish and still serves on the Board of the Institute of Racial Reconciliation at the University of Mississippi.

In 2000, he helped establish a group to work with at-risk African-American youth in Laurel, Mississippi.

Mr. President, in examining Judge Pickering's fitness for this judgeship, it is important to not only look at his record, but also his broad base of support from individuals of varying backgrounds and political affiliations.

Judge Pickering has been endorsed by the current president and 17 past presidents of the Mississippi State Bar. He has been endorsed by all major newspapers in Mississippi. He has been endorsed by all statewide elected Democrats and the chairman of the Mississippi Legislative Black Caucus.

James Charles Evers, brother of slain civil rights leader Medgar Evers has said of Judge Pickering:

> As someone who has spent all my adult life fighting for equal treatment of African-Americans, I can tell you with certainty that Charles Pickering has an admirable record on civil rights issues.

Rev. Nathan Jordan, Pastor, St. John United Methodist Church and former President of the Forrest County NAACP:

> Without hesitation, I can truthfully say that Judge Pickering is an extremely fair judge who serves all our citizens. . . . It seemed to me that he pushed very hard to insure the fair treatment of minorities.

Ruben V. Anderson, the first African American Supreme Court Justice in Mississippi and former associate counsel for the NAACP stated:

> I have known Judge Pickering for at least a quarter of a century. At all times I have found him to be an honorable man. . . . Judge Pickering would be an asset to the Fifth Circuit Court of Appeals and I recommend him without reservation.

There is no reason—no reason—as one looks at the qualifications of hundreds of people that this Senate has already confirmed over the years that Charles Pickering should not be sitting on the Fifth Circuit Court of Appeals.

The reason he is not is because my colleagues on the other side of the aisle, for all intents and purposes, have modified the Constitution by filibustering his nomination and denying this man an up or down vote on the floor of the Senate.

It is an outright violation of the advise and consent provision of the Constitution, and all Americans—Democrats and Republicans, liberals and conservatives—should demand that it stops now so that the judicial branch of Government can go about doing the job envisioned for it by the Constitution, and this body can get on with the other business of the people.

This has to end—it has to end—and I prayerfully and respectfully ask my colleagues on the other side of the aisle to cease and desist their obstructionist tactics for the benefit of our Constitution and the people of the United States of America.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, will the Senator yield? He has been talking

about the Sixth Circuit and this chart they have been placing in the Chamber.

By the way, Mr. President, what is the time on this side?

The PRESIDING OFFICER. The majority controls an additional 7½ minutes.

Mr. SESSIONS. They have been saying there are four judges being held up. But there are four being held up in the Sixth Circuit.

This is a resolution just passed I believe yesterday by the Michigan State Senate, expressing concern about this. I would just like to read from it. I know the Senator from Ohio was concerned about this circuit. It is his circuit.

They say:

Whereas, The Senate of the United States is perpetuating an injustice and endangering the well-being of many Americans. Its actions are jeopardizing our system of justice in 6 out of the 12 federal judicial circuits that have been declared ''judicial emergencies,'' including the 6th Circuit Court of Appeals which includes the state of Michigan. . . .

They say:

Whereas, The Senate of the United States is allowing the continued, intentional obstruction of the judicial nominations of all these nominees put forth by the President of the United States, including four fine Michigan jurists: Judges Henry W. Saad, Susan B. Nielson, David W. McKeague, and Richard A. Griffin, nominated to serve on the United States 6th Circuit Court of Appeals. . . .

I ask the Senator from Ohio, isn't it true that the chart they have been putting up says four judges are being mentioned; it does not include these four judges whom they are also obstructing?

Mr. VOINOVICH. They do not include those four judges who are being obstructed.

Mr. SESSIONS. I will just point out, Mr. President, if the Senator will yield the floor——

Mr. VOINOVICH. I yield the floor.

The PRESIDING OFFICER. The Senator from Alabama is recognized.

Mr. SESSIONS. Mr. President, I will just conclude by noting this is a very strong resolution from the Michigan State Senate. They say:

Resolved by the Senate—

That is the Michigan Senate—

That we memorialize the United States Senate and Michigan's United States Senators to act to end the filibusters of the federal circuit court nominees pending on the Senate floor, to release those being upheld in the Judiciary Committee of the Senate of the United States, and to vote for the bipartisan Frist-Miller Resolution. . . .

I ask unanimous consent that this resolution be printed in the RECORD.

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

Senator Cropsey offered the following resolution:

SENATE RESOLUTION NO. 199

A resolution to memorialize the United States to end the filibusters of the federal circuit court nominees pending on the Senate floor, to release those being held up in the Judiciary Committee of the Senate of the United States, and to support the reforms of the federal judicial confirmation process, all which will be addressed during 30 hours of floor debate this week.

Whereas the Senate of the United States is perpetuating an injustice and endangering the well-being of many Americans. Its actions are jeopardizing our system of justice in 6 out of the of 12 federal judicial circuits that have been declared ''judicial emergencies,'' including the 6th Circuit Court of Appeals which includes the state of Michigan; and

Whereas the Senate of the United States is allowing the continued, intentional obstruction of the judicial nomination of all these nominees put forth by the President of the United States, including four fine Michigan jurists: Judge Henry W. Saad, Susan B. Nielson, David W. McKeague, and Richard A. Griffin, nominated to serve on the United States 6th Circuit Court of Appeals; and

Whereas there has never been a filibuster on any Court of Appeals nominee in the history of the Senate. This obstruction continues to harm the lives, careers, and families of eminently qualified judicial nominees and is prolonging the judicial emergencies that have compromised the administration of Justice for many of our fellow citizens in Michigan and around the country; and

Whereas both of Michigan's Senators continue to block the Judiciary Committee of the United States Senate from holding hearings regarding these nominees. This refusal and the refusal by many of their colleagues to allow the United States Senate to complete its constitutional obligation of advice and consent is denying all of the nation's filibustered nominees an up or down vote on their nomination. All the while, the severe backlog of cases is growing; and

Whereas the 30 hours of debate on the floor of the Senate of the United States aims to improve our judicial system by attempting to end the filibuster on several nominees, and the blocking of our Michigan 6th Circuit nominees, while instituting necessary reforms in the judicial confirmation process; now, therefore, be it

Resolved by the Senate, That we memorialize the United States Senate and Michigan's United States Senators to act to end the filibusters of the federal circuit court nominees pending on the Senate floor, to release those being upheld in the Judiciary Committee of the Senate of the United States, and to vote for the bipartisan Frist-Miller Resolution (S. Res. 249); and be it further

Resolved, That copies of this resolution be transmitted to Michigan's United States Senators, The Senate Majority Leaders, the President Pro-Tempore of the United States Senate, and the President of the United States.

Mr. SESSIONS. Mr. President, there has been a lot said here. I just want to share a few thoughts. This matter is, at its core, about the rule of law in this country. We have a system that believes judges are here to apply the law as written, they are not here to enforce their rules, their personal political agenda, do what they think is nice in every case.

Clients have rights. If the rights they have protect them from lawsuits, they should be protected. If they are entitled to recover or be successful, they ought to be successful. It is up to the judge to apply the law fairly and objectively.

President Bush has his hand on the heart of the problem. He understands what is wrong with the judiciary in America. He knows it is out of control. He knows we are allowing verdicts to run wild. He knows we have a radical secularization of America that is occurring through the power of the Federal courts. It is not healthy. We have things such as the Pledge of Allegiance being struck down. He knows criminal cases are being tossed over at record rates.

Two judges we confirmed—Berzon and Paez—and I voted to give them an up-or-down vote, and I voted against them on the merits—these two nominees, in separate cases, struck down California's highly effective ''three strikes and you are out'' law that has helped drive down the crime rates significantly in California. And I say that as a former prosecutor of over 15 years. Absolutely, that has had an impact in the reduction of the crime rate in California. They struck those down as unconstitutional.

Mr. President, 170 death penalty cases have been overturned, as the Senator noted, by this Ninth Circuit, the most liberal circuit in America, and they struck down the Pledge of Allegiance. The U.S. Supreme Court has reversed the Ninth Circuit—in 1 year—in 27 out of 28 cases; in another, 14 out of 17 cases. In fact, the New York Times several years ago, in a news article, said a majority of the Supreme Court considers the Ninth Circuit to be a rogue circuit.

So what we are trying to do is come back to the mainstream. I am shocked that the distinguished Senator from New York, Mr. SCHUMER—who is really the point man on the advocacy of judicial activism in the Senate—I would submit this is what he said in this debate earlier, and I am just shocked by it. No wonder when I came in, I saw Senator SPECTER having his feelings hurt. Senator SCHUMER said:

No one except a far right militant extreme minority believes that the courts are being obstructed when 168 judges are approved and 4 are not.

So that is not the language of moderation. That is not the language of collegiality. They are accusing Members over here of being far right extremists because they do not agree with the filibuster tactics that are going on here.

In another comment recently, on the Internet site 365Gay.com:

New York's other Senator, Democrat Chuck Schumer [was quoted as saying he] launched a broadside at conservatives, accusing the President of ''loading up the judiciary with right-wingers who want to turn the clock back to the 1980s.'' Schumer said America is under attack from ''the hard right, the mean people,'' and said ''They have this sort of little patina of philosophy but underneath it all is meanness, selfishness and narrow-mindedness.''

That hurts my feelings.

Mr. President, these nominees who are here who are being held up are not extreme. Janice Rogers Brown, an African American, who grew up in Alabama under racial discrimination, went to California, got her law degree at UCLA, a single mom, got elected to the Supreme Court of California, not a conservative State. She got 76 percent of the votes. Are these mean-spirited, selfish, narrow-minded people? Not Janice Rogers Brown, if you saw her testify, as I did.

Carolyn Kuhl went to Duke Law School, graduated on the Law Review, clerked with Justice Anthony Kennedy

on the Ninth Circuit when he was on the Ninth Circuit, and has served for a number of years on the courts out there and has won bipartisan praise from those courts.

Mr. President, I ask unanimous consent that I be given an additional 3 minutes to be deducted from the majority time in the next section.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. SESSIONS. And Priscilla Owen. I guess they claim she is a right-wing, mean-spirited person. Priscilla Owen graduated at the top of her class in law school, made the highest possible score on the Texas bar exam. She was one of the most successful legal practitioners in all of Texas. They asked her to run for the supreme court. She did. She won reelection with 84 percent of the vote and the support of every major newspaper in Texas.

Bill Pryor, the attorney general from Alabama, got 59 percent of the vote in his reelection bid.

These are people out of the mainstream of this country, right-wing extremists? No, sir. The values this country holds dear with regard to the legal system, that were bequeathed to us from the English tradition, need to be cherished and protected and valued. America understands this. Mainstream America is very troubled by courts that do not adhere to the traditions of how to interpret law in America. They do not believe judges are entitled to reinterpret the meaning of words and statutes, and in our Constitution to legitimate the perpetuation of a political agenda.

That is what it is all about. President Bush understands that. The American people understand that. That is mainstream. The kind of allegations we have had here against these fine nominees is not mainstream. It is typical of the hard left that comes from the People for the American Way, the American Civil Liberties Union, and those kinds of groups.

Mr. President, I feel really strongly about it. I believe the majority acted responsibly during the Clinton years. We did not maintain a filibuster against Clinton judges, as has been done now for the first time in history. That is what is occurring today, a filibuster, systematically, of a number of highly qualified judges for whom there is no basis to object on the merits.

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

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. KOHL. Mr. President, I have been in the Senate now 15 years, and I must say I never experienced what will be 30 hours, when this debate ends at around midnight tonight, that I thought were as off point and, in many ways, as not relevant to what we are talking about here—which is Federal judgeships in our country—as this debate has been.

In my judgment, that is because our colleagues on the other side of the aisle have not wanted to deal with the facts and have wanted to, instead, try to create impressions which are not true. Because the fact is—and it has been said now on many occasions and many times since this debate started last night—the President and the committee have sent to the floor 172 nominees since he came into office, and we have voted out 168 of them positively, and 4 have been held up.

So how can anybody claim that in fact there is a conspiracy to deny those nominees sent up by the President a vote? Mr. President, 168 have been voted on and are now sitting in their Federal judgeships, and 4 have been held up.

Furthermore, the vacancy rate at the Federal judgeship level is less than 5 percent. In other words, over 95 percent of all the Federal judgeships in this country are now presently occupied. When you have a vacancy rate of less than 5 percent, how can anybody make the argument that there is something sinister going on?

Just a minute ago, my colleague from Alaska suggested that in the Ninth Circuit, because of the vacancies, apparently, justice delayed is justice denied. That phrase has been used time and again to suggest that perhaps a third or a half of all of the Federal judgeships in this country today are vacant. Again, I repeat, it is less than 5 percent. It is at its lowest point since 1985 in terms of vacancies.

Now, on the Ninth Circuit, which was referred to by my colleague from Alaska, there are 25 circuit court judges who are supposed to be sitting, and there are but 2 vacancies at the present time. So how can we make the argument that justice delayed is justice denied because there are ''so many vacancies on the Federal judiciary''? It simply is not true.

So what is the argument about? What are we spending these 30 hours on? To suggest that the Democrats are holding up the Federal judiciary by some vast conspiracy which, in fact, the numbers do not suggest in any way to be true?

In fact, when President Bush took office, we did have a vacancy rate of about 12 percent, and now it is down, as I said, to less than 5 percent, which is at its lowest point since 1985.

So to my colleagues on the other side of the aisle, what is the point? Why are we spending 30 hours debating an issue which, in fact, is not an issue? If we want to debate ideology, that is an entirely different story. But that is not what this 30-hour debate is all about. It is about the assertion made by the other side that the Democrats are preventing our Federal judiciary from doing its job by decimating Federal judgeships all over the country.

As I pointed out here, in the most clear manner, in an arithmetic way, the argument in no way has any merit. So I wish we could move on and talk about the things that are really important to the American people today, on which they are looking to us for leadership: Our economy, our deficit, our unemployment rate, our health care crisis, our educational crisis, the problems men and women who are leading their regular lives every day face and on which they are looking to the Federal Government for at least some help and assistance.

They are not all hot and bothered about the fact that 4.5 percent or 5 percent of the Federal judgeships in this country are today vacant, which is to say that over 95 percent are occupied. They are not concerned about that. They are concerned about their real problems and what we are doing to try to alleviate them. And here we are, taking 30 hours and, in my opinion, just wasting it in talking about a problem which the other side alleges exists and does not exist.

Finally, when President Clinton was in office, and the Republicans controlled the Senate from 1995 to the year 2000, nominees were also denied votes in that era. They were denied votes because they were not given hearings by the Republican Judiciary Committee. So they were denied their vote in much the same way that some are being denied a vote right now. That is the way the process works. There is nothing sinister about it, and it certainly does not cripple our country's judicial system.

My colleague from New Jersey is, I believe, waiting to speak.

The PRESIDING OFFICER. The Senator from New Jersey.

Mr. LAUTENBERG. I thank my friend from Wisconsin, Mr. President, and I was very interested in what he had to say. I thought it was right on the mark.

The fact is, this is a clear example of misplaced priorities, those of the Republican leadership and the White House. It is hard to understand why there is such outrage on the other side of the aisle about these four people being denied a spot on the Federal bench.

If they are worried—and I heard it requested here: Give these people a break. Be fair with them.

They are worried about these four people being denied their opportunity, but there is an expense to putting them on the bench that is going to be felt by Americans across this country.

What about the 3 million people who are denied jobs? What about the millions of jobless being denied unemployment benefits? What about the White House's attempt to deny millions of workers their overtime pay? What about lower income, working Americans being denied an increase in the minimum wage? What about the millions of women being denied their right to reproductive freedom by nine men surrounding the President when he signed the new anti-choice law? They took away a woman's right to make a decision, in concert with their doctor, about their health because these nine men—the male oligarchy—decided that it was appropriate that they take away a woman's rights.

There was not one woman on the floor to defend that decision. Not one woman spoke about it. Not one woman in this picture or even in the other picture that was shown in the top newspapers across the country. Not one woman, but they are making decisions about women.

I said the other day on the Senate floor, and I repeat it, I have three daughters, and I respect their judgment about how they ought to conduct their pregnancies and how they ought to live their lives to make sure they are healthy to take care of the nine grandchildren I have been blessed with, and not run any risk—my middle daughter is on her fourth pregnancy right now—not to run any risk that anything was amiss with her health that she couldn't take care of her three children.

What about the administration's attempts to deny our troops their imminent danger pay?

I just came from Walter Reed Hospital with other Senators, and I met a couple of people there. One was a young double amputee from Rockland, MA. He was in Iraq 3 weeks. He has no hands. Part of one arm is still in place. Most of the other arm is missing. It is a tragedy.

My guess is he was somewhere in his early twenties. He had been a member of the National Guard a few months and was called up from Rockland, MA.

By the way, two of our Senators—one former and one present, amputees themselves; one with three limbs missing—went to Walter Reed to console this young man and encourage his spirit and his belief that life can be functional. Senator Cleland, now out of office, and Senator INOUYE with an arm missing that he lost in southern Italy, went to cheer up this young man.

What about them? We are using time here to talk about these choices when they are not choices. They are not qualified by the judgment of many. But why carry on this battle? Why this stick in the eye to the public at large when there are so many other issues about which to talk?

I had a chance to be on TV this morning with one of our Republican colleagues. We talked about what was going on. He said: We are not losing any time. My duty was at 5 o'clock in the morning. What time did we lose? It occurred to me, what a foolish response. If it is important enough to be here at 5 o'clock in the morning, then why isn't it important enough for us to be taking care of what we have to in Iraq and getting those kids home and making sure we get as many allies as we can to pick up this burden we have and share it.

Why can't we talk about that at 2 o'clock in the morning or 3 o'clock in the morning or 4 o'clock in the morning? I don't get it. Why can't we talk about 3 million jobs lost and talk about a way to adjust that situation—jobs lost.

What about the administration denying photographers the right to honor our fallen heroes coming back in flag-draped coffins? When do we say the public doesn't have a right to honor them and remember that these people gave their lives on behalf of our country? Why is that not permitted? Why is it so obscure? We can't see them. They don't show the people what has really happened in the war. Maybe they won't think it is such a bad idea that we don't have the kind of partnership we ought to have over there fighting the battle.

On Monday, I went to a funeral in Newark, NJ, of a young man named Joel Perez. He was a sergeant. He was on the Chinook helicopter, as was the man we visited this morning. There are bones broken all over his body, but he is glad to be alive. He is very happy to be alive. He knows what happened to the 16 others. They lost their lives.

Since May 1, the President has found time for 36 fundraisers. How many families did he visit to console, to tell them he is sorry and acknowledge their bravery in serving? No, the debate is on four judge nominees. What do the American people think about that?

Look at the majority leader's own Web site. He said he did a poll. The poll said: Should the President's nominees to the Federal bench be allowed an up-or-down vote on confirmation as specified in the Constitution?

First error, ''as specified in the Constitution.'' I will talk about that in a minute. The poll answers came in: 60 percent said no, the President's nominees to the Federal bench ought not be allowed an up-or-down vote if the opposition doesn't want to give it to them—60 percent. But they quickly changed this Web site because they didn't like the answer they got. So they changed it to a more mealy-mouth kind of thing: Should we do it or shouldn't we do it? The Constitution says ''advise and consent.'' It doesn't say consent and then advise, which is what they would like to see us do here. They would like to see us go ahead and say: Mr. President, that is what you asked for; that is what we are giving you. No, our responsibility in the minority and in the majority is to stand up for what we believe and what the people who sent us here want us to say, and if they don't want us to say it, then they will reject it at the appropriate time.

This Senate spending 30 hours to talk about four judicious—judicial; they are not judicious at all—judicial nominees? Meanwhile, 3 million have lost their jobs since this President took office.

I ask my colleagues to listen closely to this fact. In the private sector, two Americans have lost their jobs every minute that George W. Bush has been President. Two families without an income; two families where there may be some humiliation about an inability to go to work.

I remember my late father who finally, in the desperate days of the Depression, had to take a job with the WPA. He was embarrassed about doing it because it looked like welfare. It was a job. The Government had created jobs. He was humiliated having to take that job, but he did it because he wanted to provide for me, my mother, and my little sister. He had to do it.

What about those 3 million people? What are we doing to help them go to work? The latest survey shows there are a total of 8.8 million Americans currently unemployed; 3 million have lost their jobs since this administration took office; and the reality is this administration doesn't have a jobs plan. Not surprising. It has a bad record on jobs.

Let's look at this chart of the last 80 years. It shows jobs gained or lost during administrations, in the millions. We have two administrations identified in red. By the way, those in green were Harding, Coolidge, Roosevelt, Truman—a variety. None of them, except President Herbert Hoover and George W. Bush, have lost jobs during their administrations. It is a sad commentary.

The chart shows actual jobs gained or lost in the millions, and here we see there are 3 million lost.

The two blobs on this chart are the administrations of Herbert Hoover and the current administration. When we look at this chart, there are only two administrations in the last 80 years that have resulted in a net job loss: this administration and Herbert Hoover's administration. I don't remember thinking about it during Hoover's time, but I was there at the time. I knew it was a disaster in my house.

I would think the Bush administration doesn't enjoy sharing this kind of company, but the inaction of this administration on this issue makes me wonder if they understand the damage they are causing to the economy and families across the country. But we are taking 30 hours of time. The 30 hours don't belong to us. They belong to the people of the country. It belongs to our constituents.

Taking 30 hours of the time of the Senate not to pass a jobs creation bill, not to pass incentives for companies to continue manufacturing in the United States, not to extend the unemployment benefits for people victimized by this economy—none of that. We are here to discuss a couple of extremist judicial nominees the President wants to force down our throats.

President George W. Bush presented himself in the beginning days of his campaign and in the early days of his administration as being a uniter, not a divider, except that is far from the truth. I have never seen a more ideologically partisan White House, and I served with Ronald Reagan when he was President. I served with George Bush, Sr., when he was President. I served with President Bill Clinton. I have never seen a more ideologically partisan White House. This administration and my colleagues across the aisle are driven ideologically to the point that I think there is kind of an impaired vision to the simple, clear, and irrefutable facts.

The Senator from Wisconsin said it. As of today, the Senate has confirmed 168 judicial nominees recommended by President Bush and blocked 4 in 3 years. President George W. Bush has gained more confirmations than President Reagan did in his first full term. Mr. President, 168 confirmed judicial nominees is particularly impressive because 100 nominees were confirmed when Democrats still controlled the Senate in the last Congress. We did our share, and we will continue to do our share, but we will not let the judicial system and the citizens of this country be taken advantage of, not if we can help it.

This is a 98-percent rate of confirmation for President Bush's judicial nominees. That is an impressive rate. As I said before, the Constitution says that the Senate must advise and consent, not consent and then advise, which is what we would like to see happen here. It is the Senate's job to put a check on the President's appointments. If it were not, then the Founding Fathers would not have written the consent requirement into the Constitution.

I think it is instructive to look back at the treatment of President Clinton's judges by the Senate. During the Clinton administration, 248 Clinton judicial nominees were confirmed, and 63 were blocked from getting votes. That is 20 percent of all President Clinton's nominees, and now there are complaints from the other side because President Bush is not getting just 2 percent of his choices.

During the Clinton administration, Republicans placed secret holds on judicial and executive nominees preventing many fine Americans from even having a hearing in the Senate Judiciary Committee.

The Senator from Wisconsin is on the Judiciary Committee. He knows and everybody in this room knows that you don't have to have a talkathon to kill nominees. All you have to do is just not bring it before the committee, or if they go before the committee, not bring them before the Senate. That is the control of the majority.

We did it differently when we were in charge. We processed most of the administration's recommendations.

In total, 63 Clinton judicial nominees and more than 2,200 Clinton executive nominees were defeated by delay or no votes. These numbers are unchallengeable. We see it here: Clinton nominees from 1995 to 2000, number confirmed, 248; nominees blocked, 63, 20 percent of the total. Of the Bush nominees, we processed 168; nominees blocked, 4; total, 2 percent. That is what is happening. And now to have this circus taking place with the crocodile tears about how we treated these nominees, and not one word about how we are treating the public. No, no.

Mr. SESSIONS. Will the Senator yield for a question?

Mr. LAUTENBERG. No, I would like to finish, Mr. President. I am sorry. At such time as the floor shifts hands, I will be happy to answer any questions.

The fact is, Democrats have used the filibuster only to block nominees with records of extremism. Americans deserve an independent judiciary with fair judges who will enforce their rights and uphold the law. Republicans want Democrats to blindly confirm result-oriented, agenda-driven judges whose rules of judicial interpretation change to meet their ideological agenda.

It is pretty obvious, I guess, to the American people, we are not consenting. That is the choice and the right that the Founding Fathers gave us as Senators. I am not about to give up that right.

I ask the Chair, how much time do I have remaining?

The PRESIDING OFFICER. The Senator from New Jersey has 4½ minutes remaining.

Mr. REID. Will the Senator yield for a question?

Mr. LAUTENBERG. I will.

Mr. REID. Through the Chair to the distinguished Senator from New Jersey, I ask my friend, we have spent—how many hours it has been since last night at 6 o'clock—talking about four people. I am sure the State of New Jersey, like the State of Nevada, and all 48 other States, has people who are unemployed. New Jersey is a very heavily populated State. Does the Senator from New Jersey think the people in New Jersey would care about our dealing with, for example, unemployment insurance where during the last 3 years we have lost 3 million jobs, or does the Senator think they would like to talk about some way to get jobs for the more than 9 million people who are unemployed in this country?

Would the people in New Jersey rather we be doing that or what we are doing now?

Mr. LAUTENBERG. I say to my friend from Nevada, I hear two principal concerns from the people in New Jersey: One, jobs; having to get to work because not only is it the deprivation of funds and the shortage of being able to afford, many times, the necessities, but it is the humiliation of not being able to provide for your family. That is what they talk about.

Do you know what else they talk about in New Jersey? They talk about health care. They talk about prescription drugs. People in the senior community—and I happen to fit, thankfully, in that community—are concerned about the prescription drugs they can't get to sustain themselves.

We saw things in the paper today—I read these with great interest—about the successful effects of a drug that is called Lipitor. I am not advertising any medication, but look in the paper and you will see that it has reduced the possibility of heart attack. People want those drugs. We have got to live this long because, A, we were lucky and, B, maybe because we had the right doctors and the right prescription drugs to keep us going. So that is what they think about.

I have yet to have a call, that I am aware of, that said: Senator, for crying out loud, pass those four judges and, by the way, I am jobless, in case you should think about it; or: Pass those four judges and do not worry about the environment because we can stand some more toxic waste in our skies or on our ground. No, do not worry about those things. Senator, you just take care of getting those four people the job that the President and the Republican Party want them to have.

To answer the question the Senator from Nevada asked—and I am reminded about this constantly—3½ million people, since January 2001, have lost their jobs in manufacturing. It also breaks the economic structure that we desperately need. We need manufacturing jobs because those are decent-paying jobs. One does not have to have a college education there, or a master's degree, or anything like that for most of those jobs. It is for the people who want to go to work who have not had the advantage of getting the extended education.

That is what they want us to talk about. They want us to talk about what is happening: Where are these jobs going that are leaving our shores? What should we do about it?

Well, we do not have time for that debate. I have to remember to tell them that when they call up. Sorry, we cannot discuss jobs or prescription drugs, or your kid's schooling. We do not have time for it. We are busy, very busy, and we are under the gun, and that is to get our appropriations bills done and things of that nature. We have to get it done so that we can end this session and we can get back to our communities and talk to our people and do what we have to, to stay in touch. No, we do not have time for that.

The PRESIDING OFFICER (Mr. CRAPO). The time of the minority has expired.

Mr. LAUTENBERG. Mr. President, I reluctantly yield.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAIG. Mr. President, may I inquire how much time now is allotted to the majority side?

The PRESIDING OFFICER. The majority has 27½ minutes.

Mr. CRAIG. Mr. President, I recognize the Senator from Wisconsin is still in the Chamber. Let me say, in all fairness, I was listening from my office to the Senator when he asked how justice delayed is justice denied when the vacancy rate is so low. He also wondered why we are spending time on judges. I think his own words answer the question.

Senator KOHL declared that the judicial confirmation process should not be about politics. In a quote in the CONGRESSIONAL RECORD of 1997, Senator KOHL said: We need these judges both to prosecute and sentence violent criminals and to prevent more backlogs in the civil cases.

I think he also stated it was in our system where judges got blocked and that there was nothing sinister about it.

Let me read a couple more of the Senator's quotes because we have been accused of hypocrisy on this floor and I do not think any of us ought to be accused of that. Different circumstances and different times oftentimes produce less than consistent quotes. My guess is that this Senator has been a bit guilty of that on occasion, too.

In the CONGRESSIONAL RECORD of May of 1997, it says that Senator KOHL urged votes on nominees who had been approved by the Judiciary Committee. Let's breathe life back into the confirmation process, let's vote on these nominees who have already been approved by the Judiciary Committee, and let's see a timetable for future hearings on pending judges. Let's fulfill our constitutional responsibilities. Justice denied demands that that be at a minimum—and so forth and so on. I could read other quotes. My guess is that if we searched the RECORD, I would find quotes by myself.

I come to this debate in probably a slightly different way than some. I am a freshman on the Judiciary Committee. I have spent plenty of time over the last year watching the inner workings of the Senate judicial nomination process. With all due respect to our colleagues on the other side of the aisle, there is an emerging trend in the process that is very disturbing to this freshman Senator on the Judiciary Committee.

I refer to an effort by a select few to legitimize probes into the nominee's personal and political ideology, in addition to the nominee's judicial philosophy. That is, they would have us ask what the nominee thinks about such items as abortion, the death penalty, affirmative action, even though the future job of the nominee has nothing to do with what he or she thinks about these issues and everything to do with how the nominee would apply and enforce constitutional, statutorial, and common law in the cases involving those issues.

Now, that ought to be very clear and it ought to be a clear difference between how one approaches a judicial nominee and how we are now approaching judicial nominees. Those who have mounted this crusade have tried to divert attention from serious constitutional problems this process poses. They have held straw hearings and brought in heavyweight legal scholars to say, of course, a nominee's political ideology should be considered in the nomination process in an effort to pass off. Everybody knows that sort of attitude. But the academic gloss quickly wears off when there is no substance underneath, and they find out this is not a probative debate on judicial philosophy, this is really raw politics of the first instance.

In a 2001 Senate judicial committee hearing, the leading proponent of the personal ideology probe said this: For whatever reason, possibly Senators' fear of being labeled partisan, legitimate concerns of ideological beliefs seem to be driven underground. It is not that we do not consider ideology, we just do not talk about it.

Now you talk about it openly. If you do not have the right ideology, you cannot make it to a vote on the Senate floor. You may be the brightest legal scholar in the country, with an absolutely gold-plated record, but if you do not walk the fine line of political attitude, political philosophy, you do not cut it.

That Senator may truly not know that political ideology is not traditionally the subject of an extensive probe. However, I would submit that the rest of us do know the reason.

Law students—I have never been one—in their first year of law school know the reason. They cannot tell you that when they are called into the class, but a professor makes it very clear that it does not matter what they think about the legal issue at hand but only what the law is on the issue and how they should apply the law. That is what a freshman law student finds out.

From the very beginning, it is not the politics of the issue, it is the law: What does the law say, and how do you apply the law?

We are in the Chamber today not about law. We are in the Chamber today because of politics, because these judges who have been responsibly nominated by a President, brought before the Judiciary Committee, with the highest possible credentials in almost every instance, gold-plated records in the judicial process, cannot now come to the floor for a vote, not even a simple up-or-down vote.

Why? Because the other side has now established a litmus test of political philosophy, and if they do not meet it, they do not cut it. That is the bottom line.

Our Democratic colleagues even know the reason. Let me tell my colleagues what Senator PAT LEAHY has said. I am quoting him. I would not take him out of context. Nobody should take any Senator out of context. Here is what he said: We need to get away from a rhetorical and litmus test and focus on rebuilding a constructive relationship between Congress and the courts. We need balance and moderation that respects the democratic will and the weight of precedence. We do not need our Federal courts further packed with ideological purity. We do not need nominees put on hold for years while we screen them for their Republican associations.

I guess the only thing I can say about that quote is: that was then, this is now.

Senator TOM HARKIN said: I thought that if the President nominated them, they had a fair hearing, and they were reported out, my own decision was whether or not they were qualified, not whether they were ideologically opposed to me or to how I feel about what they believe. Again, that was then, this is now.

So then Senator HARRY REID said: I do not think we should have a litmus test on members of the subcabinet, the Cabinet, or the judges. But then again, that was HARRY REID then, not Senator REID now.

Although I myself have never studied the law, I know the reason, too. I am going to try to be as honest as I always am on the floor and as direct as I can be. When the nomination of Ruth Bader Ginsburg came up for the U.S. Supreme Court in 1993, I was confronted with a nominee whose past revealed that she had a vastly different political ideology than my own. My constituents from Idaho, in fact, made it clear how different she was in what she had done from the mainstream of my State's thinking. However, Justice Ginsburg was a judge of great ability, character, intellect, and temperance. Her record was replete with this evidence, and though at one time she had been a vocal advocate of particular political issues, she had a sharp understanding of the limit, of the character of the judiciary and the role she would play as a judge, a neutral arbiter, not an advocate.

Well, I voted for Ruth Bader Ginsburg, not because she had the same ideology—my guess is she was here and I am there, and I think the record probably clearly demonstrates that, but I was convinced she was a bright legal mind who would, in fact, not be an advocate but a neutral arbiter.

That is not the kind of judgment nor is that the kind of test that is being applied to the nominees who are before us now. It is raw politics, folks—nothing more, nothing less. It is a fine litmus test of the attitude on the part of the Democrats, and if it does not match the litmus test, they do not get the vote.

Now and then, of course, we probably ought to make a few examples here to prove that you have that kind of power, or that you can exert that kind of power, even in fact when the advice and consent clause of the Constitution, in my opinion, and I think the opinion of a lot of constitutional scholars—of which I am not one—is that we advise and we dispose, or consent, and that you do that not by suggesting to the President that he can only send up those who meet the narrowest of a litmus test but those who meet the broadest and the most easily substantiable character, quality, training, expertise, and talent. That is what we want.

Our Founders also understood the reason judicial nominees should not be subjected to personal ideologies. For instance, in Federalist Paper 78, Alexander Hamilton underscored how important an independent judiciary was to the separation of powers:

> The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution

of their pleasure to that of the legislative body.

To guard against such legislative encroachments, Hamilton emphasized the need for qualified judges; that is, individuals who possess virtue, honor, requisite integrity, competent knowledge of the law, be of fit character, and those who have the ability to conduct the job with utility and dignity. Character and competence is what Hamilton talked of and was, therefore, the foundation of the judicial selection process. Consideration of an individual's independent political will would undermine it.

Yet today, we have slipped into that morass of politics. We are not holding up individuals looking at them for the character of the individual and the quality of the legal mind and how they have demonstrated the use of that talent in their lifetime and through their professional ways.

Those are the issues that are debated on the floor, and that is the substance of this debate. For the first time, this freshman on the Judiciary Committee is witnessing something unique, and that uniqueness is quite simple. We are now applying politics instead of the judgment of character to the judges the President is sending forth for us to consider.

May I ask how much time remains on our side?

The PRESIDING OFFICER. Thirteen minutes, 50 seconds.

Mr. CRAIG. I yield such time to the Senator from Wyoming as he may consume.

The PRESIDING OFFICER. The Senator from Wyoming.

Mr. THOMAS. I will not take much time. I have been listening, of course, as we all have, to the debate, some of it from the chair this morning. Nearly everything has been said, I suppose. Not all of us have said it, and so it is important that we all do.

I am no expert in the judicial system. I am not on the committee. But I have been here and I have observed what has gone on throughout this whole last year. We keep talking about the fact that we ought to be talking about unemployment, we ought to be talking about a number of things, and I agree with that. We should have been doing that over the last year, but we spent a lot of time on this very issue right here on the floor when we could have been talking about energy; we could have been talking about health care; we could have been talking about all of those things.

So I kind of hate to hear that this 30 hours is holding things up when we spent much more than that with the other side simply holding up moving things along.

I am convinced there needs to be a system in the Senate we can depend on and work with, that we can bring it to a vote and decide yes or no. There has to be that system. That is what this is all about. There seems to be a lot of talk, of course, about the individual candidates we are talking about here who have not been able to be dealt with. But the real fact is it is the system that is in question. That is what it is really all about, and I think we need to deal with that issue.

There has been obstruction, frankly. There has been obstruction on almost all of our issues. It has been called slow-walking. Some evidence of that from last year is that we did not even get a budget. Remember that? We did not even get appropriations through the whole year.

That same obstructionism has been going on this year. It is all political. It is too bad, really, because we have so much we can do and so much we really ought to do. We have a constitutional duty, of course, to provide the advice and consent of these nominations. It is pretty simple. The Constitution specifically requires a supermajority for overriding a veto, for impeachment, for ratification of treaties. Advice and consent is not in that category and has not been in that category.

As I said, I will not take long. Some of the past comments from the other side of the aisle I think have been interesting as time goes by. Let me quote from Senator EDWARD KENNEDY from the CONGRESSIONAL RECORD in 1999, in September: Delays can be described as an abolition of the Senate's constitutional responsibility to work with the President and ensure the integrity of the Federal courts.

Another quote: The delay has been especially unfair to nominees who are women and minorities, selected for that sort of business.

Another from the Senator from California: I am very glad we are moving forward on judges today.

We have all heard, as we were growing up, that justice delayed is justice denied. We have vacancies in many of our courts that have gone on for a year or 2 years, in many cases getting to a crisis level. I am pleased we will be voting. I think whether the delays are on the Republican or Democrat side, let the names come up and let us have a vote. Let us debate and have a vote. The Senator from California and I agree with that point of view.

I yield the floor.

Mr. CRAIG. Mr. President, I thank the Senator from Wyoming for his comments as we debate this issue. How much time remains on our side?

The PRESIDING OFFICER. There are 9 minutes 40 seconds.

Mr. CRAIG. I yield to the Senator from Utah 8 minutes.

Mr. BENNETT. Mr. President, we have compared numbers around here, particularly the number of 168 to 4 over and over again. I make it clear that these two numbers are not in the same ballpark; that is, this is not 168 who have been approved and 4 who have been disapproved. There has been no vote disapproving the 4. Rather, it is 168 who have received a vote in the tradition and the precedent set and maintained for 214 years.

The Constitution was ratified in 1789, and from that time forward there has never been an instance where a judge reported out of the Judiciary Committee, or whatever committees preceded the Judiciary Committee in the existence of the Senate, never been a time when a judge whose name has come to the floor has been denied a vote until this year. If you take apples and apples, if you take the number of those reported to the floor and voted on until this year, the number was 2,372–0 for 214 years. Whether it was under control of the Democrats or the Republicans, this body never denied a reported nominee a vote. Some of those who got votes got defeated, but no one who was reported was denied a vote until this year.

We talk about the law. We talk about the Constitution. One of the parts of the law as I understand it becomes established is the question of precedent, 214 years of precedent, 2,372 cases of precedent upset in this Congress by the Democratic leadership.

A lot of people have called a lot of people names during this debate. I don't want to do that. I was urged to do that just before I came over here by some who said: Why don't you say the kind of things about them they are saying about you or their nominees? Mix it up.

I don't want to do that because I don't think that is useful. What I would like to urge on the Senate on this occasion is that we go back to a proposal that was made some years ago by the Democrats, specifically, Senator LIEBERMAN and Senator HARKIN, a proposal endorsed by Senator DASCHLE, that said let us eliminate the filibuster for nominees, start out with a 60-vote cloture motion, followed up with a second cloture motion at a lower level, follow it up with another cloture motion at another level, and so on. The Republicans did not endorse that. I am, today, rising to endorse that. I am today rising to say, we thought that rule change was not necessary because we thought the precedent would hold. But the precedent has now been broken. The precedent did not hold.

The time has come to recognize the wisdom of Senator LIEBERMAN and Senator HARKIN and Senator DASCHLE and others to change the rules. The vote we will have tomorrow on what is now called the Frist-Miller proposal is a vote to endorse the wisdom and farsightedness of Senator LIEBERMAN, Senator HARKIN, and Senator DASCHLE in previous Congresses. And the practical effect of passing Frist-Miller will be to establish in the Senate rules a 214-year-old precedent that has been broken in this Congress for the first time. The effect would be to establish in the Senate rules a precedent that has held up 2,372 times, and has only fallen in this Congress. It will be a vote to make a bipartisan solution to a problem that has spawned far too much acrimony, far too much controversy. It will be a permanent solution to this matter.

It will not solve the question of Miguel Estrada who was tired of having his reputation trashed and decided to withdraw and thus deprive the United States of the opportunity to have the services of a man who excelled academically, who excelled professionally, who, though he was appointed to the Solicitor General's office by the first President Bush, was maintained in that office for several years by President Clinton because they thought he was that good.

Today he has been attacked on this floor as a lemon, someone who deserved to be rejected. We have fallen to that level of discourse, and we should avoid that level of discourse. Let us adopt a bipartisan solution which Republicans previously blocked. This Republican is prepared to repent. This Republican is prepared to say, OK, I recognize the wisdom of Senator LIEBERMAN's proposal. I am willing to endorse it. Now it is before us once again. Let us not kill it just because it bears the name Frist-Miller instead of the names Lieberman-Harkin as it originally had.

Give Members an opportunity to put the bitterness, the wild and sometimes excessive statements behind us and move forward in the future as we have done in the past for 214 years to see to it that any nominee who makes it through the committee process and gets reported to the floor gets voted on, whether he or she is a Republican or a Democrat, Hispanic or an African American, a Roman Catholic or a Jew or whatever the situation. If he or she survives the committee process and comes to the Senate floor, he or she deserves a vote in the same tradition that we have followed for 214 years.

I yield the floor.

Mr. CRAIG. How much time remains on this side?

The PRESIDING OFFICER. There are 2 minutes 15 seconds.

Mr. CRAIG. Mr. President, let me be brief and close. I see the Senator from Washington and the Senator from Wisconsin ready to speak. As the Senator from Washington engages this afternoon, I would like to quote some of her comments so they are fresh in her mind.

Senator MURRAY raised the issue of the action on female and minority nominees was denying justice and holding the system hostage. On September 14, 2000, she said at a press conference: Our justice system is being held hostage and American communities are paying the price.

Senator MURRAY went on to say at a press conference on September 14: This delay is especially troubling when we look at what happens to women and minorities. It is time to dismantle the glass ceiling and let qualified jurists take their place on the bench. We are here to send a message. Confirm the judicial nominees pending before the Senate and let these qualified men and women fill the vacancies of the courtrooms across America.

That is a quote from the Senator who is about to address this afternoon the issue of the filibuster of the qualified judges who are before the Senate. I hope her statements of less than 3 years ago would be fresh again in her mind as she resumes the debate this afternoon.

I yield the floor.

The PRESIDING OFFICER. The Senator from Washington.

Mrs. MURRAY. Mr. President, this morning on the Senate floor I spoke at length about the importance of the Senate's role in confirming judges for lifetime appointments and talked of the success in the Senate confirming 98 percent of the judges sent to the floor. We have, I remind our colleagues, confirmed 168 judges on the Senate floor. That is pretty impressive. But all the Senate action that is important to occur before the end of the year is now being held up over four judges.

I also talked this morning about the success we had in Washington State using a bipartisan commission to select and confirm qualified judges. This morning I noted that we should be spending our time on much more pressing issues like helping the many unemployed workers who are about to run out of unemployment benefits.

We are wasting 2 days of the Senate's very limited time left in this session on four judges. We certainly have more important things to do. We were supposed to pass 13 appropriations bills by October 1. We did not. Today, more than half the bills that fund the Federal Government are incomplete, waiting for congressional action. We have a lot of work to do that affects millions of families. But instead, we are wasting 30 hours of the Senate, precious hours of time talking about four judges.

What we are not doing is we are not helping laid-off workers in these 30 hours. We are not improving health care. We are not fixing roads across this country. We are not improving the economy. We are not helping our troops. And we are certainly not improving veterans care. We are not doing anything for the millions of Americans who need help today because the other side is tying the Senate in knots so nothing can get done.

What we are doing right now reminds me a little bit of the behavior back in 1995 when the other side did not get exactly what they wanted on the budget, so they shut down Government. Boy, we really heard from people across the country when the Government was shut down. Federal services were shut down, people could not get their Social Security check, agencies were shut down. The needs of every American were set aside at that time so Republicans could complain about a budget with which they disagreed.

The same thing happened here today. The needs of every American are being set aside so Republicans can complain about four judges they want confirmed. Forget the laid-off workers, forget health care, forget education. The other side wants to make a point, and they are shutting down the Senate and the needs of the American people so they can make that point.

Each passing hour on this floor feels more and more like the Government shutdown of 1995. We cannot work on critical needs because the other side is holding things up. After 30 hours of hearing about this, the American people will get it. They will see that we are not working on the things that really do matter to them. I am sure many Americans are scratching their heads, wondering what is going on in the Senate. The answer is, we are not working on jobs. We are not working on education. We are not working on health care because the majority is upset we have confirmed only 98 percent of President Bush's judicial nominees.

As I mentioned this morning, there are much more important things we need to be doing. We do need to extend unemployment benefits for laid-off workers. I tried to bring up the bill to help laid-off workers get unemployment benefits, but when I bring it up the majority says it is not the right time to discuss helping laid-off workers.

I invite the majority to explain to laid-off workers in my State who are going to exhaust their benefits on December 31 why we are talking about judges instead of helping those laid-off workers? These hours that we are wasting on this manufactured crisis could be much better spent on the real crisis facing so many Americans.

Two weeks ago I introduced legislation to extend unemployment benefits to workers who will run out of benefits on December 31, right after Christmas. For millions of Americans who cannot find jobs, the clock is ticking and every day counts. Unless this Congress acts, those families are going to start the new year without a job and without any help paying for the basics like housing and food and medicine.

Two weeks ago I introduced the amendment in the Senate. If the majority wants to vote against helping laid-off workers, that is their choice, but we are going to force them to take a vote because working families should not be punished any more than they already have been in this tough economy.

Congress cannot leave town for the year—and many people are talking about ending next week—we cannot end next week without extending the benefits on which these many families rely. We have extended benefits in past recessions and we need to do it in this recession because the clock is ticking.

In my home State of Washington, we have the third highest unemployment rate in the Nation. It is 7.6 percent. Since President Bush took office, we have lost more than 70,000 jobs in Washington State. Those laid-off workers want jobs. They are eager to work. In King County alone, 10,000 people are on a waiting list for job training. They want to provide for their families, but they are about to get cut off unless the

Congress does the right thing and extends unemployment benefits. If Congress does not extend those benefits, another 124,000 in my home State, Washington State, will exhaust their benefits by December 31. These families are draining their savings accounts just to hang on. Many of them have run out of options. But they still have to pay their mortgage. They still have to pay their medical bills. They still have to pay college tuition. That is why they need these unemployment insurance benefits.

The bill I introduced will do three things. First, it will help families as they try to get back on their feet. These benefits simply will help them buy groceries, pay the mortgage, keep their kids in college. It will give them a little bit of cushion as they try to find work.

Second, extending benefits will help stimulate the economy in every State and every Member wants their economy to be better in their State because when we send the unemployment insurance, people then have the money they need to buy things for every day. That will be a shot in the arm for the hard-hit States, for our hardware stores, for grocery stores, and all of our businesses like that. It means these people will have the money they need to keep those businesses going as well.

Finally, extending benefits will help stimulate our Nation's economy. Every dollar invested in these benefits generates another $1.73 for our economy.

Laid-off workers deserve a vote on this bill. They deserve a debate on this bill. They deserve time in the Senate on this bill. They need our help. We should be using 30 hours of time to talk about the unemployed workers, the difficulties facing them, and how we in this Congress are going to get them back on their feet. That is what we should be spending 30 hours on.

It seems to me at a time when we are spending $1 billion a week in Iraq, the very least we can do is give unemployed Americans a few hundred dollars a week. Congress cannot leave town without providing a life line to laid-off workers. The clock is ticking, time is running out, and we should be helping laid-off workers instead of squandering our limited time on the judges issues.

To understand how serious this is, I will read some letters from the people I represent.

How much time remains on my side?

The PRESIDING OFFICER. The Senator has 21½ minutes.

Mrs. MURRAY. I ask the Presiding Officer to notify me when I have used 6 minutes.

The PRESIDING OFFICER. You will be notified.

Mrs. MURRAY. Let me read a letter from Laura Perry in Battle Ground, WA, a small community in southwest Washington. Laura wrote:

I really need to know what is being done not only in the State of Washington, but in Congress to acknowledge workers who have lost their jobs.

Millions of us are going to lose our homes!

Throughout my life, I have done all the right things to stay current with the job market.

In spite of this fact and having a college degree, I lost my job after 9/11 when my company closed the northwest branch office due to the economic downturn.

Now, a year and one-half later, I find that I do not fit in all the niches for acquiring employment retraining because I am not on welfare, I haven't been employed by Boeing, I am not a dislocated homemaker, and I am not a veteran.

Please let me know what is being done to help the unemployed in this country when the unemployment insurance runs out.

For the first time in my life, I am also without medical benefits.

I think Laura Perry deserves 30 hours of time on the Senate floor.

Let me read a letter from Marshall Dunlap of Kent, WA, a suburb out of Seattle. He writes to me:

Please support the upcoming bill to extend unemployment benefits to those who have lost our jobs.

It doesn't help the economy when millions of us are about to become homeless.

I would prefer a job but until the economy recovers I am finding this impossible.

I am a high tech worker and have no other skills.

I am 53 years old and have very few options.

For every job I apply for there are hundreds of other applicants.

Once the economy comes back, I'm sure I'll be able to support myself but without help until that happens I will lose my house.

I know I am not alone so imagine the problem multiplied by millions.

There are over 97,000 people unemployed in the Puget Sound are alone. Please help.

That is from Mr. Marshall Dunlap, in Kent, WA.

I think Marshall would prefer we were spending 30 hours talking about how we are going to help him get back into the workforce and able to provide for his family.

Here is a letter from Ronnie Harper of Kingston, WA:

Thank you very much for working to extend UI benefits in the state of Washington.

I moved here 6 years ago to enter the technology market, which I did immediately upon my arrival.

Unfortunately, things turned sour at Hasbro last year because people stopped buying toys, and I was laid off after 5.5 years of exemplary service.

I have been working extremely hard over the past year to find another job; a job that is in the IT industry with a competitive compensation package.

My efforts have been practically fruitless, with most employers even refusing to discuss their reasons for not considering me for their open positions, and many filling posted positions internally.

At this point, I am on my last week of unemployment insurance, and I have mouths to feed. I hope very much that this bill is successful, please keep us posted!

That is from Ronnie Harper in Kingston, WA.

Unfortunately, I need to add that since he wrote this letter to me, Mr. Harper has now exhausted his benefits. That is why I think this Senate needs to act and why we should be spending 30 hours of debate time talking about how we are going to help Mr. Harper.

Mr. President, how much time do I have left?

The PRESIDING OFFICER. Seventeen minutes 40 seconds.

Mrs. MURRAY. Mr. President, let me add one final letter before I turn it over to my colleague from South Dakota who has been waiting in the Chamber.

This is a letter from Bill Gilbertson of Sequim, WA. He says to me:

DEAR SENATOR MURRAY: Thank you for your support of S.1708, Emergency Unemployment Compensation Act.

Your comments to the Senate, describing the real life problems of being unemployed will hopefully encourage passage of this important matter.

Please pass on my comments to your colleagues who don't know what its like to be jobless.

Life without a job is a demeaning experience; it affects all aspects of your life.

You have to be very careful with the little money you have, only necessities can be considered.

Fear, low self image, feeling of lack, and despair of the future are some of the challenges you face when hit by unemployment.

I have been unemployed now for over a year, it's been tough, but I won't give up till I get a job.

Extension of S. 1708 would really help me thru this.

That is Bill Gilbertson of Sequim, WA.

We are talking about real people facing real problems. I think it is essential that this Senate deal with this issue now.

UNANIMOUS CONSENT REQUEST—S. 1853

Because of that, I ask unanimous consent, Mr. President, that the Senate proceed to legislative session and the Finance Committee be discharged from further consideration of S. 1853, a bill to extend unemployment insurance benefits for displaced workers; that the Senate proceed to its immediate consideration, the bill be read a third time and passed, and the motion to reconsider be laid on the table.

The PRESIDING OFFICER. Is there objection?

Mr. CRAIG. Mr. President, reserving the right to object, I appreciate the concern of the Senator from Washington. The Senate is in session. The Senate is working. It is November 13. The timeline she has outlined is December 31.

Mrs. MURRAY. Is there an objection?

Mr. CRAIG. I therefore object.

The PRESIDING OFFICER. Objection is heard.

Mrs. MURRAY. I am deeply disturbed to hear that. The Senate is going to be out of session shortly. Everyone wants to finish by Thanksgiving. I am sure the letters I have read from a few of the people in my State reflect a lot of people's concerns that these people are going to be facing Thanksgiving without knowing how they are going to be paying for their mortgage, their food, and their basic necessities.

The PRESIDING OFFICER. The Senator has used 6 minutes.

Mrs. MURRAY. Mr. President, I yield to my colleague from South Dakota who has been waiting.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. JOHNSON. Mr. President, I rise today to express not just my profound disappointment but, very frankly, my contempt for the outrageous political ploy the Senate Republican leadership is foisting upon this Senate and upon the American people.

This is a monumental waste of time, every Member knows that, at a time when we have so much work to be done, to be wasting 30 hours—now, I understand, perhaps more than that—on a false, fabricated issue.

On top of that, all of this, I am being told, is costing the taxpayers at least $100,000—taxpayer money for this political ploy to be brought to the floor. And as the media has said from all around the Nation, there is no judicial crisis in America at the Federal level. This is a fabricated crisis which, frankly, is a polite way of saying that what is being brought to the floor is a fake. It is phony. It is fabricated. At stake is not a principle; at stake is—let's face it—money.

What is at stake is the far radical right of the Republican coalition with their vision of an America with no Social Security and no Medicare, no Federal role in the schools, what have you, a radical vision that very few Americans share. They have let it be known to the Republican leadership of the Senate here that they are going to not be as generous with their political contributions if they do not see more noise and more combat on behalf of a tiny percentage of judges nominated by the President.

This, what we have here today, and last night, and on into the night tonight, is an incredibly cynical political ploy not worthy of the Senate, certainly not worthy of the American people, Republican or Democrat.

The American people deserve better. They deserve better of this institution than what the Republican leadership has foisted on this country; and then, to add insult to injury, putting it on the credit card of the American people.

So far, this President has had 168 Federal judges—virtually all conservative, Republican judges—approved by this Senate, and I have voted for most of them. So the question is not whether the Senate will approve conservative Republican judges—we have over and over and over again; 168—but the Constitution requires the Senate to provide advice and consent to this President or any President on these appointments, which are of a lifetime nature. This is not some Cabinet appointee who will come and go with whoever is President. These people will sit on the Federal bench for as long as they live, if they so choose. Much longer than virtually anyone in this Chamber will live, these nominees will still be there.

If the expectation—which apparently is the logic of the opposition here today—is that anything short of 100 percent approval of these judges is out of compliance with the obligation of the Senate, then what does that say about our Republican friends' notion of what advice and consent is all about?

Now, President Bush, obviously, with 168 successes to 4, could have 100 percent success if he would send us mainstream, conservative Republican judges, which he mostly has done. But obviously he has taken the political tactic of rounding up a handful of judges who are absolutely beyond the pale and sending them here knowing they would be lightning rods, knowing they would energize the radical, political right in this country, and it would gin up political contributions. That is what this is all about.

Now, when President Clinton was President, he was told: Do not send any liberals to be nominated for the bench. They will not even get hearings, much less votes on the Senate floor. And that turned out to be true.

The Senate, because of our parliamentary rules, allows the minority party to exercise a 60-vote criterion on issues that are controversial. It is one of the reasons the Senate has long been the institution of moderation, relatively speaking, in the Congress, because while in the other body the majority of one allows them to jam almost anything through that body, on the Senate side we have an ability to enforce a certain level of bipartisanship because nobody can get anything done that is controversial without 60 votes. I would suggest that this is one of the geniuses of the Senate, that this is not the House of Representatives, that there is a certain level of consensus that is required to get things done in the Senate, and I believe that is what the American people want to see.

Now, we respect the right of this President to nominate like-minded people to the bench. He has. And they have been approved—168 of them. But where those people, those nominees, fall outside of the broad consensual understanding of the Senate, and cannot get 60 votes, those nominees ought to be rejected.

They will be easily filled by other no doubt conservative Republicans, but at least people who have the respect of the bar associations, of the Senators of their States, and who fall clearly within the mainstream of contemporary legal and political thinking.

Mr. President, 98 percent of the administration's judicial nominees have been confirmed—98 percent. That is a good success ratio in almost any human endeavor, contrary to what you hear from the other side.

Mr. President, 95 percent of Federal judicial seats are now filled. We currently have the lowest judicial vacancy rate in 13 years. If anything, this Senate ought to be patted on the back for its acceleration of judicial nominees the Judiciary Committee has considered and the floor has approved.

Last year, the Senate, led by my colleague from South Dakota, Senator DASCHLE, confirmed the largest number of judicial nominees in a single year since 1994—a remarkable track record. So to stand this on its head and suggest there is some sort of an obstruction, some sort of interference with the process, it goes beyond outrage, it defies comprehension.

Sometimes we hear: But what about the appellate judges? Well, the Senate has confirmed 29 of President Bush's circuit court of appeals nominees to date. More Bush circuit court nominees—get this, and this is the highest Federal court until you get to the Supreme Court—than Clinton, Reagan, or George Herbert Walker Bush had by this point in any of their administrations.

We also hear that this process requiring 60 votes, this process requiring bipartisanship on judicial nominees for their lifetime appointments, is some unprecedented sort of thing. Well, that is far from the truth.

Our Republican friends required 60 votes on 6 Democratic judicial nominees on the floor and filibustered 63 nominees in committee. So there is nothing unprecedented that is going on here. What is happening is there is an enforced bipartisan, an enforced moderation that I think is good for the country, and certainly good for the Federal bench, at a time when this country is narrowly divided, at a time when we are approving people who will serve on that bench for a lifetime.

What is sad is that while these hours are being devoted to a fabricated fake crisis that has to do with political fundraising, we are not getting on with the issues of jobs, of education, of health care, and prescription drugs. We have an Energy and Medicare bill in conference, but they are both on life support as we speak.

The budget, which was supposed to have been done by October 1, the first day of the Federal fiscal year, has not been done. It is not even close to having been done. And yesterday Senator BYRD, our colleague from West Virginia, noted that this week, the week of Veterans Day, the Republican leadership insisted we shut down the debate on the Veterans Administration legislation appropriations bill in order to consume this time on this issue. The American people deserve better than that.

I have to wonder if the other side that concocted this cockamamie scheme has any shame at all, to have done this to the American people, and to have done this to this institution. We ought to be talking about the jobless economy that continues to drag on. The economy would now have to create 326,000 jobs every month to keep the Bush administration from having the worst job creation record of any administration since the Great Depression.

As of October 2, 2 million people have been unemployed for over 6 months, more than triple the number at the beginning of the Bush administration. That remains the highest level in 10

years. Almost 5 million people work part time because of the weak economy. This is an increase of 44 percent since January of just 2001—the highest level in almost 10 years.

Talk about crisis. Talk about the need for attention. What about an increase of 44 percent in part-time workers and record high unemployment? Mr. President, 24,000 manufacturing jobs were lost last month alone. Imagine that, 24,000 manufacturing jobs just last month lost. And in too many cases, those jobs are not coming back.

Talk about crisis. That is what this body ought to be talking about. According to job placement firms, planned layoffs of U.S. companies shot up to 172,000 jobs in October from 75,000 in September. Announced layoffs are at their highest level since October 2002, when 176,000 jobs were cut.

Recent studies suggest that jobs lost since 2001 are now gone for good. A study by the Federal Reserve Bank of New York has concluded that the vast majority of job losses since the beginning of the 2001 recession were the result of permanent changes in our economy and are not coming back.

The labor market is not going to regain strength until positions are created in new economic sectors. The surge in discouraged workers masks the true impact of the economic downturn.

Currently, 1.6 million people are marginally attached to the labor force; about 462,000—almost a half million of these workers—have stopped looking for work altogether because they do not believe there is any work available.

African Americans and Hispanics bear the brunt of the economic downturn. During a month with a net gain in jobs, the unemployment rate among African Americans jumped to 11.5 percent in October, about twice the national average. The unemployment rate among Hispanics, 7.2 percent, is far higher than the national average.

This anemic job creation of the last month provides about 25,000 fewer jobs than are required to even keep up to the new entrants into the labor market. We actually lost ground this last month, meaning young people leaving high school and college cannot find work in too many cases. In addition, average hourly wages increased by 1 penny last month.

So when we talk about urgency, when we talk about a crisis, we need to get past the right-wing politics and get back to political moderation, which is what this 60-vote requirement requires of this body, and we ought to get back to the real issues the American public want the United States to be considering.

The PRESIDING OFFICER. The time of the minority has expired.

Mr. JOHNSON. I yield the floor.

The Senator from Mississippi.

Mr. LOTT. Parliamentary inquiry, Mr. President: I believe there will now be another hour, 30 minutes to the Republican side of the aisle, followed by 30 minutes to the Democratic side of the aisle.

The PRESIDING OFFICER. The Senator is correct.

Mr. LOTT. Under that agreement, I am glad to yield such time as he may consume to the distinguished senior Senator from my great State of Mississippi, Mr. COCHRAN.

The PRESIDING OFFICER. The Senator from Mississippi.

Mr. COCHRAN. I thank the Chair. Mr. President, I appreciate my colleague yielding me time.

Back in 1787, with a great deal of disenchantment around the country with the Articles of Confederation, a new Constitution was written to bring all the States of the Union into a workable bond. One of the fundamental principles reflected in that Constitution, as explained in the Federalist Papers, was majority rule. It was a difficult concept because the States were not all the same size, and the Senate would have two Members from each State.

There were situations that could develop when a minority of Senators, or Senators reflecting a minority of the population, could actually cause a decision to be made in behalf of all of the people of the country. So there are controversies surrounding that principle. But it was a fundamental maxim that is reflected in the Federalist Papers.

One other complicated factor is Gov. George Clinton of New York was strongly opposed to ratification of the Constitution. The Framers thought if he prevailed, then it might kill the effort to ratify the Constitution and get the country moving forward to fulfill the hopes and aspirations of the Framers.

Alexander Hamilton was also from New York, and he took the lead in crafting some essays that were published in newspapers in New York to convince the general public and, through them, the legislators who would vote on ratification that the Constitution was a good idea for the country. He was joined, of course, by James Madison and John Jay. They all collaborated, contributed to the essays published under the pseudonym Publius, and they were persuasive.

That majoritarian principle has been carried down through the years in our country, in our Government, in our Federal system. Now only in exceptional circumstances is more than a majority needed on any particular issue. As a matter of fact, the Constitution itself States that supermajority voting requirements exist only in certain specific circumstances. Confirmation of judges and other high-ranking officials in the administration are not among those instances where a supermajority is required by the Constitution.

The Framers were committed to the majority-rule principle, and the rules of the Senate carry forward that principle. But this year, the Standing Rules of the Senate are being used in an unprecedented way to impose a supermajority requirement of 60 votes to obtain confirmation by the Senate of Presidential appointments.

Article II of the Constitution creates a unique relationship between the President and the United States Senate in the selection of people to serve in the Government. It provides that the President ''by and with the Advice and Consent of the Senate, shall appoint'' and then it lists those that come under this section.

Section 2 of article II actually contains the exact language. It is instructive to be reminded what the Constitution itself says:

> He shall have Power,—
>
> The President—
>
> by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

It is very clear, in my mind, that this majority principle is supposed to apply and obtain in the votes for confirmation as described in section 2 of article II of the Constitution.

The filibustering of nominations is a new development. Prior to this year, the number of cloture votes taken on any executive nominee was three, and on any judicial nominee, it was two.

The cloture rule was adopted by the Senate in 1917. This was the first time Senators were guided by a procedure for bringing a debate to a close on any measure, motion, or other matter pending before the Senate.

Over the next 51 years, no judicial nomination was filibustered, and not one cloture vote was required to end debate on a judicial nominee.

The minority has begun a process that only history will be able to judge, but I fear—I genuinely fear—that nominations in the future by any President will be denied confirmation unless they can muster 60 votes to win approval by the Senate. That is not what the Constitution requires. That is not what the rules of the Senate require. A 60-vote requirement for the confirmation of Federal judges is not consistent with the history and the practices of the Senate. It must be rejected.

If we are unable to prohibit this practice by a change in the Senate rules, we will find it harder than ever before to attract talented and well-qualified candidates to serve in the Federal judiciary.

The PRESIDING OFFICER (Mr. SMITH). The Senator from Mississippi.

Mr. LOTT. Mr. President, I thank my distinguished colleague from Mississippi for his comments. He has

shown, once again, he is a student of the Constitution and of the law. I hope our colleagues found his speech to be informative, and I keep hoping and praying that there will be a change of heart and mind in how we deal with this issue.

Mr. President, the debate that has been taking place for nearly 24 hours is the culmination of 9 months of obstructionism by a minority of Senators who have subverted the Constitution's advice and consent provisions and undermined the very fundamental tenets of democracy.

It is an elementary principle of democratic government that the majority determines the outcome of political questions. Certainly the minority has a right to state it's case and have input into the issues. But at the end of the day, when the final decision is at hand, a majority decides the outcome.

Yet in the 108th Congress we have seen an unprecedented attack on this core principle of democracy. Instead of majority rule as our governing principle, we have the rule of the minority. Four nominees to the Courts of Appeal are supported by a clear majority of Senators. Yet a minority of Senators refuses to allow the Senate to vote on these nominations.

The Founding Fathers well recognized the dangers inherent in granting a minority a veto over the will of the majority. James Madison, in Federalist 58 pointed out that the Constitutional Convention explicitly rejected the idea that Congress be required to adopt a supermajority quorum to transact business. He warned that the ''fundamental principle of free government would be reversed,'' if we allowed a minority to overrule the majority.

Why is majority rule the ''fundamental principle of free government?'' Simply stated, Mr. President, if the will of the majority is not the prevailing principle, then it is legitimate for one person, whether a king, or autocrat, to determine the fate of political society. Our Founding Fathers rejected that idea and all of American society has rejected that concept since 1776.

Unfortunately, what we have witnessed over the past 9 months in connection with the nominations of Miguel Estrada, Priscilla Owen, William Pryor, and Charles Pickering is a hijacking of the Senate's constitutional responsibility to advise and consent on the President's nomination and to accept the idea of majority rule.

A minority of Senators have literally rewritten the Constitution to engraft a supermajority rule into the confirmation process, a requirement that completely contradicts the intent, spirit and language of the Constitution.

The Founding Fathers believed there were a few extraordinary instances where supermajorities are necessary and they spelled them out in the Constitution: Ratification of a Treaty; override of a presidential veto; conviction in a case of impeachment; passage of a constitution amendment; and expulsion of a Member.

Amendments to the Constitution have added two other supermajority requirements—one, a post-Civil War disqualification rule for serving in Congress; and another regarding a determination of whether a President is disabled.

But now a minority in the Senate has effectively rewritten the Constitution to demand a supermajority vote on some Presidential nominations. That completely contravenes the Constitution.

When the members of the Constitutional Convention considered the appointment power, they first debated placing the appointment power in the Senate. However, that idea was rejected because the members of the Convention believed the Senate was ''too numerous and too little//personally responsible, to ensure a good choice,'' according to Madison.

The convention also considered giving the President the sole authority of appointment. In an effort at compromise, Madison suggested that the power of appointment be given to the President with the Senate able to veto the choice only if two-thirds of Senators opposed the nomination. Ultimately, the Convention allowed for a simple majority vote on the President's nominations.

The Founders were so confident that the power of judicial appointment is primarily an executive function that they wrote into the Constitution a provision that allowed Congress to pass a law giving the President exclusive authority to appoint all judges below the Supreme Court. In addition, the President was granted the power to make temporary appointments when the Senate is in recess.

You can search the historical record and not find a single shred of evidence to suggest that the Framers of the Constitution ever envisioned a scenario where a minority of the Senate could cause the rejection of a Presidential nominee. But that is exactly the situation we face today.

On 7 different occasions, as many as 55 of 100 Senators voted in favor of ending debate on the nomination of Miguel Estrada. But the minority obstructing his nomination refused to allow an up or down vote and ultimately Mr. Estrada withdrew his nomination.

Fifty three Senators voted to end debate on the nomination of Priscilla Owen. But the minority refused to allow an up or down vote.

Fifty three Senators voted to end debate on the nomination of William Pryor. Again, the minority refused to allow an up or down vote.

And just 2 weeks ago, a majority of 54 Senators voted to end debate on the nomination of Charles Pickering. And once again, the minority prevented us from bringing this vote to a conclusion.

This undemocratic obstructionism threatens to destroy the integrity of this institution.

I have heard it said by some who are blocking the President's nominations, that there is nothing wrong with the confirmation process. They say we've confirmed 168 of the President's nominees; why is there a problem just because we block four nominees? 168–4 is a pretty good record, they say.

I would like to bring to the Senate's attention another statistic: The number of President Clinton's judges that were blocked by Senate filibusters. 0. No a single Clinton nominee who was brought to the floor was blocked by a filibuster.

Cloture petitions were filed on 5 of President Clinton's nominees. But every single one of those nominees was given a straight up or down vote. Every one of them. So if we are comparing records, here is the record that matters: Four of President Bush's nominations blocked by filibuster and none of President Clinton's nominees blocked by filibuster.

This is not baseball or basketball; this is the responsibility of the Senate to live up to its Constitutional responsibilities. And what a minority of Senators have done is to create a double standard for judicial nominations. They say for some judges, we accept the constitutional mandate of a majority vote. But for other nominees, we have created an extra-constitutional higher standard.

For nominees Miguel Estrada, Priscilla Owen, William Pryor, and Charles Pickering, a constitutional majority is not good enough. You have to garner a supermajority.

That's a standard that is not fair, yet that is precisely what a group of Senators in the minority have demanded. And as a result, they are failing to fulfill their constitutional responsibility to provide advice and consent.

For those who say there is nothing wrong with the confirmation process, I say look at this chart.

Up until 1968 there was never a filibuster of a judicial nominee. In some instances, cloture was filed twice and even when cloture was not invoked, every single nominee whose name had not been withdrawn was given an up or down vote.

We have had an unprecedented 7 cloture votes on Miguel Estrada and 3 on Priscilla Owen. In both cases, a majority of the Senate voted in support of the nominees. But a minority of Senators refuse to give these nominees straight up or down votes as required by the Constitution.

I believe that establishing a rule that if a nominee cannot garner a supermajority of 60, the nominee will not be entitled to a vote is a very dangerous precedent that will haunt this chamber for decades to come.

We have never in 214 years established such a rule. Even in the case of the most controversial nominees in recent memory—Robert Bork and Clarence Thomas—the Senate carried out its constitutional responsibility by giving each of them an up or down vote.

In June, I chaired a Rules Committee hearing on judicial nominations where one of the witnesses claimed that in the 19th Century, there were several instances where a minority of Senators prevented the Senate from considering judicial nominees. I would like to take a few moments to clarify the record on this issue.

In December, 1828, lame duck President John Quincy Adams nominated John Crittenden to the Supreme Court. In February 1829, a month before Andrew Jackson was to be sworn is as President, the Senate voted 23–17 to postpone the nomination until Jackson came into office. Clearly, in this instance a minority was not blocking the will of the majority.

In June, 1844, President John Tyler nominated Ruben Walworth and Edward King to fill Supreme Court vacancies. The Senate, by votes of 27–20 and 29–18, voted to postpone the nominations. After Tyler was defeated in the 1844 election, he resubmitted the Walworth and King nominations. The Senate refused to vote on the nominations submitted by the lame duck.

John Meredith Read was also nominated by lame duck President Tyler. A month before Tyler's successor was to be sworn into office, the Senate voted to adjourn rather than consider the Read nomination. Obviously, the will of the majority was not thwarted by the minority when the Senate voted to adjourn.

In the summer of 1852, President Millard Fillmore nominated Edward Bradford to the Supreme Court. The nomination was made just before the Senate was already planning to adjourn. It adjourned before considering Bradford's nomination. When the Senate reconvened, Franklin Pierce had won the 1852 Presidential election. And Fillmore did not renominate Bradford.

Instead, in early 1853, lame duck Fillmore nominated George Badger to the Supreme Court. The Senate voted 26–25 to postpone consideration of Badger's nomination. Fillmore then nominated William Micou, but the Senate refused to act on the lame duck nomination. There is no evidence that a majority supported Micou.

Finally, Mr. President, in January 1881, the lame duck President, Rutherford B. Hayes, nominated Stanley Matthews to fill a vacancy on the Supreme Court. The nomination never was reported from the Judiciary Committee. When President Garfield took office in March, he renominated Matthews. After 2 months of debate, Matthews was confirmed by a vote of 24–23.

I have taken the Senate's time to provide details of these 19th century nominations to make the point that there is no evidence that any of the controversial justices nominated in those years was blocked by a minority of Senators.

In every instance, a majority voted to delay or defer consideration. And in most of these instances, they involved nominations made after a sitting President was defeated for re-election. They have absolutely no relationship to the situation that has confronted President Bush throughout this year.

As my colleagues are well aware, historically, the Senate has demonstrated a great reluctance to tamper with the Rules that govern this body, especially the rules that govern debate. However, when a minority of Senators have repeatedly abused the filibuster, the Senate has acted to change its rules.

After a minority of Senators blocked efforts to have an up or down vote on a proposal to arm merchant ships during World War I, the Senate adopted its first cloture rule. The cloture rule was larger changed in 5 separate occasions, most recently in 1986.

The last attempt to change the cloture rule occurred in 1995 when Senators HARKIN and LIEBERMAN proposed a cloture rule nearly identical to the majority leader's proposal, but broader in scope because it applied to legislation as well as nominations. On a motion to table, that effort failed by a vote of 76–15.

I voted against that proposal because I agreed with Senator BYRD that the biggest abuse of the filibuster had occurred in connection with Motions to Proceed and that the Rules of the Senate, in particular Paragraph 2 of rule VIII, provided an adequate remedy to address this problem.

However, it has become apparent that there is no remedy in the current Senate rules to address the obstructive practices of a minority of Senators to block Presidential nominations. And that is why I cosponsored the majority leader's resolution, S. Res. 138. This resolution was reported favorably from the Committee on Rules on June 26, of this year.

The majority leader's resolution that will return the advice and consent responsibility to what the founding fathers intended. Our resolution would give the opponents of a nomination more than a fair opportunity to express their reasons for opposing a nominee. But it would not allow a minority of members to avoid their constitutional responsibility to have a final yes or no vote on a nomination.

Under our approach, cloture on a nomination could not be filed until the Senate has considered the nomination for at least 12 hours. On the first cloture vote, 60 votes would be necessary to invoke cloture. On a second vote, cloture could be invoked by 57 votes. If a third vote was necessary, 54 votes could bring cloture. And if a fourth cloture vote was necessary, then, and only then, a majority of Senators voting and present would be all that is needed to invoke cloture.

What our proposal does is give the opponents of a nomination 12 hours to first express their opposition. And then they will have as many as 8 days to speak against a nomination. And then, if cloture is invoked on the fourth cloture vote, the opponents will still have 30 hours in which to speak.

In other words, Senators would have as many as 234 hours to speak for or against any Presidential nomination. I think that is more than enough time for the Senate to fully consider a President's nominations.

The Republican cosponsors of this resolution are making a very simple statement—no matter whether the occupant of the White House is a Republican or a Democrat, we believe that a nominee reported from committee is entitled to a confirmation vote on the Senate floor.

We believe it is unconscionable and constitutionally infirm for a minority of Senators to have the capacity to prevent the Senate from carrying out it's advice and consent functions.

Filibusters by a minority of members to prevent a vote on a nomination should have no place in the Senate. Whether a cabinet choice, a district court judge or a Supreme Court Justice, Presidential nominees are entitled to a vote. That is what the founding fathers anticipated and that is what our resolution would achieve.

I would prefer that we could break this impasse without changing Senate Rules. But if this action stands, if a minority of Senators can obstruct the will of the majority and prevent the President's nominees from having a vote, the Rules of the Senate must be changed.

I wish to talk about how I feel personally touched and involved in what we are dealing with here.

In my 15 years in the Senate in a variety of positions as a new Member, as a member of the leadership, both as secretary of the conference and as whip and leader, I have experienced a lot of what has gone on with confirmations personally and firsthand. I have been involved in a lot of them.

I must say, without it being aimed at just one party or the other, this process has been on a slippery slope down that whole time. I believe it goes back to the nomination of Judge Bork before I actually got to the Senate. The pattern continued with John Tower who was nominated to be Secretary of Defense in my first year in the Senate, and it continued to slide down with the nomination of Justice Clarence Thomas. And throughout the Clinton years, we had difficulty in this area.

I just wonder how much further downward can it go. I think we have reached the bottom. We are trying now to abuse the rules of the Senate, to ignore the Constitution, and set in place a new precedent to block good, qualified men, women, and minorities to the Federal judiciary. We have to stop it. We should stop it here and begin to go back up into a more positive approach in how we deal with Presidential nominees.

I was involved with President Clinton's first Cabinet. I was selected by then-minority leader Bob Dole to work through the nominations and see if there were problems. As a matter of fact, I want the record to show that we

confirmed every one of his nominees by the day he was inaugurated. It was not easy. Some nominees had some problems. We got the job done. He was the President. These were his Cabinet selectees. They deserved to be confirmed.

During my years as majority leader, we had a lot of discussions back and forth over how the process worked, how judicial nominees were treated when they got to committee, and when they got to the floor. I remember a lot of those debates. I remember the Senator from Maryland was involved in those debates in March and in December of 1997. I didn't always like the process. I wasn't always proud of how we treated these nominees. But I will tell you this: On my watch, not one Clinton nominee was filibustered. Zero. None.

If you want to use the numbers game—this is not baseball or basketball, but that is an important statistic—during the Clinton years, from 1993 to 2001, no judge was defeated by a filibuster. By the way, it was attempted a few times. I had to file cloture several times, but usually we were able to set it aside and, in every instance, we confirmed the nominee.

On one occasion, I remember late in the afternoon—actually the Senate voted not to invoke cloture, not to cut off the filibuster on a judge—I took this spot in the Senate and said we cannot let that stand. Senator ORRIN HATCH, chairman of the Judiciary Committee, said the same thing. And before the night was over, we backed away from that position. Zero in the Clinton years; 4 already in the Bush years.

It has been just this year that this new abuse of procedure has started—the American people understand that. The American people understand there is something innately unfair about dragging out an up-or-down vote on these men, women, and minorities. So four already, and at least two more are threatened.

I don't know where it is going to end, but I do think that it is important the people understand this is not insignificant. This is very important. We are about to set this precedent, something the Senate did not do before this year. We did not do it in the 214-year history of this country, and now we are about to set this new precedent.

What do my colleagues on the other side of the aisle think is going to happen if the tables are reversed? What if there should be in some far off, distant future time a Democratic President and a Republican majority? Do they think if this precedent has been set that the tables won't be turned and there won't be filibusters of liberal judges on the other side? I will be opposed to that if I am here, as I have been in the past.

That is another number we ought to look at: 214 years, and no judges were defeated by a filibuster. I feel very personal about this point. I have gone back, in addition to looking at the number of years, and looked at occasions when there were attempted filibusters, when Presidents late in their terms made nominations and there were subsequent votes. I want to show you the list of what has happened over the years where there have been attempted filibusters.

This shows what happened in 1968, 1971, through the eighties and nineties. We can see there were some attempted filibusters, and cloture motions to cut off this extended debate were filed. But in every case but one, they were all confirmed. Justice Fortas, in 1969, had his nomination withdrawn by President Johnson when it was revealed that he did have some serious ethical problems.

Over all these years, even though there were filibusters and cloture motions, they were all confirmed. There are a couple of nominations on this chart about which I feel very strongly.

There was an attempt to hold up in a variety of ways two nominees to the Ninth Circuit Court of Appeals—Richard Paez and Marsha Berzon. Their filibusters were offered. I had great concerns about these judges, but I voted against the filibusters. I voted to invoke cloture, and they went to a straight up-or-down vote. I voted against them, but they were confirmed.

I was under intense pressure to not let that happen, but I refused to let that precedent be set on my watch because I didn't think it was fair at all.

I also feel personally and, I admit, emotionally involved because of the very unfair treatment that Judge Charles Pickering of Mississippi received over the last 2½ years. This is a good man, a good judge. He has had his reputation besmirched. This is a man who was confirmed unanimously by the Senate 13 years ago. Now he is being filibustered by the Senate. It is so unfair.

I hear a lot of talk about the human aspects of unemployment. What about the human aspects that these men, women, and minorities have had to go through? Their career is in limbo. They don't know whether they should stay with their law firm, stay on a State supreme court; are they going to be confirmed; how do they explain, how do they answer questions from the press? They have a very personal problem, too.

In the limited time we have, I don't want to just complain about what is going on here, I want to talk about the solution, how we get out of this situation, how we get off this limb onto which we have worked ourselves. We know this is wrong. Both sides of the aisle know this is wrong, and there has to be some concern about what the long-term impact will be. It has contributed to the overall atmosphere we are now dealing with in the Senate.

Here is what we can do. First of all, we can bring up the nominations of these good people. Justice Owen from Texas is a brilliant, impressive woman on the Texas Supreme Court. She is being filibustered. Why? Is she not qualified? Does she not have the proper education? Does she not have impressive credentials in her experience? Is she not sitting on the highest court in Texas? What is the problem?

The answer is that she is a conservative woman, that is all, a mainstream conservative woman. They try to let on there is something wrong with her philosophy and how she has ruled. I looked at a lot of these rulings. This is an eminently qualified woman. Yet she is being blocked by a filibuster. How do we get out of this situation? First of all, we try to give our colleagues on the other side of the aisle an opportunity to stop doing this filibustering. We bring up nominations of the judges. Apparently, they are not going to stop. At the end of this week, we will probably have three men and three women, including minorities, all blocked by filibusters—Hispanic, African American, women, men, it doesn't make any difference. I don't understand what is happening here.

What do we do next? We have a debate like we are doing now. Some people say: Why are you doing this? The Federal judiciary has a huge influence in what happens in this country. So these lifetime appointments are very important. We are trying to put the American people on notice as to how dangerous this is and what is going on, and it is getting some additional coverage. People are now calling in and saying: I didn't know that was going on. Why are you doing this?

Give us an opportunity to highlight the unfairness and the precedent we are setting and allow the people to weigh in a little bit. That is step 2.

Step 3: As chairman of the Rules Committee, I worked with the majority leader, BILL FRIST, and Senator ZELL MILLER of Georgia, and we came up with a process that could stop these filibusters. It is an elongated process, but one to which surely nobody could object.

After 12 hours of debate, we would have a cloture vote. It would require 60 votes. Then after a period of time, there would be a second vote. Fifty-seven votes would be required. A third vote would then occur with 54 votes required, and finally, only on the fourth cloture vote, would we get down to 51. We would have the 12 hours initially. Then we would have 30 hours after the fourth cloture vote to speak. All total, it could take as long as 234 hours. It is not a perfect process, but at least it is a process.

A similar proposal was made a few years ago by two current Senators on the Democratic side of the aisle. We should perhaps have a vote on that proposal.

Last but not least, at some point I feel very strongly we are going to have to make it clear through some process—and I won't go through it now—that says judges will be confirmed with 51 votes—only 51 votes. That is what the Founding Fathers intended. Senator COCHRAN made the historical point, and so have I. That is what it should be.

We can go back and vote on these nominees. They might not be confirmed, but I think the American people understand the fairness of voting them up or voting them down. Justice for judges. Do whatever the Senate's will is, but don't use a procedural technique requiring 60 votes to defeat these good men, women, and minorities.

This is an important issue. It is worth taking time to debate. I am very pleased we are debating this issue. I see Senator SARBANES on the floor of the Senate. He has been on the House Judiciary Committee. I was on the Judiciary Committee with him way back in the seventies. He is a lawyer. He has looked at these issues. I know he has been involved in them. We have had some discussion back and forth over the years.

In March 1997, he rose on the floor of the Senate and spoke in support of the nomination of Merrick Garland to be on the district court. He said:

> It is not whether you let the President have his nominees confirmed. You will not even let them be considered by the Senate for an up-or-down vote. That is the problem today. In other words, the other side—

The Republicans—

> will not let the process work so these nominees can come before the Senate for judgment. Some may come before the Senate for judgment and be rejected. That is OK. But at least let the process work so the nominees have an opportunity and the judiciary has an opportunity to have these vacant positions filled so the court system does not break down because of the failure to confirm new judges. . . .

These judges along the way were being slow-walked or they had problems or they got to the floor and we had other legislation we wanted to consider. We did not always get them up, but here is an important point: During that time I was the majority leader, we confirmed Merrick Garland. It happened. He got confirmed. He is on the bench today.

Senator SARBANES was right, give them an up-or-down vote, and that is what we are calling for today.

I see Senator GRAHAM of South Carolina is in the Chamber and prepared to speak. I may want to have a final statement later on today, but before I yield to Senator GRAHAM, let me wrap it up this way: I plead with my colleagues in the Senate. This is not a good thing for us. It is not good for the institution. It is not good for our country. It is not good for our relationships. It is not good in terms of getting our work done and making sure we have a judiciary that is occupied by good men and women.

We should stop rejecting these judges just on the basis of their philosophy. I voted for Justice Ruth Bader Ginsburg. I knew I would not agree with her decisions. I did not agree with her philosophically across the board, but by education, demeanor, qualifications, and experience, she should have been confirmed. I voted for her. I ask no less of my colleagues on the Democratic side of the aisle.

Let's stop this, and then let's get back to making sure we pass energy legislation, pass aviation legislation, get a prescription drug plan for our elderly people. This discussion is not delaying that. Work is being done on it right now. We can get this process corrected and then we can pass these substantive bills.

I yield the remainder of my time to the Senator from South Carolina.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM of South Carolina. I thank the Senator from Mississippi for yielding.

How much time remains?

The PRESIDING OFFICER. Eight minutes.

Mr. GRAHAM of South Carolina. I think it would be appropriate now to compliment Senator LOTT. During his time as majority leader, he ran into a very dicey situation with judges. There was a lot of emotion on both sides. He was able to manage the system so that the people would get the vote the Constitution requires.

After having witnessed this debate for the last day or so, I can understand how hard that must have been. It must have taken a lot of effort, a lot of courage. He had to tell people no who did not want to hear no. The country is better off by Senator LOTT allowing these people to have a vote up or down. If we do not fix this situation before the Senate, and it becomes part of the institutional way of doing business, then the consequences to the public are very dire.

The first thing that is going to happen, in my opinion, is we are going to get good men and women who are watching this, maybe one day aspiring to be judges, to say: Why in the world would I put myself through this? You are called all kinds of bad names. They take everything you have written or said or thought about saying, and they cut and paste it and try to create mental images of who you are that are totally contradictory to your life's work, are contradictory to what the ABA says about you as a professional, are contradictory to what your friends and the people who have practiced with you say about you. So it is not a very pleasant thing.

The Senator from New York, Mrs. CLINTON, with whom I have very much enjoyed working on other matters, had a chart talking about 168 to 4. The 168 were apples; the 4 were lemons. Now we are down to calling people lemons. These are real people and they have one thing in common. It is not four that are going to be filibustered, it is well over a dozen before it is over with. The one thing these four have in common right now—and that is not including Justice Brown and Judge Kuhl, who will be filibustered; they cannot get a vote either—is that they are the first in the history of the country.

We could literally put everybody in a phone booth who has been voted out of the Judiciary Committee by a majority vote but has never received a vote on the Senate floor. This 168 to 4 is a joke. The four people in question are the only ones in the history of the country to come out of the Judiciary Committee and never get to be voted upon. That is very dangerous because if that is the way we react to people who come out of the Judiciary Committee, if we start letting 40, 41 Senators dictate the advise and consent role, then we have really taken a turn for the worst because the Constitution says the Senate will advise and consent to the Presidential nominations.

Who does the advising and consenting? A majority of us or a minority of us? For 200-plus years, we have done it one way. But on the watch of Senator DASCHLE, with whom I have also enjoyed working, we have taken a very big turn for the worst.

We are in political and constitutional quicksand. The harder we try to get out of it, the deeper we go. If my colleagues do not believe it will be answered in kind down the road if there is ever a Democratic President, as Senator LOTT talked about, then I think we are all naive.

What I hate the most is I have been in the Senate for a year, and the abuses of the past I am sure are real. I have never put a hold on any judge for any reason. I am worried about the future. I think my job as a new Member of the Senate is to talk about the consequences of this action for the future.

I do not want to serve in the Senate in its darkest days. Right now, we are writing every day we speak one of the darkest chapters in the history of the Senate. Good people are being put through the wringer unnecessarily. If my colleagues do not think they are good people and they really think they are lemons, the Constitution gives my colleagues a way to object to them, and that is vote.

My colleagues can be on record forever saying, this is a lemon, this person should never be able to be on the bench; but they do not have the right to take the Constitution and turn it upside down for their own political gain and their own political desires. That, my colleagues do not have the right to do.

Money was mentioned. They were talking about the phones ringing over at the Republican Senatorial Committee because our base is excited we are fighting back and this is a fundraising opportunity. Well, people are raising money off this event and it pretty much stinks, on both sides, but that is the moment in which we find ourselves.

Let me read an e-mail that was sent out on November 3 by Senator CORZINE, the chairman of the Democratic Senatorial Campaign Committee. His job is to fire up his donors to give money so the Democratic Party can recapture the Senate. There was a great deal of lambasting the Republican Party about writing fundraising letters about this event, and that we are doing this to

fire up our base, and that we are doing this to raise money.

Let me read what Senator CORZINE told his Democratic contributors:

Senate Democrats have launched an unprecedented effort. . . .

We are well into the 30 hours and we cannot get an agreement as to whether or not this is unprecedented. I can assure my colleagues that he is not lying in the e-mail, that this is not false advertising. If it is false advertising, people ought to get their money back.

It is unprecedented, and the word ''unprecedented'' is underlined for a reason. No one has ever done this before. He was not lying when he put it in an e-mail to open up people's wallets. Unprecedented by doing what?

By mounting filibusters against the Bush administration's most radical nominees.

Let's break that statement down. It is unprecedented, but my colleagues on the other side will not admit it is. Filibustering, exactly what my colleagues on the other side are doing, against the Bush administration's radical nominees because of their ideology. That is something that is very dangerous, too.

One of the nominees was asked the question why he and his wife chose not to take their two daughters to Disney World during Gay Pride Day. Nobody should be asked about that. They are trying to ask that question to have a mental construction that this person somehow is not going to be fair to people based on sexual orientation.

The Mississippi situation is the worst of them all, in my opinion, of trying to change an image of who somebody really is. In 1967, Judge Pickering, who has been a Federal judge for a dozen years, well qualified by the ABA, well respected in the State of Mississippi, was a young prosecutor—an elected position—who chose to testify against the Imperial Wizard of the Ku Klux Klan in Mississippi, not the fast track to get ahead in 1967. It was radical in the right way.

In 1967, they integrated public schools in Mississippi, as they did in South Carolina. I was in the sixth grade. I could remember going back to school and seeing five Black kids come to my class for the first time in my life. As an adult, a 48-year-old man, I now realize how their parents must have felt, to send their kids into a very uncertain, unchanging situation, but they sent their kids to public schools to make it better. I respect those parents because a lot of people quit, on both sides.

In 1967, Judge Pickering chose to send his children to public schools when White flight was the phenomenon of that county. We will see a photograph of a lot of Black kids with very few White kids in 1967 Mississippi public schools, and those White kids are Judge Pickering's kids. That was the right thing to do.

These people are not lemons, but if my colleagues do not like them, vote against them. My colleagues do not have the right to change the Constitution for the political moment.

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

The Senator from Minnesota.

Mr. DAYTON. May I inquire, does this side have 30 minutes?

The PRESIDING OFFICER. There are now 30 minutes for the Democratic side.

Mr. DAYTON. May the time be equally divided between the Senator from Maryland and myself?

The PRESIDING OFFICER. It may if the Senator wishes.

Mr. DAYTON. I thank the Chair.

Mr. President, it is now 4:30. At 4:15, the Central Intelligence Agency began a classified briefing of all Senators on a just completed report on the worsening conditions in Iraq, a report that, according to the news accounts that were published yesterday and today about it, was reportedly leaked by a very high level Bush administration official so that it could not be hidden from the American people and from us in Congress.

When I became aware of this—and we were only informed of this briefing this morning—I asked Senator DASCHLE and Senator REID to see if we could suspend our talking and talking and talking about all of this for 1 hour to go listen to what is happening to the 130,000 courageous Americans whose lives are on the line in Iraq and to learn what we might be able to do, or must do, to support and aid them.

Senator DASCHLE and Senator REID inquired, could our colleagues across the aisle either give up 1 of the 30 hours that we are talking and talking about the jobs of four Americans and devote that time to protecting the lives and protecting the safety of 130,000 Americans and to preserving their heroic success that they achieved last spring in Iraq, which was for some of them their heroic sacrifice on our behalf, and which the CIA assessment reportedly has concluded is now in real jeopardy. Or even if that was not satisfactory, could that hour be added on to the scheduled conclusion for this blame-athon, keep the 30 hours as planned even though it is clear to this Senator, having participated between 12 and 1 this morning and listened to others throughout the early hours and now up until this time, that 30 hours for this topic is excessive and that our speeches are becoming increasingly repetitive, but just pause for 1 hour so that all of the Senators could attend that briefing on behalf of their constituents who are over in that precarious situation.

The answer was no. I thought that when this blame-athon began, it showed fellow caucus members on the other side of the aisle with mistaken priorities, but this has convinced me that it is much more serious than that. Winston Churchill once described a fanatic as somebody who cannot change his mind and will not change the subject. This fixation today fits that description.

We had a Senate Armed Services Committee hearing scheduled this morning, the committee on which I serve, with the Acting Secretary of the Army and other high-level Army officials testifying. We just received a briefing from them, reports of the timetables they have for deployments in and out of Iraq. We have seen reports of other news sources that within a few months the intention is to increase significantly in Iraq the number of reservists and National Guard men and women, which has a lot more importance to a lot more people who live in my State of Minnesota, whose loved ones are either over there now or are training to go over there soon or will be called up to go over later, than any judicial appointment. That hearing was cancelled.

The House of Representatives is taking this whole week off. They are waiting for us to catch up on passed appropriations bills for a fiscal year that started on October 1. Yesterday, we suspended action on the VA-HUD appropriations measure, set it aside for this period of time to talk and talk on the same well-beaten, thoroughly debated, and genuinely disagreed-upon difference of our respective opinions, which is somehow so important to some of us that everything and everyone else must simply wait.

The House Members are being paid by the American taxpayers to not even be in town this week because they are waiting for us to catch up. We are spending our time and American taxpayers' dollars to say the same things over and over and over and over again.

UNANIMOUS CONSENT REQUEST

I ask unanimous consent that the Secretary of the Senate be instructed to deduct the pay of all Senators for 15 hours, which is half the time that we are engaged in this excessive pursuit, and that should be our time, and for indulging in our priorities and playing to our audiences and doing whatever else this is supposed to be about but it is not serving the interests of the people of America any longer and I believe we should face up to that and recognize that.

The PRESIDING OFFICER. Is there objection?

Mr. LOTT. I object.

The PRESIDING OFFICER. The objection is heard.

Mr. DAYTON. I would point out we are not going to vote until tomorrow. We are going to vote tomorrow on a couple of these matters, on a couple of these nominees. According to our own Senate rules and procedures, we are not able to vote until then. Contrary to what some people watching this show might deduce from comments that have been made in the last few minutes, and before me and in the hours preceding, we actually do follow our rules and procedures in this body. We have 216 years' established rules and procedures, and if any 1 of the 100 Senators who doubts that those rules and procedures are being properly followed or disagrees with the action, we have a remedy for that. We have a referee, we

have a head umpire and impartial ruler on our rules, who is the Senate Parliamentarian. He or she, as the case may be, at the moment can be asked by any one of us to rule on any action, any tactic, any maneuver being employed by any Member of the Senate or any group of the Senate.

Yet for all the accusations for the last number of hours that we are violating somehow the rules, the procedures, the traditions, the Constitution, the intent of the Founding Fathers and just about everything else anybody has conjured up to justify their own point of view, we could ask. No one has asked. I am told that as of yesterday no one had asked the Parliamentarian, and I believe the reason is likely that the colleagues on the other side know that the answer would be clearly and unequivocally that we are following the practices and the traditions long established over 216 years by which this body conducts its matters, its business on behalf of the people of the United States of America.

We can have legitimate differences of opinion about whether that is a good set of rules, one that serves us and serves us in one situation or does not serve us, but they are there. I have learned this in my 3 years here, to my own proper humility, that there is a real collective wisdom that has been established with almost 1,900 men and women serving over the course of those 216 years and that while I may still not agree with some of the particulars, there is a way in which this country has been better served in the eyes of many people more learned than I about government and legislative procedure, has been better served by this body than any other legislative body in the history of the world anywhere on this planet.

Two generations ago, Gladstone called the Senate of the United States ''that remarkable body, the most remarkable of all the inventions of modern politics.''

James Madison, one of the authors of the document which we swear to uphold when we take this oath of office, the Constitution of the United States, said at the time:

> In order to judge of the form to be given to this institution [the Senate], it will be proper to take a view of the ends to be served by it. These were,—first, to protect the people against their rulers, secondly to protect the people against the transient impressions into which they themselves might be led.

I appreciated the words of the distinguished Senator from Mississippi just now because he was kind and gracious enough, and correct enough, to disagree with the application of these rules and procedures. But not as some have done, casting aspersions on following the rules and procedures, but beyond that, following our responsibilities and proscriptions under the Constitution of the United States, which I consider to be about the most serious accusation that any Member could direct toward anyone else.

As I said earlier, we have taken an oath of office to uphold the Constitution of the United States. That is the most solemn oath I have ever taken in my life. I expect every other Member of this body who has taken that oath is as sincerely and dedicated to that oath as I. To different people it may mean different things. But I never imagined questioning any Member's commitment. If there were reason to doubt or question, the proper way to direct that is through courts of this country, because it is a constitutional matter of the gravest import.

I urge everyone who has engaged in this constitutional practice these many hours to weigh those words far more carefully than some are doing. As I am on the Senate Rules Committee, I appreciate the approach the chairman of that committee suggested or implied in looking at these matters and, through a proper forum, if it be the desire, to consider them in a learned way, to bring in constitutional scholars who can give us a variety of opinions, impartial, nonpartial opinions about the Constitution and case law.

Then we can have an opportunity to consider whether what is established as a long-standing tradition and practice, whereby 41 Members of this body can prevent the other 59 from proceeding on something that would be passed by majority vote. I could argue the merits or demerits of that position over a particular matter, but I certainly would not question any Member's proper use of that just because I did not happen to like its application.

There were 69 of those measures taken in the last two years when we were in the majority; 69 times Senator DASCHLE had to move to proceed and file cloture when he was majority leader to consider bills and amendments, to go to final passage of legislation that affected health care for senior citizens, veterans benefits, environmental protection, matters that had far more consequence to many more Americans than any single judicial appointment to a Federal court.

I respect and appreciate the chairman of the Rules Committee and his thought on that matter. I welcome the chance to participate in that. I believe that is the responsible forum to review these matters and, if deemed necessary or desired on the part of those to consider it, to recognize we have the right and responsibility.

We have been elected independently by the men and women of our own States to do this job as each of us sees best, and I am willing to give anyone the benefit of the doubt who is doing so. That is our responsibility. That is our right.

I yield the floor.

The PRESIDING OFFICER. The Senator from Maryland.

Mr. SARBANES. Would the Chair state the parliamentary situation, please.

The PRESIDING OFFICER. The Senator from Maryland has 15½ minutes remaining on the Democratic side.

Mr. SARBANES. I will address the various issues concerning the long-term unemployed in this country. Before that, I will make a couple of comments about the judges.

Sixty-three of President Clinton's nominees were blocked from consideration. Four of President Bush's nominees have been blocked. Twenty percent of the Clinton nominees in the period of 1995 to 2000, the period when the other side controlled the Senate, the committees and the floor, were blocked and not given any opportunity to move forward. Many of those blocked were extraordinarily able people. Only four of President Bush's nominees have been blocked. Many of us feel very strongly that they represent extreme points of view outside of the legal mainstream in this country.

In a sense, the period over the last 6 years of the last century when an incredible number of the President's nominees were blocked is the genesis of the situation that people are talking about. Of course, the other side was able to do it in committee. They did not have to do it on the floor, they did it in the committee since they had a majority in the committee and they simply brought the curtain down at that point.

Yesterday, the New York Times ran an editorial entitled ''Chatter in the Cave of the Winds.'' I ask unanimous consent the full text of that editorial be printed in the RECORD at the conclusion of my remarks.

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

(See exhibit No. 1)

Mr. SARBANES. I will quote part of it and then I will elaborate on this issue.

> Senate majority Republicans might take a moment—or even a vote—to extend reassurance to the nation's millions of unemployed tonight during the 30-hour ersatz ''filibuster'' they plan to protest the Democrats' blocking of President Bush's more extremist judicial appointees. The filibusters will talk through the night, performing from a political script in a time-wasting tableau designed to produce campaign fodder for next year. But out there in real life, federal emergency unemployment benefits are scheduled to expire on Dec. 31 with no sign of notice from the Republicans in Congress. A year ago, they blithely quit the Capitol and let the unemployed stew through the holidays before retroactively approving a benefit extension that was far too modest.

I recall that very well because I was involved in the effort last year to try to extend these unemployment insurance benefits and the Congress left. It went home. The unemployment benefits ran out. People found themselves in absolutely dire circumstances. When the Congress finally returned, they extended the benefits retroactively. But meanwhile, people had passed through an extraordinarily difficult time for themselves and their family.

Nearly 9 million workers are unemployed today. There are another 4.8 million, just under 5 million Americans, who want full-time jobs but can only find part-time work. Some people

choose to work part-time. These are people who want to work full time but cannot find full-time jobs so they have part-time jobs. That is almost 14 million Americans, those that are unemployed and those that are underemployed. In addition to that we have about 1.5 million Americans who were in the labor force but dropped out because they are so discouraged about the prospects of finding work.

This is the worst jobless recovery since the Great Depression. During this administration we have lost 2.9 million private-sector jobs, as measured by employees on private nonfarm payrolls. This chart shows where we were in January of 2001 and this is where we are in October of 2003. That is a loss of just under 3 million jobs.

Even the Secretary of the Treasury is not predicting that all of those jobs, will be recovered by the end of this term. He has made a prediction which a lot of people think cannot be achieved, but even the administration is not predicting that they are going to recover all of the lost jobs.

Now, if they do not recover these lost jobs, and I see no way that they can possibly do that, this will be the first presidential administration since Herbert Hoover under which the economy has lost private-sector jobs.

This chart shows presidents and private-sector jobs gained or lost during an administration, in millions. We start with President Harding and then we go to President Coolidge. The green on the chart shows there was job gain during those administrations. Then we plunge down with President Hoover and we come back for job gains, all positive, net job gains during these administrations, President Roosevelt, President Truman, President Eisenhower, President Kennedy, President Johnson, President Nixon, President Ford, President Carter, President Reagan, President Bush the first, President Clinton; and, now, the current President Bush, with a negative, net job loss.

In the past, it has been a long-standing bipartisan policy to extend unemployment insurance during periods of labor market weakness. Unemployment insurance benefits were actually extended four times during the Reagan administration and three times during the first Bush Administration. The month we are in is the 31st month since the recession began. At this point during the 1990s recession, every worker was eligible for a minimum of 20 weeks of additional benefit. The basic benefit is 26 weeks. We then seek to extend it if the labor market is not improving, so people can support their families. Actually, the benefit they get is less than 50 percent of what they were earning and in order to draw an unemployment insurance benefit you must have built up an employment record. So by definition, you were working and you had a job, you lost your job, and only then do you get the unemployment insurance benefit. The benefit is designed to help carry you and your family through difficult circumstances.

Now we have 13 weeks of extended benefits but that pales in comparison with what was done in previous times. It certainly is inadequate in the face of a labor market in which we are not recovering jobs. What are these people to do who lose their jobs, they start drawing unemployment benefits, the benefits run out, they have been looking for work, they cannot find work, and then they no longer receive benefits. How do they support their family at a minimum level? They cannot do it.

As the New York Times said in this article:

After the tax-cutting binges President Bush and Congress engineered for the affluent, failure to renew the nation's helping hand to the jobless would present a scandalous holiday scenario worthy of Dickens. More than talk, action is required.

They are absolutely right. Mr. President, 1.4 million American workers have exhausted their benefits and are unable to find work. They are out in the cold with no support. We now have over 2 million long-term unemployed. That is people who have been out of work for 26 weeks or more.

When President Bush came into office in January of 2001, the number of long-term unemployed, people unemployed for more than 26 weeks, was 660,000. The number of long-term unemployed in October of 2003, is just over two million. The number of long-term unemployed has tripled in the course of this administration. It now constitutes 23 percent of the entire unemployed population.

The last time such a large percentage of the unemployed were the long-term employed—in other words, people out of work for more than 26 weeks—was 20 years ago. This is the worst performance in 20 years, in two decades. Obviously, we need to extend these unemployment benefits and repeated efforts to do so have been blocked. The leadership is talking about leaving at the end of next week until next year. Of course, what that means is millions more will run out of their benefits and be unable to sustain their families.

There is money in the unemployment insurance trust fund for this purpose. That money is paid in, in good times, in order to address the situation in bad times. But that money is not being used. It was specifically set aside for this purpose. The extension of unemployment insurance benefits is a policy we have followed in the past. It has support from both sides.

These benefits are for people without jobs. I am hearing lamentations about four people who did not get their Federal judgeships. They have other jobs. These people have no jobs.

We made repeated efforts to bring the legislation up. I will make such an effort right now, once again. There is legislation pending to address this issue in the Finance Committee. It would help these workers. It would help our economy. It would ensure that we did not go through the travail and the turmoil which occurred at the end of last year, as well. It would provide an additional 13 weeks of benefits to those who have already exhausted their benefits.

[From the New York Times, Nov. 12, 2003]

CHATTER IN THE CAVE OF THE WINDS

Senate majority Republicans might take a moment—or even a vote—to extend reassurance to the nation's millions of unemployed tonight during the 30-hour ersatz ''filibuster'' they plan to protest the Democrats' blocking of President Bush's more extremist judicial appointees. The filibusterers will talk through the night, performing from a political script in a time-wasting tableau designed to produce campaign fodder for next year. But out there in real life, federal emergency unemployment benefits are scheduled to expire on Dec. 31, with no sign of notice from the Republicans in Congress. A year ago, they blithely quit the Capitol and let the unemployed stew through the holidays before retroactively approving a benefit extension that was far too modest.

This filibuster has no practical purpose. In the older days, a single lawmaker had to talk nonstop to block a hated bill; nowadays, the leadership merely counts heads to see if enough senators want to block a bill and then it is silently hung up. So if the retro-orators just want to make rhetorical points today and run short of topics, we beg them to ponder their jobless constituents instead of resorting to boilerplate sound bites and creaky filibuster stunts (in sad memory there was Alfonse D'Amato's singing an ''Old McDonald'' parody).

Serious help is needed for the 2.4 million more recent jobless facing the end of their state benefits, not to mention the 2.1 million long-term unemployed who have slipped off the job-hunting scope. The promising uptick in the deep hiring slump—126,000 new jobs in October—is less than half the rate needed to even begin to dent the backup of joblessness. To deal realistically with the problem, Congress needs to double—to 26 weeks from 13 weeks—the federal emergency benefits that are available when state benefits run out. This would be similar to the help offered during the recession of a decade ago when long-term joblessness, especially in manufacturing, was hardly the problem it is now.

After the tax-cutting binges President Bush and Congress engineered for the affluent, failure to renew the nation's helping hand to the jobless would present a scandalous holiday scenario worthy of Dickens. More than talk, action is required.

UNANIMOUS CONSENT REQUEST—S. 1853

Mr. SARBANES. Therefore, Mr. President, I ask unanimous consent that the Senate proceed to legislative session, that the Finance Committee be discharged from further consideration of S. 1853, a bill to extend unemployment insurance benefits for displaced workers; that the Senate proceed to its immediate consideration; that the bill be read the third time and passed and the motion to reconsider be laid upon the table.

Mr. LOTT. Reserving the right to object, I ask consent that the Senator modify his request so that just prior to proceeding the requested 3 cloture votes be vitiated and the Senate immediately proceed to three consecutive votes on the confirmation of the nominations, with no intervening action or debate.

Mr. SARBANES. Mr. President I made a unanimous consent request, which is pending.

The PRESIDING OFFICER. Is there objection?

Mr. LOTT. Does the Senator object to the modification?

Mr. SARBANES. The Senator does not modify the unanimous consent request.

The PRESIDING OFFICER (Mr. CORNYN). Objection to the request is made.

Is there objection to the request as made?

Mr. LOTT. In view of that, I object.

The PRESIDING OFFICER. Objection is heard.

The Senator's time has expired.

The Senator from New Mexico.

Mr. DOMENICI. Mr. President, I do not have a New York Times to quote, but I think I am a lot more fortunate because I have two New Mexico papers, important papers in my State, to quote. I do not have to use them to change the subject. I will quote from a couple of our New Mexico papers on the issue of the nominations, the nominating process, and what has happened to that process in the last couple of years.

Let me first quote from our largest newspaper, the Albuquerque Journal. It says in its headline: ''End Filibuster, Put Court Nominee to Vote.'' And then it says:

What the Colt revolver was on the dusty streets of the Old West, the filibuster is on the floor of the U.S. Senate: The great equalizer gives 41 senators the ability to bring the chamber's business to a halt.

The tactic should be unholstered only on issues of high principle or grave importance. Considering the issues currently confronting Washington, the judicial nomination—

In this paper it is referring to Miguel Estrada when it says:

The judicial nomination of Miguel Estrada does not rise above partisan wrangling. To block a vote on his appointment to the U.S. Court of Appeals for the District of Columbia Circuit is an abuse of the filibuster.

I ask unanimous consent that this editorial from that distinguished newspaper be printed in the RECORD.

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

[From the Albuquerque Journal (NM), Feb. 23, 2003

END FILIBUSTER, PUT COURT NOMINEE TO VOTE

What the Colt revolver was on the dusty streets of the Old West, the filibuster is on the floor of the U.S. Senate: The great equalizer gives 41 senators the ability to bring the chamber's business to a halt.

The tactic should be unholstered only on issues of high principle or grave importance. Considering their issues currently confronting Washington, the judicial nomination of Miguel Estrada does not rise above partisan wrangling. To block a vote on his appointment to the U.S. Court of Appeals for the District of Columbia Circuit is an abuse of the filibuster.

Democrats say the filibuster is justified because too little is known about Estrada and he has not been forthcoming about his judicial philosophy.

New Mexico Sen. Jeff Bingaman said Friday he has not made up his mind about backing continuation of the delay tactic, and echoed the Democratic indictment of the Honduran immigrant as a stealth conservative.

''Obviously, you become suspicious of a person's point of view if he won't answer questions,'' Bingaman said.

Let's get on past mere suspicions of Democrats and declare guilt by association. Estrada is the choice of President Bush. His views doubtlessly come closer to mirroring Bush's than those of left-learning Democrats or those of Clinton's judicial nominees.

Femisinst Majority president Eleanor Smeal, for one, doesn't need any more information about Estrada to know that in blocking him, ''the Democratic leadership is giving voice to its massive base of labor, civil right, women's rights, disability rights, environmental, gay and lesbian rights groups.''

Oh, then this is about constituent politics.

There's another constituent-oriented facet: Miguel Estrada is a successful immigrant, current front-runner to become the first Hispanic Supreme Court justice and an obvious role model in short, a poster boy for Republican recruitment of minorities away from the one, true political faith.

This isn't about suspicions; Estrada is the Democrats' worst nightmare from a partisan perspective.

From a personal perspective, Democrats who have worked with him in the Clinton administration have high praise. Seth Waxman, Clinton's solicitor general, called Estrada a ''model of professionalism.'' Former Vice President Al Gore's top legal adviser, Ron Klain, said Estrada is ''genuinely compassionate. Miguel is a person of outstanding character (and) tremendous intellect.''

During Judiciary Committee hearings in September, Estrada said: ''Although we all have views on a number of subjects from A to Z, the first duty of a judge is to a put all that aside.''

That's good advice for a judge, and it's good advice for senators sitting in judgment of a nominee. Put aside pure partisan considerations; weigh Estrada's qualifications, character and intellect; end the filibuster and put this nomination to a vote.

Mr. DOMENICI. This editorial continues:

Feminist Majority President Eleanor Smeal, for one, doesn't need any more information about Estrada to know that in blocking him, ''the Democratic leadership is giving voice to its massive base of labor, civil rights, women's rights, disability rights, environmental, gay and lesbian rights groups.''

Oh, then this is about constituent politics.

Then there was another editorial in a New Mexico paper, the paper is a rather liberal newspaper, the Santa Fe New Mexican. The Santa Fe New Mexican editorial is entitled: ''Estrada Tosses Towel; Pyrrhic Win For Dems.''

So Senate Democrats got what they wanted—or avoided what they didn't want: Miguel Estrada has asked President Bush to withdraw his nomination to the U.S. Court of Appeals. . . .

The 41-year-old Honduran immigrant, who led his law class at Harvard, was a vastly better choice for the judiciary than any number of Democrats who slid onto the federal bench during the early Clinton presidency.

Now, with a GOP president and a bare Republican majority in the Senate, the Dems still are able to stymie the appointment of conservative judges reflecting the apparent wishes of the American electorate: There are too few Republican senators—or principled Democrat ones—to apply cloture to threatened filibusters over the confirmation of Estrada and other qualified appointees.

And it goes on to talk about various Senators and how they conducted themselves on this nomination. I ask unanimous consent that the editorial from the Santa Fe New Mexican be printed in the RECORD.

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

[From the Santa Fe New Mexican, Sept. 5, 2003]

ESTRADA TOSSES TOWEL; PYRRHIC WIN FOR DEMS

So Senate Democrats got what they wanted—or avoided what they didn't want: Miguel Estrada has asked President Bush to withdraw his nomination to the U.S. Court of Appeals, for the District of Columbia Circuit.

The 41-year-old Honduran immigrant, who led his law class at Harvard, was a vastly better choice for the judiciary than any number of Democrats who slid onto the federal bench during the early Clinton presidency.

Now, with a GOP president and a bare Republican majority in the Senate, the Dems still are able to stymie the appointment of conservative judges reflecting the apparent wishes of the American electorate: There are too few Republican Senators—or principled Democratic ones—to apply cloture to threatened filibusters over confirmation of Estrada and other qualified appointees.

Estrada was appointed to the appellate court in the spring of 2001. He's been in a kind of limbo ever since. Yesterday, he threw in the towel, saying it's time to devote full attention to his law practice and his young family.

We can almost hear the echo of hurrahs from Capitol Hill, where only four Democrats sided with 51 Republican colleagues who quite properly saw him as an excellent appointment. New Mexico's Jeff Bingaman wasn't one of the four. The Senator has offered excuses about a lack of information on Estrada, who has been in a figurative fishbowl since long before his nomination—but Bingaman knows darn well this is party politics at its lowest. Republicans have pulled similar stunts on Democratic nominees during years past. This is payback time—or repayback time; playing schoolyard games with our nation's system of justice.

For the Dems, this could prove to be a Pyrrhic victory: The day will come when a Democratic president's nominees might face treatment as shoddy as Estrada got. We can only hope the Republican Senators of that day will prove more gracious than their GOP predecessors—and today's Democrats.

Mr. DOMENICI. Mr. President, I just want to move, for a moment, to compare how certain other judges have been treated in terms of how long they had to wait while the Senate did nothing because we were in a filibuster mode in the Senate. I want to take two or three of our nominees and just go through with those who are listening the various qualifications and the like for various nominees. I will start with Miguel Estrada, and I will take three other nominees and talk about them versus Miguel Estrada.

Nominee:

Douglas H. Ginsburg: nominated by President Ronald Reagan; college, Cornell University; law school, University

of Chicago Law School; circuit court clerkship, Carl McGowan of the D.C. Circuit Court of Appeals; Supreme Court clerkship, Thurgood Marshall; Federal Government service, Deputy Assistant AG.

A. Raymond Randolph: nominated by President George Bush; college, Drexel University; law school, Pennsylvania Law School; circuit court clerkship, Henry J. Friendly, Second Circuit Court of Appeals, Federal Government service, Assistant to the Solicitor General.

Merrick B. Garland: nominated by President Bill Clinton; college, Harvard, summa cum laude; law school, Harvard Law School; circuit court clerkship, Henry J. Friendly, Second Circuit Court of appeals; Supreme Court clerkship, William J. Brennan, Jr.; Federal Government service, Special Assistant to the AG.

Now, for each of these: it took 15 days for one of them, 66 days for one of them, and 71 days for the third.

Then we come to Miguel Estrada: nominated President George W. Bush; college, Columbia, magna cum laude; law school, Harvard Law School, magna cum laude; circuit court clerkship, Amalya Kearse, Second Circuit Court of Appeals; Supreme Court clerkship, Anthony Kennedy; Federal Government service, Assistant U.S. Attorney and Assistant Solicitor General. Mr. President, he waited 848 days.

Obviously, Mr. President, there is no validity to the conversations coming from the other side that they have not taken qualified appointees and decided that they would apply this rule of 60 instead of 51.

Out there in America, when people look at the Senate they say when you have 51 votes, that is the way you win. With 51 votes you win; with 49 you lose—but not when it comes to judges they do not like, just plain do not like—not that they are not qualified, they just do not want them.

For some reason they have decided they are not going to let that person on, and no longer is the majoritarian rule the rule of the day. It is a supermajority. Then the time begins to run.

Miguel Estrada had to wait more than 800 days before he gave up. I have just gone through the names of three. I am not going to say the others were not qualified; they were. But certainly Miguel Estrada is as qualified as any of them are, if you look at just the paper background and the previous service and achievements prior to them coming to the floor and languishing or getting confirmed.

For none of those three are better nominees than Miguel Estrada, and everybody looking at his record and seeing what he has done and what he has not done knows that.

Now I would like to close with a last editorial, an editorial also from New Mexico. This one is from the Albuquerque Journal. This editorial speaks about the current situation when so many candidates and other Democrats in high positions are coming to our State, the State of New Mexico, to talk to the Hispanic people where we have large numbers, and to talk politics to them.

I am quoting from a September 11, 2003, editorial from the Albuquerque Journal. It says:

> Democratic presidential hopefuls mouthed and sometimes mangled Spanish words in Albuquerque last week, searching for Hispanic votes.
>
> Earlier that day, a Hispanic judicial nominee who wanted a simple up-or-down vote on the Senate floor withdrew after two years of Democratic mangling of the confirmation process.
>
> Democrats could not argue that Miguel Estrada was unqualified to serve on the appeals court for the District of Columbia, a stepping stone to the U.S. Supreme Court.
>
> Playing catch-up after emigrating from Honduras at 17 with little English, Estrada graduated from Columbia with honors, earned a Harvard law degree and clerked for Supreme Court Justice Anthony Kennedy.
>
> Estrada's credentials were good enough for the Clinton administration, where he worked for five years in the U.S. Solicitor General's Office.
>
> Though he has no paper trail of decisions as a judge, his reputation as one of the nation's finest appellate lawyers led to a unanimous American Bar Association rating of ''well qualified'' for the Supreme Court.
>
> But ''well qualified,'' in terms of legal intellect, is not qualification enough in the U.S. Senate. There's blame enough to spread around both sides of the aisle. . . .
>
> But Democrats have escalated the partisan warfare to the filibuster level. Estrada would have been confirmed by a simple majority, but Democrats raised the bar for this Hispanic from the wrong side of the political tracks. Estrada had to have a super majority of a Senate where Democrats toed the party line against him.
>
> Though accustomed to adversity, Estrada finally withdrew after two years of this absurdity. His experience should not be in vain.
>
> Democrats who take Hispanic support for granted but can't bring themselves to vote for a qualified Hispanic should learn a new word from the lips of voters: !Basta!—Enough of this purely partisan jockeying on judicial nominations.

I think, while many came to the floor and quoted the New York Times and other major newspapers, I think my two New Mexico papers have hit it on the head, the last one right where it belongs during a political campaign—come and mingle and mangle our language and our last names, and then when one is nominated, make them have the supermajority, all the time asking for their vote—paraphrasing the last editorial that I just read from the Albuquerque Journal.

I think what has happened to these nominees—in particular, the four we are speaking of, led by Miguel Estrada, and the three women—it is clear they have been politicized. They are qualified. If they would have had a chance under other Presidents at other times with their kind of qualifications, they would be serving on a higher bench in the United States without question.

They have just found themselves at a point in time when the filibuster rule is applied with such assurance that there is no harm to come to those politically or otherwise who use the instrument of filibuster against the extremely qualified.

That is exactly what has happened here. I am pleased to speak for just a few moments. I compliment all of those who have taken much time over the last day and a half to speak to the issue, specifically as to these people, and generally as to how this process used this way is ruining the political process and making good candidates—let's make it superior candidates—subject to the whim of the 60-vote rule.

I yield the floor.

The PRESIDING OFFICER. The Senator from Missouri.

Mr. TALENT. How much time do we have remaining on our side?

The PRESIDING OFFICER. There are 15 minutes 20 seconds.

Mr. TALENT. I am going to be brief, Mr. President. I had an opportunity to speak last night and I want to have a chance to hear my friend from Ohio and I want to give him a full opportunity to speak.

We are here—I am here again; others have been here more often than I—because we are trying to put a stop to filibusters that are unprecedented in their nature. For the first time in the history of this institution, court of appeals nominees of the President of the United States have been filibustered to death on the floor of this Senate by a determined minority.

It is a usurpation of the Constitution. It is hurting the courts, and it is unfair to these nominees who are not only qualified, who not only should be confirmed, but who would, just a few years ago, have flown through this body because of their extraordinary qualifications.

I just want to address a couple points. One that has been made very often by some Senators who have been participating in these filibusters is that, in fact, they are really not doing anything that unprecedented or that bad because they have approved, they have allowed all but four of the nominees to go through. Well, that is just not the right way of looking at it.

They set out to hunt, if you will, the big game, the court of appeals judges. So it is true, they have not been taking any shots at the rabbits, at the squirrels, at the district court judges. Those they have let through. But they have taken down or they are threatening to take down, through the filibuster, a quarter of President Bush's nominees to the court of appeals.

This graph shows it. None of the previous four Presidents, or any of the Presidents, had ever lost a court of appeals nominee by a filibuster of the minority on the floor of the Senate.

President Bush has had 29 court of appeals nominees confirmed. Twelve of them have either been filibustered or they are going to be filibustered tomorrow or there are threats to filibuster them.

He sent 46 down in total. Twelve have been filibustered or threatened to be filibustered, which is a quarter of his nominees. That is not a passing percentage in anybody's book, and it is unprecedented to have even one filibustered.

Second, Senators have said: Well, look, the filibuster has been used in the past, and that is because motions for cloture have been offered and passed sometimes in the past. There have been small groups of Senators who have tried to filibuster nominees in the past, and the rest of the Senate has said: No, we do not do that. We may not like the nominee, but we do not filibuster them. In every case, the leaders of both parties have supported motions for cloture, and cloture has been invoked.

They are using instances when the filibuster has been stopped by the Senate in the name of the Constitution, and in the name of the traditions of the Senate to support their efforts where the filibuster has succeeded. They are turning the past on its head to support a present and a future which is completely inconsistent with the Constitution and the traditions of the Senate. It is wrong, and it is wrong to people involved.

I wish I had time today. Perhaps I will have time later to go through the qualifications of these nominees. On top of everything else, they just deserve this. Many of these people have overcome tremendous obstacles, personal obstacles in their youth, to achieve tremendous success in the field of law. They would be great judges. We need those judges on the courts.

Finally, Mr. President, and before I yield to my friend from Ohio, I just want to say that repeatedly it has been suggested by that group of Senators who have been filibustering that: Well, we ought to go on to other business. In fact, they are upset that the process of the Senate is being obstructed.

Well, I would sure like to go on to other business, too. You can filibuster or not filibuster. There is no question under the rules of the Senate, Members have the raw power to do this. What you cannot do is filibuster and then complain about obstruction. You cannot do that. That is called having your cake and eating it, too. The minute that Members of this Senate decide they want to go on to other business, we can go on to other business. Just allow us a time agreement to vote. Allow us to vote on these people. Five minutes after you do that, we are off to other business of the Senate, which all of us want to go on to.

In the meantime, please, if you are going to filibuster these nominees, at least do not complain about obstruction of the processes of the Senate.

With that, Mr. President, I yield the floor to my friend from Ohio.

The PRESIDING OFFICER. The Senator from Ohio.

Mr. DEWINE. Mr. President, the nominees who President Bush have nominated are outstanding attorneys, people who would make fine judges and, frankly, the sooner we have an up-or-down vote on these nominees the better.

The nomination of these judges affects the citizens living in their judicial circuits and the nominees themselves. So this is not just a theoretical debate, this is a real world debate with real consequences.

Let me turn to one of those nominees, and that is Judge Charles Pickering. I want to talk about the merits because that is what we should be talking about, what we should be debating on the Senate floor, the merits of all these nominees. If we had an up-or-down vote, I say to the Members of the Senate, that is what we would be able to do. That is what this whole discussion for these 30 hours is about: our request to be able to vote on the merits.

Let me talk about the merits and what we would be able to talk about if we had that opportunity.

Judge Pickering, a man who graduated from the University of Mississippi with honors. This is a man who graduated from law school the first in his class; a man who has had a distinguished career as a lawyer; a prosecuting attorney; a judge who was confirmed unanimously by the Senate to a district court position 13 years ago.

What about the ABA? We always hear about the ABA. We don't think that should be the be-all and end-all, but the ABA should be a part of what we look to. Here is a letter ABA sent to me and other members of the Judiciary Committee:

> Senator DEWINE, We are transmitting to you for your consideration, this committee's evaluation pertaining to the nomination of the Honorable Charles Pickering, Sr., as judge of the United States Court of Appeals for the Fifth Circuit. I am pleased to report, as a result of our investigation, a substantial majority of the committee is of the opinion that the Honorable Charles W. Pickering, Sr., is well qualified for appointment as judge to the United States Court of Appeals for the Fifth Circuit.

That is what they had to say about him.

People who know Judge Pickering best in his home State of Mississippi also agree that he should be on the bench. People who have known him for years have written to this Congress and have talked with us and have said this man is qualified. This is a man of great character; he should be on the bench.

There have been attacks about Judge Pickering. Let me talk about these for a moment. Again, this is the type of discussion we should be having on the Senate floor. We shouldn't have to be down here making the argument that all we want is an up-or-down vote. This substantive argument is what we really should be able to have.

Let me talk about some of the attacks on Judge Pickering. At the time of our hearing on Judge Pickering, he had decided roughly 4,500 cases as a district court judge. Out of those 4,500 cases, he has been appealed 328 times and ultimately he was reversed or had the case remanded for additional work or some clarification in 26 cases.

Without getting too much into the numbers, I can tell you he has a good reversal rate—about 8 percent. That is better than the national average, and it is even better than the average in the Fifth Circuit.

Some of Judge Pickering's critics would argue the problem is not the number of cases on which he has been reversed. They say the problem is what you find in those reversals. Let's take a moment and look at that.

I looked at the 26 cases where he was reversed or where the case was sent back for further clarification. The statement was made in one of Judge Pickering's hearings several times that his cases boiled down to civil rights, voting rights, employment, and that is what was troubling. I think we need to look at each of these areas, and I will try to do that in the brief time I have.

There are a few ways to categorize a case and what type of case it is remains, certainly, in the eyes of the beholder, but I have looked at the reversals and the areas mentioned during the hearings, and this is how I break them down.

On my count, 2 of the 26 cases involve employee rights, 1 case involved voting rights, and 4 were civil rights cases. I believe as we look at these cases, there is no merit to the charges in regard to Judge Pickering.

Let's look first at the accusation of voting rights. Judge Pickering was reversed on one voting rights case, and that was Watkins v. Fordice. Judge Pickering was part of the three-judge panel that decided that case. Here is the key. We should be very clear about this. The voting rights issues in this case had already been resolved. The issue that went up for appeal was, guess what—Listen to this: attorneys fees. That is what the issue was. That is what went up on appeal.

So to categorize that as a voting rights case, that the judge was appealed on a voting rights case and overturned on a voting rights case is simply not fair. It is not fair by any good judgment.

When the case went up on appeal, the court of appeals said: We need more information. And they sent it back to Judge Pickering's three-judge panel. Judge Pickering and the other two judges gave them more information. It went back up, the court of appeals looked at it, and said: It's OK, you were right. We are not going to reverse you. And that ended it. That is the voting rights case about which everyone is talking.

I should also note for the record there were three other voting rights cases that Judge Pickering decided. Not one of these cases—not a single one—was reversed. In fact, nobody ever

appealed the cases, which again tells us something. When a voting rights case is not appealed or when a major case is not appealed, it certainly tells us something.

So we end up on the voting rights issue with only one case where he was appealed, in that particular case it was about attorney's fees and, in the end, Judge Pickering was held to be correct anyway, and three other cases were not appealed at all.

Let me talk briefly about Judge Pickering and the civil rights cases. Every one of the civil rights cases—of the 26 cases we are talking about—every single one of them involved claims made by prisoners. I point that out not to say prisoners rights cases are unimportant; they certainly are important. We all know they are important. They can involve basic rights. But these are not the type of cases that we would normally associate, or at least the public would normally associate, as civil rights cases. Lawyers know them as civil rights cases, but I believe the general public would not think of them as typical civil rights cases. They were often procedural requests, sometimes requests for very specific relief.

For example, in one case, the whole issue was whether or not a prisoner had a right to use a certain type of typewriter. This prisoner wanted to use a memory typewriter instead of a regular typewriter, and that is what the substance of the case was about.

There were procedural issues there, and the court of appeals took a look at them. They were reversed, and we certainly understand that.

Again, I am not minimizing that, but I think we just need to put this whole case in its proper perspective.

Let me also note for the record that Judge Pickering was reversed, as we have said, in a total of 11 of the so-called prisoner cases out of an estimated 1,100 prisoner cases with which he dealt.

Let's now talk about Judge Pickering's employment cases. I will be very brief because I see my time is almost up. We need to look at both the employment cases, the Marshall case, and the Fairley case. In the Marshall case, Judge Pickering upheld an arbitrator's decision reinstating an employee who had been fired from her job. In the other case, the judge found on behalf of the worker suing his employer's disability plan for damages. In both cases, Judge Pickering ruled in favor of the employee.

The court said he was wrong about how he did it, wrong in the decision, and the court overturned him. But no one should use the employment case where he was overturned—these two cases—as in any way indicating that he is not sensitive to employees. He did, after all, in these two cases, rule in favor of the employees.

Judge Pickering is well-qualified. There is no doubt about it. His overall record as a judge is excellent. The specific cases cited as a concern do not show anything at all except that he is a human being who sometimes made some mistakes. I submit that virtually every district court judge that we look at and look at as carefully as we have looked at Judge Pickering, we would find similar reversals.

When we look at these specific cases, I believe there is no indication that Judge Pickering is hostile to civil rights, to voting rights, to employment rights, or any other type of rights. I believe there is no evidence at all that Judge Pickering substitutes his personal opinions for the law. In fact, the evidence shows that he clearly does follow the law.

Judge Pickering has testified under oath to the Judiciary Committee twice that he will follow the law and abide by the law, and Mr. President, his record shows that he will.

This is just an example of the debate that I think we ought to be having. If our colleagues across the aisle would allow us to have an up or down vote on these nominees, we could talk about the qualifications and criticisms of these nominees. We could talk about allegations and they could be supported or dispelled. There are many, allegations against these nominees that would be dispelled—just like the ones I've just discussed about Judge Pickering.

I encourage our colleagues to let us have the debate on the merits of the nominees. Then Senators can hear all the facts—both sides of the debate. And then they can make up their minds and vote—yes or no, just vote.

I thank the Chair. I yield the floor.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, as I understand under the agreed procedure, the Senator from Hawaii and myself will have a half hour; is that correct?

The PRESIDING OFFICER. That is correct.

Mr. KENNEDY. I yield myself 15 minutes.

The PRESIDING OFFICER. The Senator is recognized.

Mr. KENNEDY. Mr. President, I have listened with interest over the last 24 hours to those who have taken exception to the action that has not taken place in the Senate with regard to judges. I listened very carefully. Many of our colleagues have been extremely eloquent in their presentations.

As we are reaching the 24-hour point, it is important to understand exactly what our responsibility is in the Senate with regard to the appointment power, what our Founding Fathers expect of the Senate, and whether we are measuring up to the test which they established at the Constitutional Convention.

I draw the attention of our colleagues once more to the raw statistic, which I think effectively rebuts so many of the allegations and the presentation that has been made, where we have actually confirmed 168 of the nominees, and only 4 have not been affirmatively approved. That is 98 percent. We ought to think about what has been said on the other side about the abuse of those who have expressed opposition to these nominees, whether there has been an abuse of the system itself, when we find out they have gotten 98 percent of their way over this Congress. My good friend from Vermont has gone through the statistics in great detail.

I listened a little earlier to one of my colleagues on that side of the aisle say there never has been an instance where a circuit court judge was filibustered by the other side. I am a member of the Judiciary Committee, and I would be glad to sit down with my colleague and go over the 23 well-qualified nominees who never emerged from the Judiciary Committee to be considered on the floor of the Senate.

Nonetheless there are those who are listening tonight who may say, ''My goodness, we have these nominees and they are not being considered. Isn't this a one-way street, where now Democrats, perhaps a few Republicans, are not permitting the vote on particular nominees?''

I can remember very well the other side using the same rules to their own advantage with regard to judicial nominees, and history demonstrates that, as has been pointed out by our colleagues.

Rather than dwelling on that, I think it is instructive once more to think about what our Founding Fathers expected of this body with regard to the appointment process. When we look at that, we will see that they expected us to exercise our own good, independent judgment. There are those on the other side who say, if the President sends someone up to the Senate, you better find a good reason not to vote for him or otherwise the President is entitled to that individual. That is not the case. That has been repeated time and time again.

To the contrary, if you look at the debates in the Constitutional Convention, our Founding Fathers weighed their debates and discussions believing that we in the Senate should have the heavy hand in terms of the final judgment with regard to nominees. I will take a few moments to review that because it is instructive.

The Constitutional Convention met in Philadelphia from late May until mid-September of 1787. On May 29, 1787, the Convention began its work on the Constitution, and when the Virginia Plan was introduced by Governor Randolph, it provided that a National Judiciary be established to be chosen by the National Legislature.

Under this plan, the President had no role—no role—in the selection of Federal judges. When this provision came before the Convention on June 5, several Members were concerned that having the Congress as a whole select judges was too unwieldy.

James Wilson of Pennsylvania suggested an alternative: that the President be given the sole power to appoint judges. The idea had no support. John Rutledge of South Carolina said he ''was by no means disposed to grant too great a power to a single person.'' James Madison agreed that the legislature was too large a body, and stated that he was ''rather inclined to give the appointment power to the Senatorial branch.'' This is the debate of our Founding Fathers, a group sufficiently stable and independent, as James Madison pointed out, to provide ''deliberate judgments'' on judges.

A week later, Madison offered a formal motion to give the Senate—the U.S. Senate—the sole power to appoint judges, and this motion was adopted without a single objection.

On June 19, the Convention formally adopted a working draft of the Constitution, and it gave the Senate the exclusive power to appoint judges. This was the thinking of our Founding Fathers.

We learn in that debate on the floor of the Senate, the Founding Fathers intended the Senate of the United States to be a principal partner, obviously, in the consideration of these judges.

On July 18, the Convention reaffirmed its decision to grant the Senate the exclusive power. Wilson again proposed ''that judges be appointed by the executive,'' and again his motion was defeated. The issue was considered again on July 21 and in the Convention for the fourth time and again agreed to the exclusive Senate appointment of judges. In a debate on the provision, George Mason of Virginia called the idea of executive appointment of Federal judges a ''dangerous precedent.''

Not until the final days of the Convention was a compromise suggested. On September 4, 2 weeks before the Convention work was completed, the committee proposed that the President should have a role in selecting judges. It stated: ''The President shall nominate and, by and with the Advice and Consent of the Senate, shall appoint judges of the Supreme Court.''

The debate made clear, Mr. President, however, that while the President had the power to nominate the judges, the Senate still had a central role. Gouverneur Morris of Pennsylvania actually described the provision of giving the Senate the power ''to appoint judges nominated to them by the President.''

It's clear that the Constitutional Convention, which had repeatedly rejected the proposal to let the President alone select the judges, did not intend the Senate to be a rubberstamp for the President. And it is equally clear that, especially when the Senate is controlled by the President's own party, the Founders did not intend the Senate to roll over and play dead whenever the President tells them to.

We have approved 168. And only 4 have been rejected. That is a pretty good record for this President.

On the contrary, it is clear what the Founders would say to us today. They would say, ''We gave you this power to use it whenever you think the President proposes judges who will not be beneficial to the Nation. We did not tell you what rules to use to exercise that power. We gave you the right to set your own rules.''

And they did. And the Founders did not say, and did not mean that ''the President can appoint whomever he wants to the Federal courts, as long as he gets a bare Senate majority to consent.'' If we did adopt a rule that allowed the President to do so, the Founding Fathers would look down on us and say, ''Shame!''

''You are the Senate. If we wanted the President alone to be able to pick the judges, we would not have given you the power that we did in the Constitutional Convention. For 214 years, you have used that power wisely, and under the power we gave you, you have the authority to set your own rules.'' That is what the Founding Fathers said.

As Senators, we have the obligation to say no to the President when we think he is wrong. We should not abdicate the powers the Founding Fathers gave us. If we are true to our oath of office as Members of the Senate, we cannot abdicate the powers the Founders gave us.

We should not erase the rules which give us the ability to be the Senate and protect the independence of the Federal courts.

We exercise different judgments on Presidential nominees. The independence of the Senate and the courts is the essence of our Constitutional system of checks and balances that has served us so well throughout our history.

The Senate has never hesitated to exercise its advice and consent power. During the first 100 years after ratification of the Constitution, 21 of 81 Supreme Court nominations one out of four were rejected, withdrawn or not acted on. During these confirmation debates, ideology often mattered. John Rutledge, nominated by George Washington, failed to win Senate confirmation as Chief Justice in 1795. Alexander Hamilton and other Federalists strongly opposed him because of his position on the controversial Jay Treaty with Great Britain. A nominees of President James Polk was rejected because of his anti-immigration position. A nominee of President Herbert Hoover was rejected because of his anti-labor view.

When a President makes the request for a member of the Cabinet, it is time limited to the 4 years that President is going to be there. The President has the heavy presumption that he is entitled to his own advisers, and that is why the overwhelming majority of nominees by the Presidents for their Cabinet are approved. We have some for the regulatory agencies that may be a little bit longer, or go past a particular administration, and perhaps we apply a somewhat tighter and more stringent test, but we are talking about lifetime tenure on important courts of this land.

The DC Circuit Court has really been called another supreme court because they have the appellate jurisdiction on so many of the regulatory agencies. These appeals that come before that DC Circuit involve the rights of working men and women. They make the decision in terms of whether the workplace is going to be safe for all of those who go in and work in their plants and factories. They are going to interpret whether the various legislation dealing with the environment is adequately enforced, along with a whole range of different issues that affect the health and safety and well-being of the people of this country.

Our friends on the other side say, ''If the President nominates someone, why are you not rubberstamping it?'' That is not what our Founding Fathers said or agreed to or instructed us to do. They said we should make our own independent judgment and decision, and the fair judgment and decision, I believe, is whether these individuals who are nominated demonstrate a core commitment to the fundamental teachings of the Constitution of the United States. That is what this Senator looks for with a nominee.

When they will not answer the questions—but the administration knows what those answers are—or they have demonstrated over a lifetime by statements and deeds that they will not abide by the fundamental teachings of the Constitution, why in the world should we take a chance, in representing the people we do, to think they deserve a promotion to serve in these high courts? It should not be that way. The Founding Fathers never expected us to be that way, and we will not have it that way.

Recently, we had a very distinguished historian who wrote a magnificent book. It is called ''Master of the Senate'' by Robert Caro. In that book, he did an enormous amount of reading and studying of the views of our Founding Fathers and also of the early years of the Senate in order to put his historical figure, President Johnson, then-Majority Leader Johnson, into some perspective. I will just mention these lines which I think are very insightful about the Founding Fathers and what they believed this institution was really all about:

''The writings of the framers of the Constitution make clear that Senators, whether acting alone or in concert with like-minded colleagues, are entitled to use whatever means the Senate rules provide to vigorously contest a President's assertion of authority with which they strongly disagree.

One could say, in fact, that under the fundamental concept of the Senate as envisioned by the Founding Fathers, it is not merely the right, but the duty of the Senators to do that, no matter how popular the President or how strongly the public opinion polls of the moment

support the President's stand on the issues involved.''

Then he continues:

''. . . in creating the new nation, its Founding Fathers, the Framers of the Constitution, gave its legislature . . . not only its own powers, specified and sweeping . . . but also powers designed to make the Congress independent of the President to restrain and act as a check on his authority, (including) power to approve his appointments, even the appointments made within his own administration . . . ''

And the most potent of these restraining powers the Framers gave to the Senate is:

''. . . the power to approve Presidential appointments was given to the Senate alone; a President could nominate and appoint ambassadors, Supreme Court Justices, and other officers of the United States, but only 'with the Advice and Consent of the Senate.'''

''. . . the Founders, in their wisdom, also gave the Senate the power to establish for itself the rules governing exercise of its powers. Unlike the unwieldy House, which had to adopt rules that inhibited debate, the Senate became the true deliberative body that the framers had envisioned by maintaining the ability of its members to debate as long as necessary to reach a just result. For more than a century, the Senate required unanimous agreement to close off debate. The adoption fo Rule XXII in 1917 allowed a two-thirds cloture vote on 'measures,' but nominations were not brought under the rule until 1949.''

In short, two centuries of history rebut any suggestion that either the language or the intent of the Constitution prohibits or counsels against the use of extended debate to resist Presidential authority. To the contrary, the nations's Founders depended on the Senate's Members to stand up to a popular and powerful President. In the case of judicial appointments, the Founders specifically mandated the Senate to play an active role, providing both advice and consent to the President. That shared authority was basic to the balance of powers among the branches.

Surrendering such authority is not something which should be done just because of a Senator's point of view on the particular issues of the moment—because much more than the particular issue is involved.

Republican Senators are wrong when they say, ''The President is entitled to have his own people on the courts.'' We know that history tells us the opposite. The Senate usually chooses to give the President broad leeway in appointing members of his cabinet and filling other positions in the Executive Branch. Je is politically responsible for these appointees. They generally serve at his pleasure, and their appointments end at the end of his term in office. But appointments to the federal courts are lifetime appointments. Federal judges are able to fulfill their own constitutional responsibility because they are independent of both Congress and the White House.

The Founding Fathers wanted the checks and balances, the independent government agencies: The Presidential and the executive, the Congress with the House and the Senate, and an independent judiciary. It does not belong to the President. It does not belong to the Congress. It belongs to the American people, and both the President and the Senate have an important responsibility to make sure it remains independent.

I yield the remaining time to the Senator from Hawaii.

The PRESIDING OFFICER. The Senator from Hawaii.

Mr. AKAKA. Mr. President, I have spent the past 23 hours listening to the debate which was billed as a debate on judicial nominations and has turned into a semantics fest over who is responsible for the delayed enactment of legislation important to both sides of the aisle. One thing is clear to me, this is not getting us any closer to enacting the legislation we have identified as important.

We are devoting 30 hours to debate the fact that the Senate has passed only 98 percent of President Bush's nominees, not 100 percent. I take my responsibilities as a United States Senator very seriously. My understanding is that I am to provide the President with my advice and consent regarding the individuals he nominates for a lifetime position to the Federal judiciary. It troubles me that we are spending 30 hours to discuss the fact that we have not acted on 2 percent of the President's nominees to the Federal judiciary.

We are talking about 4 individuals, 4 individuals who have jobs, while 3 million people have lost jobs since President Bush took office. We should be talking about jobs. We should be debating and voting on legislation to increase the minimum wage. We should be finishing our appropriations bills. We should be talking about ways to strengthen our manufacturing base. We should be discussing extended unemployment benefits for the long-term unemployed, the 3 million Americans who have lost their jobs during the Bush presidency.

If we want to start talking about legislation that is important to us as individual Senators, we could be talking about Federal recognition for Hawaii's indigenous peoples, Native Hawaiians, an issue of extreme importance to my constituents in Hawaii. We could be talking about ending mutual fund abuses for investors or promoting financial literacy for our students. We could be talking about how to fund the promises we extended when we passed the No Child Left Behind Act which has been severely underfunded since its enactment.

Instead, we have spent 23 hours talking about 4 judicial nominations, 4 nominations out of 172, which have not been approved by this body. We have spent the past day blaming each other for the lack of progress on the issues that we have identified as priorities. It is sad that we have come to this point. During my tenure in the Senate, we have been able to work in a bipartisan manner to achieve our goals.

I take particular offense, to the claims that have been made about Democratic Senators being anti-woman, anti-Catholic, anti-Hispanic, and anti-African-American, merely because we refuse to approve 4 of the President's judicial nominees. Since when do we cast aspersions simply because we are unable to get our own way? As a former principal and teacher, this is not behavior that I would condone in the classroom, much less on the floor of the Senate.

My colleagues from the other side of the aisle argue that this is the first time a filibuster has been used for a judicial nominee. Republicans have openly filibustered 6 judicial nominees on the floor of the Senate, 5 of which were circuit court nominees.

There seems to be a theme that my colleagues on the other side of the aisle have not engaged in efforts to block a judicial nomination. I want to share with my colleagues a situation I encountered during the 104th and 105th Congress. An individual from Hawaii was nominated to serve on the U.S. District Court, District of Hawaii. This was a nominee strongly supported by both Senators from Hawaii. This nominee had a hearing before the Senate Judiciary Committee and was reported favorably. However, this is where the process stopped for a period of two-and-a-half years.

A colleague from another state placed a hold on this nominee for over 30 months before allowing us to confirm this nomination. In effect, a Senator from a State thousands of miles from Hawaii blocked a district court nominee that the senior Senator from Hawaii and I supported. This colleague is now the attorney general of the United States, and happens to be a good friend of mine. I found this situation to be so unusual, that a colleague from another state would place a hold on a district court nominee from my State when both Hawaii Senators strongly supported the nomination. I also find it highly ironic that the person who placed that hold is now in a position of great importance in this administration. I raise this issue to dispute the notion that this is the first time a nomination has been blocked, after the Senate Judiciary Committee favorably reported the nomination to the Senate for consideration.

I could also speak about the nomination of Justice James Duffy to the United States Court of Appeals for the Ninth Circuit. A fine nominee, described by his peers as the ''best of the best,'' he had strong support from Senator INOUYE and me to fill Hawaii's slot on the Ninth Circuit. Yet, Justice

Duffy never received a hearing in the Senate. Seven hundred and ninety-one days without a hearing. Justice Duffy is one of the well-qualified and talented men and women nominated during the Clinton administration, individuals with bipartisan and home-State support, whose nominations were never acted on by the Senate. In back of me are pictures of those, and Mr. Duffy's picture is on the chart.

The last person I will mention is Richard Clifton, who is now serving on the U.S. Court of Appeals for the 9th Circuit. Richard Clifton was nominated after President Bush withdrew Justice Duffy's nomination. Richard Clifton served as the Hawaii State Republican party counsel. While I don't necessarily agree with all of his views, I supported his nomination, and he was confirmed within a year of his nomination.

Ninety-five percent of Federal judicial seats are now filled, creating the lowest vacancy rate in 13 years. So let's get back to the things we should be talking about—jobs, education, Medicare, minimum wage, unemployment insurance, and helping the poor.

We are squandering valuable time that the Senate could and should be using to address matters of great importance to thousands of Americans. I am honored to cosponsor legislation offered by the senior Senator from Massachusetts, Mr. KENNEDY, to raise the minimum wage. He has spoken with tremendous passion of the urgent need for an increase in the minimum wage.

I remind my colleagues that since establishing the minimum wage requirement in 1938, we have had only 19 increases in the minimum wage, the latest occurring in September 1997. The minimum wage would need to reach $8.38 an hour to equal the purchasing power of the statutory minimum wage in 1968. A full-time worker paid the minimum wage earns about $4,000 below the poverty line for a family of three. This is not right.

We should not only be raising the minimum wage so that employees working full time are not struggling to stay above the poverty line. We should also extend the Temporary Extended Unemployment Compensation program. This program, which was enacted on March 9, 2002, provided up to 13 weeks of federally-funded benefits for unemployed workers in all states who exhausted their regular unemployment compensation benefits. In addition, up to an additional 13 weeks for certain high unemployment states that have an insured unemployed rate of 4 percent or higher. The program has been extended several times, with the latest extension enacted into law on May 28, 2003. While this program will be phased-out through March 31, 2004, the program actually ends on December 31, 2003. Although employment has risen, the national unemployment rate has remained unchanged at 6 percent. In October 2003, the Department of Labor has indicated that 2 million unemployed persons were looking for work for 27 weeks or longer. This is greater than the 13 weeks of regular unemployment and greater than the additional extended unemployment benefits. We should be doing more not just for our men and women who are fighting our war on terrorism, but for those who are fighting the war on poverty.

My time is almost up, so I will end here. In a Senate where the divide between the majority and minority is held by a mere vote, and that division reflects the viewpoint of the American body politic at-large, it is imperative that we work together to resolve so many of the issues that are important to our constituents. When it comes to judicial nominations, the confirmation rate of 98 percent clearly shows that we, in the minority, are doing what we can to work with the majority in upholding our constitutional obligation to provide advice and consent to the President on judicial nominations. I can only hope we achieve a 98 percent rate in enacting the laws addressing funding for education, healthcare reform, Medicare reform, increasing the minimum wage, extending unemployment insurance, and providing Americans with the financial tools to be successful.

The PRESIDING OFFICER (Ms. MURKOWSKI). The Senator from Massachusetts.

Mr. KENNEDY. How much time do we have remaining?

The PRESIDING OFFICER. The minority has 1 minute remaining.

Mr. KENNEDY. I thank my colleague and friend. He mentioned the increase in the minimum wage. It has been 7 years since we have increased the minimum wage. In that time, we have also increased the pay for Members of the Senate five times, but we are denied the opportunity to increase the minimum wage for working families in this country. I think it would not take us very long. If the Senator would agree with me, it would take us about half an hour before we are prepared to go ahead and vote on a minimum wage, and here we have just used 30 hours or are going to be using 30 hours of discussion that is not related to that or to education, overtime, unemployment compensation, jobs, or education funding.

I thank the Senator for an excellent presentation. I believe our time is just about up.

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

Who yields time for the majority?

The Senator from Georgia.

Mr. CHAMBLISS. Madam President, I say to my colleagues that if they will give us an up-or-down vote on all of these nominees, as they have done in every other instance and as the Senate has done for every other President of the United States, there is a lot of work we need to do and we look forward to moving on to that. What we have been doing over the past 24 hours almost now, what we are going to do for the next several hours, is some of the most important business this Senate can ever take up, and that is the confirmation of our judicial nominees.

I am pleased to yield such time as he may consume to the Senator from Missouri, Mr. TALENT.

Mr. TALENT. Madam President, I thank my friend for yielding. It has been a pleasure, in a sense, to be here. I will not take very much time.

I have enjoyed hearing the remarks of my friends, the Senator from Hawaii and the senior Senator from Massachusetts. I have the pleasure of serving with them on the Armed Services Committee. They have often been eloquent on the floor of the Senate.

My friend from Massachusetts has been eloquent on the subject of judicial nominations before. I am going to quote something he said about 5 years ago. I do it with respect and for a reason. He said on January 28, 1998:

> Nominees deserve a vote. If our Republican colleagues don't like them, vote against them. But don't just sit on them—that is obstruction of justice. Free and full debate over judicial nominations is healthy. The Constitution is clear that only individuals acceptable to both the President and the Senate should be confirmed. The President and the Senate do not always agree. But we should resolve these disagreements by voting on these nominees—yes or no.

We should resolve these disagreements by voting on these nominees—yes or no. I have quoted this for a reason. The divisiveness over nominations, holding them up in one way or another, is not new to this Senate. This tactic of abusing the filibuster rule for a minority to stop court of appeals judges from even getting a vote, that is new; that is unprecedented. They have been blocking now or threatening to block a quarter of President Bush's court of appeals nominees. That is unprecedented, and the Senators doing it are responsible for doing it. They have to stand up for that. But the divisiveness and some elements of obstruction are not new.

We have an opportunity with this debate, and we are all exhausting ourselves talking, trying to come up with a real bipartisan resolution. I hope we can end the debate by stepping back and coming up with a set of rules that will be fair to whoever is the President and whichever party controls the White House. If we could do that, then we could clear these nominees for a vote.

We are coming to the end of President Bush's term. We don't know who is going to be President a year from now. But we know that President deserves a better procedure than we have given this President. Now is the opportunity to do that, and then we can get on to the other business of the Senate.

I encourage both sides to do that, and I thank my friend from Georgia for yielding.

Mr. CHAMBLISS. I thank my friend for his very insightful comments, as always.

I yield such time as she may consume to the Senator from North Carolina, Mrs. DOLE.

Mrs. DOLE. Madam President, when the Constitution was drafted so many years ago, it outlined a process by which the President of the United States would nominate judges with the ''advice and consent'' of the U.S. Senate. The filibuster expands the Senate's advice and consent role in nominations well beyond what the Constitution envisioned.

And for too long, politics has prevented the Senate from doing its constitutional duty.

The judicial process is obviously gridlocked. Qualified candidates have been nominated only to find that they are unable to get proper consideration on the Senate floor. In the meantime, burgeoning court dockets, delayed trials and overworked judges have become the norm for far too many of our courts, especially in North Carolina.

This simply isn't right. Every President, Republican or Democrat, deserves to have his nominees voted on. Every Senator has a responsibility to exercise his or her constitutional duty to vote on the President's nominees, and every nominee deserves a hearing, a committee vote, and an up-or-down vote on the Senate floor. Americans deserve courts that are staffed with qualified judges, and the process should be absolutely free of politics.

I was sworn in as a U.S. Senator to represent 8 million North Carolinians. In doing so, I took an oath to fulfill the duties of this office, including one of a Senator's most important responsibilities—voting on judicial nominees submitted by the President. Unfortunately, politics has undermined this process. Americans have the right to know where their Senators stand, and no one, no one should be able to hide behind parliamentary loopholes to avoid accountability to his or her constituents. The Constitution calls on all 100 Senators to give their advice and consent—not one Senator with a blue slip, not a group of Senators on the Judiciary Committee, but all 100 Senators.

President Bush has said that each judicial nominee deserves a vote within 180 days of his or her nomination. Unfortunately, that is not the case for several of our excellent North Carolina nominees. Right now, we have three candidates whose nominations have been languishing in the Senate.

Terry Boyle was first nominated to the 4th Circuit Court of Appeals in 1991—and then again in May 2001—this means he has been denied the courtesy of a vote in the Senate for more than a decade. Let me make that clear—More than a decade. The 4th Circuit hears federal appeals from North Carolina, South Carolina, Virginia, West Virginia, and Maryland. North Carolina is the largest State in the 4th Circuit, and historically the number of judges roughly corresponds with population. By this measure, we should have four to five judges on the court. We have only one. This seat has been vacant so long it has been declared a judicial emergency, so it is imperative that we act now.

And Terry Boyle is extremely well qualified for the job. He is Chief Judge for the U.S. District Court in the Eastern District of North Carolina, having served on that court for 17 years. He was designated to sit with the court of appeals 12 times, and he has authored over 20 appellate opinions. Everett Thompson, an Elizabeth City lawyer and a Democrat, said this of Terry Boyle: ''I think he is really one of the best trial judges I've every appeared before. He's a student of the law, he works hard, he's bright, he's fair. And I never saw him be political about anything at all.''

And then there is Jim Dever, former Editor-in-Chief of the Duke University Law Journal, nominated to serve on the U.S. District Court for Eastern North Carolina. How long should a nominee have to wait for a hearing? Three weeks? Six week? Six months? This distinguished attorney has waited 18 months just to get a hearing. The seat has been vacant for almost 6 years—currently, the longest district court vacancy in the country. And the Eastern District is an area where his skills and expertise are desperately needed—this vacancy has been a judicial emergency since 1999—and, until the recent confirmation of Louise Flanagan, there were only two full-time judges there. The caseload got so heavy last year that U.S. District Judge Malcolm Howard had to continue seven civil cases because of the pressing criminal docket, which takes precedent by law. In an order announcing his decision, Judge Howard wrote, ''For more than two years, this four-judge authorized court has functioned with two active judges. The result over time is that the caseload, civil and criminal, has become almost insurmountable.'' Mr. President, there hasn't been one single objection raised about Jim Dever's qualifications. He has broad bipartisan support. Robinson Everett, a Duke Law professor and former chief judge of the Court of Appeals for the Armed Forces, describes Jim Dever as having ''all the requisite qualities''—''he will be a superb jurist.''

And, Bob Conrad is a well-respected U.S. Attorney nominated in April to be U.S. District Judge for the Western District of North Carolina. He is sorely needed. This is a district that had one of the highest caseloads in the country for the sixth year in a row. Bob Conrad is held in high esteem by his colleagues—Republicans and Democrats. He is known for his prosecution of a cigarette smuggling ring funding the terrorist group Hezbollah. In 1999, he was appointed by then-Attorney General Janet Reno—Janet Reno, as the point man for a Justice Department Task Force looking into illegal fundraising on the campaign trail. Roy Cooper, the Democrat Attorney General for North Carolina, said of him, ''Bob is a straight shooter. We are from different political parties, but I believe he is a student of the law and his decisions are not affected by partisan politics.''

All three North Carolina nominees come with superb credentials, yet none has ever been considered by the Senate Judiciary Committee or, of course, the full Senate. This is a fairness issue. It isn't fair to these nominees and certainly isn't fair to our judicial system, which must not be subjected to political maneuverings.

If a Senator believes a nominee is not qualified, then have the confidence to convince fellow Senators to vote against him. But at least take a vote. I trust my colleagues will vote based on a nominee's qualifications, like integrity, fairness, intelligence, work ethic, adherence to the rule of law and judicial temperament. We owe it to their constituents to take a stand on each and every judge. And that simply isn't happening in the U.S. Senate.

There are a variety of ways that nominees have been held up in the Senate over many years. But we have reached an unparalleled level with the filibuster of judges. Instead of continuing a trend of retaliation, we have the ability to stop this downward spiral in its tracks. If we don't, the loser will be justice, the hundreds of thousands of crime victims in the United States and the judges who are overworked and unable to meet the demands on their courtrooms. And common sense tells us that many of America's highest courtrooms don't have judges to run them, and as a result, the legal system simply can't function. Yes, justice delayed is justice denied.

Mr. CHAMBLISS. I thank the Senator from North Carolina for her very insightful comments, as always, about what has been happening in North Carolina with respect to the delay of judicial appointments once again.

Now I yield such time as he may consume to the Senator from Indiana, one of the most respected men in the Senate, Mr. LUGAR.

Mr. LUGAR. Madam President, I thank the distinguished Senator from Georgia. I thank him for his leadership throughout this debate and his extraordinary contribution to our understanding. I likewise appreciate very much the testimony of the distinguished Senator from North Carolina with specific references to remarkable nominees, and the distinguished Senator from Missouri, who preceded the Senator from North Carolina, with his insightful comments.

I would like to take a slightly different approach in my speech. I believe this debate is about the thought that we ought to have a vote up or down on each nominee. That is very important to the Senate, to our country, for fairness to the nominees and to the strength of the judiciary.

It has been my privilege to serve almost 27 years, 15 of these years with a

Republican President. The custom I knew as a young Senator and now in whatever age I am at is that you have a responsibility: If you are going to make recommendations to the President of the United States, do so with care.

In the first 25 years of my career, I appointed a nominating committee in Indiana made up principally of very distinguished attorneys and judicial figures for whom I had respect and from all over my State. I knew these people commanded respect, and they were very helpful in identifying, each time a judicial vacancy occurred, several nominees.

Without fail, I presented all of these nominees to the President, and his staff sifted through them and in each case came up with one of the nominees, frequently the one recommended first by the panel I had suggested. And thank goodness, each one of these nominees had an up-or-down vote, usually a very fine consideration by the Judiciary Committee. I did not ever take that for granted, but I saw coming along the horizon a very different story in the current workings of the Judiciary Committee.

I have great respect for that committee and its members and for those who have served as chair and ranking member of the committee. I think there is a crisis in that committee which is very important for us to be thinking about. I believe that privately a good number of members in the committee on both sides of the aisle deeply regret what has been occurring in the committee.

Nevertheless, once again, on May 15, 2002, I was confronted with the news that Judge William Lee and Judge James Moody would both be retiring. I appreciated that those vacancies, two of them, were going to come in to the particular milieu about which we are now talking.

So on this occasion, I took the responsibility personally to write to the press throughout our State that we had a very substantial opportunity ahead of us. I outlined all the qualifications I could see of a Federal judge and, with great cooperation of the press, invited every well-qualified person to apply. The applications the candidates filled out consumed tens of pages, including substantial writings and often the statements they had made in their professional work.

Over the course of 4 months, ultimately 15 serious candidates emerged. I personally read all of their statements carefully. Those 15 candidates included 6 State judges, 4 U.S. magistrate judges, 2 attorneys in private practice, 1 Federal prosecutor, 1 Indiana prosecutor, and a legal professor. Their ages ranged from 35 to 61 and they represented 11 counties across our State.

After taking a hard look at all of these applications, I interviewed, over the course of an hour or 2, 5 of the nominees I thought were the most promising. In those interviews, I was interested principally in their professional skills, but likewise I had read the opinions of these nominees. I did not ask them questions on social issues in America today, on political issues, on foreign policy issues. I did ask them about their work, the characterization of how they would fulfill their responsibilities.

Following all of that, I submitted three names to the White House, and two of those persons were in fact nominated. They were Philip Simon, an assistant U.S. attorney and chief of the criminal division in Hammond, IN, and Theresa Springmann, a U.S. magistrate judge from Hammond, IN, this being the northern half of that State, that particular district that was involved.

In fact, I have nominated a third, whom I shall not indicate in this address. But President Bush, in fact, did send those two nominees I have cited, Mr. Simon and Ms. Springmann, to the Senate.

Philip Simon, I had found and the Senate Judiciary Committee discovered, had a remarkable record as a U.S. attorney. He was chief of the criminal division and responsible for all criminal prosecution in the Northern District of Indiana. He supervised and participated in prosecutions involving large-scale drug distribution rings, illegal firearms trafficking, white-collar fraud cases, environmental crime, and mob-related racketeering cases. He was in charge of a public corruption task force in Lake County, IN, which was very vigorous. He has been the recipient of a number of awards and commendations. The mutual insurance companies of Indiana presented an award to Judge Simon for his work to combat insurance fraud. He was given the Directors Award by former Attorney General Janet Reno, the highest award given to a U.S. attorney by the Justice Department in the last administration.

Judge Springmann was the first woman to be made partner at Sprangler, Jennings & Doherty, the largest law firm in northwest Indiana. She followed this up by becoming the first woman judicial official in the Northern District of Indiana, presided over 30 civil jury trials, 10 civil and criminal bench trials, and conducted 300 settlement conferences for the district court. She received a number of commendations and the highest rating from the Lake County Bar Association.

At this point, I decided to write to Senator HATCH and Senator LEAHY, chairman and ranking member of the committee. Beyond that, I went to both of them for personal conversation about these nominees, to explain the procedure and my own criteria, at least, in making these suggestions to the President.

In fact, on March 12 of this year, Judge Springman and Judge Simon were given hearings; but prior to that time, I approached Senator EVAN BAYH of Indiana, and I gave to Senator BAYH the total records of these nominees, so that he might see exactly the same applications I had examined, the same opinions. I asked him for his support of these nominees, and in fact he gave that. He appeared with me before the Judiciary Committee on behalf of these two nominees.

Perhaps we had an unusual situation in Indiana, but I point out that I was pleased the Judiciary Committee acted promptly on the nominees and the Senate did likewise. Thus, what could have been a gaping hole in the Northern District of Indiana judiciary lineup, in fact, was promptly filled, even after the departure of these two distinguished judges. Now, that will not work for every situation, and there may be occasions, as a matter of fact, when the President of the United States has nominees in mind, as he takes a look at a particular State, that the Senator from that State may not have in mind. I can conceive that my three nominees might have led to the President or his people saying: Go back and try again and see if there are not other persons among these distinguished people you have nominated who more fit the idea of what I believe ought to be on the bench in America today. I recognize that.

But it was very important to my constituents in Indiana that we have the service of these judges—continuity in that regard. It was very important that they knew the criteria, the character, the whole process, that it was totally transparent and played out over several months with an enormous amount of publicity.

Sadly enough, the Northern District of Indiana has an extraordinary number of political corruption trials going, with problems of gang-related crime from Chicago and the Illinois border, and sometimes from Michigan and through that area, which brings a total Federal emphasis quite apart from the local situations that might have been involved. These were controversial areas of turmoil, not the placid situations that more characterize my State.

This is why the selection of people in this particular business—where there was enormous fraud, abuse, and corruption—was especially important and the civic trust in these judges is especially important. They have been serving for several months with distinction, as I anticipated they would. There was in fact a recognition at the time they were sworn in by the total community, in a very large celebration, celebrating the judiciary and the rule of law in that part of our State.

I recite all of this and have asked Senators to indulge in what amounts to maybe a parochial recitation about Indiana simply to say I believe that somehow in the workings of the Judiciary Committee and the relation of that committee with the White House and with us, there really has to be a working out of a better feel. What I suspect is occurring here is that, unfortunately, there may be individual members of the committee who have decided a way to carve out a different

function for themselves or maybe suggest a different function for the Senate.

We are all judges of the Constitution and what is proper and so forth. There are some who say, after all, a Presidential nominee for a Cabinet position is going to be bound by the term of the President. But these are lifetime officials, and we recognize that. But as the distinguished Senators who preceded me have pointed out, new Presidents come and go. The fact is that Republicans and Democrats are somehow going to have to work together year after year in an ongoing body for the continuity of our country.

What is occurring now doesn't work. Without arguing the wisdom or justice of someone holding up a nomination through a filibuster, I submit that this is not in the best interest of the Senate or our judiciary. The public doesn't like it. There may be partisan persons or people with special interests in America who do like it. Whose entire being resonates with a particular cause and they attempt to prevail upon people to stop somebody at all costs before they do harm. I understand that. We all have to deal with that.

What we are talking about today is, I hope, the continuity for the very broad number of Americans who want to have confidence in justice and confidence in us, even in a closely divided Senate, maybe in a closely divided country, and to be able to work in their interests. That is why this debate is so important—to elevate this idea not only of comity but of justice, doing the right thing to a much higher level, as opposed to the tactical advantage of filibuster, of a misuse, in my judgment, of a separation of power situation to cause harm.

Madam President, I appreciate the opportunity to participate in this debate with my distinguished colleagues.

I yield the floor.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. CHAMBLISS. Madam President, I thank the Senator from Indiana. As always, he has provided great insight into the way in which judicial nominees are best handled. He does it in a way in which all of us function. It does work. Particular instances we have had on the floor under consideration have also gone through a similar process, where the President has picked nominees he knows are great jurists and great men and women.

Unfortunately, we are having to go through the exercise that we are having to go through to hopefully seek the cloture and to vote to ensure that these men and women get an up-or-down vote.

I want to talk quickly, in the remaining time we have, about two of the nominees.

I had the opportunity to visit this afternoon with the Honorable Janice Rogers Brown, who is a justice on the Supreme Court of California, whom the President has nominated for a position on the DC Court of Appeals. Justice Brown has a very distinguished 26-year legal career, all but 2 of which she served in public service. She has a great Horacio Alger story to tell. She was born in a tiny community called Greenville, AL, outside Montgomery. She grew up in the rural South just, as I did and Senator ALEXANDER did, at a time that was very difficult. She made the best of the conditions under which she grew up and she survived in a situation which a lot of people didn't survive.

I was so impressed not only with her legal background and her educational background but just with Janice Rogers Brown as a person. She is just a great lady. For her to go through what she is going through now, for one simple reason—that reason being nothing to do with any particular decision she has rendered in the Supreme Court of California. The only reason she is going through what she is going through now is that she gave a speech to about 50 people in which she challenged the young people in that audience and, as a result of that, she is now being filibustered or is in the process of coming to be filibustered by the Democrats.

I urge my colleagues to consider very thoughtfully voting positively on the cloture motions we are going to have tomorrow.

The PRESIDING OFFICER. The Senator from Maryland is recognized.

Ms. MIKULSKI. Madam President, here I am in the Chamber again exactly 24 hours 30 minutes from when I was gaveled down from trying to complete the VA-HUD bill. I was on the floor 24 hours 30 minutes ago, standing up for veterans, trying to protect the environment, and working very closely and enthusiastically on a bipartisan basis with the chairman of the subcommittee on appropriations for veterans, housing, the environment, and other independent agencies.

We were only 2 hours and about five or six amendments from being gaveled to come to cloture on the bill. As I was gaveled down, I was just heartsick that we could not take 2 more hours to finish the bill. Instead, this went on for 30 hours, and I am puzzled what has been accomplished by it.

I know what wasn't accomplished by it. We did not finish the appropriations bill yesterday. Because we didn't finish the appropriations bill yesterday, we essentially said to millions of American veterans that we are going to put you on hold. We said to those thousands of faith-based organizations that build housing for the elderly—oh, no, we have to worry about a filibuster for judges; oh, no, we cannot move the bill. For those people who are trying to bring criminal prosecutions on polluters in the environment, we said we cannot really fund that, even though you don't have the right computers and enough staff. We have to talk about four judges. Millions of veterans, housing to be built for the elderly, the environment to be protected, getting our astronauts back to space safely, investing in science and technology at the National Science Foundation—that is the stuff of the VA-HUD subcommittee. That is why I am so passionate about it. It is one of the greatest subcommittees in Appropriations because it meets compelling human needs and yet gets America ready for the future.

But oh, no, we could not finish it yesterday, we could not take 2 hours—oh, no, we had to talk about four judges and a process.

I am very disappointed in that, and I have to express my gratitude for the way Senator BYRD pushed for completion of the bill. I also express my gratitude to Senator TED STEVENS, who obviously worked out something where tomorrow we can come back and attempt to finish the VA-HUD bill. But this could have been done in the spirit of comity. We had momentum yesterday. It is the way the Senate ought to work. We had a bipartisan bill. We were forging bipartisan compromises, because when it comes to standing up for veterans, we cannot be the Republicans and Democrats, we have to be the red, white, and blue party.

Today, I was at Walter Reed talking to Marylanders who will forever bear the permanent wounds of war. We were in wards with young men who have put themselves on the line. They didn't lose their lives, but they have lost a limb. You see their families. You say hi to a young lady who is a wife or to a mother of one of those wonderful soldiers getting great treatment at Walter Reed. You have a 22-year-old wife and a 42-year-old mother trying to be there with her husband and her child, the man they love, so he can get well and get back on his feet.

They are doing a fabulous job at Walter Reed. We are going to do all we can to support them. Those men and women look so young, so fragile. They are so brave and they cannot wait to get back on their feet. Some want to get back to their unit. They are going to come back to the VA. We cannot abandon these soldiers, sailors, and marines who are coming back from Iraq either bearing permanent wounds of war or the permanent impressions of war on them. We have to have a VA. This is why we need to move our legislation forward promptly, expeditiously, on a bipartisan basis.

I know, working with the distinguished Senator from Missouri, the chairman, we can do this. But oh, no, we could not do it last night. We had to put it aside. I didn't tell the guys at Walter Reed that we didn't fund veterans health care last night. It would have broken my heart to tell them we are going back to the Senate to argue about a filibuster, to argue about four people of questionable qualifications to sit on the Federal bench.

I didn't say that to them, but I say this to you. We have to get serious about the agenda for the United States of America. We need the right priorities. Do we need a good judiciary? You

bet we do. That is why we passed 168 judges already. With these four, with the qualifications that are so thin and troubling and these other issues, I don't think so.

I want to talk about the priorities. Fortunately, again, because of the vigor of Senator BYRD and the cooperation of Senator STEVENS, we are going to be in the Chamber tomorrow. We do have priorities. I spoke about veterans health care. You also know we have really significant issues in housing. Our communities need help. We are ready to move funds such as the community development block grant. This is money that goes into local communities, whether it is a big city such as New York or the small communities of Alaska, providing help to build childcare centers, rehabilitation of dilapidated properties. CDBG, last year, created over 100,000 jobs. When we asked for 2 hours, we were standing up for that. When we look at housing for the elderly, most of it is built and operated by faith-based organizations, such as the Associated Jewish Charities, Associated Catholic Charities, the Lutherans. It is wonderful because they take small amounts of Federal dollars and leverage them with philanthropy. They not only run programs, they run them with great compassion.

These are the things we should be spending hours on the floor advocating. That is why we also worked to have funds to protect the environment. I wanted to talk about the Chesapeake Bay. Last night, I didn't talk about how we needed to protect the bay because we were short of time. People wanted to stand up on how they want to protect something about these four judges in the filibuster.

How about the National Science Foundation? That needed attention last night, too. This is the one that invests in groups such as biotechnology and infotech and nanotech. Nanotechnology is a whole new field of inventing subatomic particles. I said to the Senator from North Carolina yesterday when she was presiding, our earrings, Madam President, this will contain all the books in the Library of Congress 20 years from now. That is what nanotechnology means. Taking one pill—you can take everything from your heart rate to your blood sugar, and also make new metal that is 10 times lighter than steel and 10 times stronger.

I just lost thousands of steel jobs—thousands—and they are losing their pensions and their health care. Maybe with nanotechnology, we will have a new kind of metal mill and we can bring manufacturing back to our country. Instead, we are sending our jobs on a fast track to Mexico and a slow boat to China while we are slowing the Senate down in this 30-hour process and squandering time and not focusing on national priorities.

I don't want to diminish what we are doing on judges. The judiciary is a separate and independent branch of Government. This is why we need to have the best of the best.

Our courts are charged with safeguarding the very principles America stands for: justice, equality, individual liberty. That courthouse door must always be open, and when someone walks through that door they have to find an independent judiciary. I want to be sure when somebody walks through that courthouse door they not only get a fair trial and a fair hearing, but they know that person providing it is the best of the best.

The Senate does have an important and coequal role in the confirmation of judges. There is an advise-and-consent clause. It doesn't say sit around and rubberstamp. There is nothing in the Constitution that talks about 180 deadlines. It says give advice and consent.

We gave advice, but we do not give our consent on four individuals. When I look at judges, I have three categories: judicial competence, integrity, and commitment to the core constitutional principles.

My senior colleague and I have just supported three Republican judges from Maryland. We did it with enthusiasm. One was Judge Titus, whom the Senate confirmed just a few days ago. He is a brilliant man, very esteemed, involved in the Maryland bar. He could go on the Fourth Circuit Court of Appeals.

Another we backed in committee and on the floor was Judge William Quaries, an African-American jurist who I predict will go far. A scholar with a touch of the people. He has a unique touch.

We also backed someone unique, a man who chaired the Republican Party in Maryland. He actually ran against a Democratic attorney general and Senator SARBANES and I signed the blue slips with a flourish and appeared before the committee. Why would we do that? Because Judge Robert Bennet is a fantastic person and an excellent judge. He was fabulous as the U.S. Attorney. He brings legal ability, writings, et cetera. Look, we said, let bygones be bygones, he would make a great judge, and we are not going to stand on the party. This is the way SARBANES and MIKULSKI have operated.

But guess what. Now we get to the court of appeals. What a process this has been. First they sent us a gentleman who wasn't even a member of the Maryland bar. He lived in Maryland, but we don't think ZIP Codes are the only qualification. We think you have to be a member of the Maryland bar and participate in the Maryland legal community. So we rejected him.

The next person they sent was on the staff of Judge Gonzalas. We felt that was a little—it was an excellent job for him, but a little thin for the court of appeals.

Guess what. Now we have been sent a Virginian. You might say, Is there anything wrong with being from Virginia? No, as long as it is the Virginia seat. It is by tradition that there are geographic seats on the court of appeals and we want ours. My colleague Senator SARBANES and I are going to fight that on the basis of geography. There are many other things about Mr. Allen that are troubling about his background, but right now our battle will be because this should be a Maryland seat.

I have voted for Republican judges and I voted for Republican judges on the court of appeals in Maryland. There is Judge Niemeyer, an excellent judge. I supported him for the district court and now on the court of appeals.

When Judge Dianna Motts went to the court of appeals I didn't even know what party she was. I didn't know. You know what, I didn't care.

Here we are, arguing over a process. We are squandering our time, while pressing national needs are here. I would say, let's move on. Let's get back to the business America wants us to focus on. We can't have food fights and so on in the Senate. I have worked with so many of my colleagues on a bipartisan basis that I would like to get the momentum back for that type of action.

Tomorrow when I get another chance at VA–HUD, I look forward once again to returning to work in the Senate that tries to move bipartisan legislation. When it comes particularly to national security and the people who defend America, we put party aside and we are the red, white, and blue party. Maybe we need to start acting like that in the Senate on every issue.

I yield the floor.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Madam President, as I understand the allocation of time, we have the remaining time, am I correct?

The PRESIDING OFFICER. Yes, 15½ minutes.

Mr. KENNEDY. We have 15½ minutes.

As my friend and colleague from Maryland pointed out, we have been listening to our friends on the other side of the aisle for at least half of the past 24 hours. After we have listened to that, we still come back to the fact that 98 percent of their judges have been approved and 4 have not, and the Constitutional Convention never expected us to be a rubberstamp. We are faced on the other side by the prospect, at least, of changing the rules of the game even though those on the other side have used the system and refused to permit consideration of a number of judges. They did that in the Judiciary Committee of which I have been a member for many years.

It is interesting to me as we have gone over that ground so many times, our friends on the other side would be so interested and concerned about four individuals who have lost their jobs when we are facing so many other Americans out there who have lost their jobs and are really suffering.

We were talking about numbers. I mentioned the recent figures of the Department of Agriculture that say tonight there are 13 million children who

are going hungry. That is Department of Agriculture statistics. Have we heard over the period of the last 24 hours ideas or suggestions or recommendations about how we are going to deal with the problems of hunger in children? That is happening tonight, 13 million.

The other side is talking about four judges—four individuals who make more than $100,000 a year. What about the 13 million hungry children? Have we talked about that?

How much have we talked about the 9 million Americans who are unemployed? There are 1.4 million who have already lost their unemployment compensation, with all the implications of that. They can't buy health insurance, they can't put food on the table, they can't pay the mortgage, they can't buy a birthday present for their children, they can't celebrate any kind of holiday for any of the members of their family. They are hard-put and hard-pressed. Have we talked about that for those individuals?

How about the millions of Americans who do not have health insurance tonight? How about the millions of Americans who do not have health insurance tonight, the hundreds who lost their health insurance today, and all of their concerns for their families? How are they going to be able to deal with medical bills? Have we talked about that?

The escalation of the cost of health care—have we talked about that and what that means to families? Have we talked about families who have gone into bankruptcy because they can't pay their medical bills? That affects 2 million Americans every year. We talk about four judges; we don't talk about 2 million Americans who go bankrupt every year because of health care costs. We don't talk about that.

We haven't talked a great deal about the 80,000 workers who have contributed to the unemployment compensation fund, and starting the end of next month—and we are in the final moments and hours of this session—80,000 a week are going to lose their unemployment. This is at a time when the unemployment fund has $20 billion in surplus.

We are in the final hours, as the Senator from Maryland has pointed out. Have we talked about what is going to happen to them? Don't you think they are concerned about whether the Senate is going to take any action in the final hours? Do we demonstrate any anxiety about what is going to happen to their families? I haven't heard a great deal about it from our friends on the other side. I haven't heard a great deal about it.

We haven't heard a word from the other side about doing anything about increasing the minimum wage. It has been 7 years since we have increased the minimum wage; 7 years have gone by, and we can't get a vote on it in the Senate. The other side brings up a bill like the State Department reauthorization and I offer the minimum wage as an amendment and the majority Republicans pull the bill to deny us the opportunity to vote on it. I mean, if we are going to get indignant about the rules of the Senate, come on. Come on. Let's vote on an increase in the minimum wage. All of those on the other side who said, ''Let the majority have a chance, let's have a vote on an issue, let's have a vote on this, let's have a vote on that,'' we say, ''Let's have a vote on the increase in the minimum wage.'' Oh, no, we can't do that. We can't have a vote on the increase in the minimum wage. We couldn't even get a vote now on the question of extending unemployment compensation. Oh, no, we can't do that. No, no, we are not going to be able to do that. We can't get a vote on hate crimes. No, no, we can't. We have to study that some more.

I mean, come on. Twenty-four hours and you are going to continue for another 6 hours pontificating about the injustice that is being perpetrated when you have all this taking place across this country? The anxiety and tremendous frustration and the sense of hopelessness that takes place across this country, and you refuse to let us have a vote on the increase in the minimum wage?

This is the chart on the minimum wage. This is what is happening to the minimum wage in the United States of America.

This blue line indicates the purchasing power. It was almost $8.50 back in 1968. It is now down to, without the increase, $4.95 in purchasing power this year, without any increase. It will be just about the lowest it has ever been.

Who are the minimum wage recipients? Here we go. Here is another chart that shows the minimum wage no longer lifts a family out of poverty—from 1972 through 1982, there were 2 years when it was just at the poverty line. We said people who want to work and can work will work 40 hours a week, they will be able to get out of poverty. Look what has happened in the 1980s, 1990s. We were able to get a little blip in early 1992 and again in 1998. It was basically the same legislation. Now, since 1998 to 2003, we are unable to get a vote to increase it $1.50 over 2 years.

Can you imagine the amount of money we have seen returned to American taxpayers, $2 trillion over the past 2 years, and we can't get an increase in the minimum wage for working men and women? And the other side is trying to be indignant about the fact four individuals who are making over $100,000 are being put upon and we are going to have to listen to them for 6 more hours?

What is the increase in the minimum wage? It is the equivalent of $3,000. It might not seem like a lot to people, but it is 7 months of rent, 11 months of groceries, 14.5 months of utilities, full tuition for a community college degree. That is what that represents. That is real money for working families who are at the bottom end of the economic ladder.

Our Republican friends refuse to give us at least the opportunity to vote. Understand, vote. We heard that word used a great deal on the floor of the Senate. Let's get a vote on this issue.

Let me review as well about jobs. We talked about four jobs. What we are facing here is 3 million Americans who have lost their jobs. Let's think, besides the statistics, exactly what it means in terms of financial hardships of the unemployed. Look at this. Half the unemployed adults have had to postpone medical treatment—that is 57 percent—or cut back on spending for food. I have just given the figures and the statistics of the Department of Agriculture that have 13 million children hungry tonight. Thirteen million children are hungry tonight.

One out of 4, 26 percent, has had to move to other housing. Imagine that. We have 3 million people who have lost their jobs and 1 out of 4 had to move out—move in with friends or relatives. There is a problem that deserves debate, discussion, and ideas and solutions and resolution and determination and accountability here. There are 38 percent who have lost their telephone service, 22 percent are worried about losing their phones, more than a third, 36 percent, have trouble paying the gas or electric bill—things that are absolutely assumed around here.

People are really hurting. We are not talking about 4 people, we are talking about hundreds of thousands of people, and we have occupied the time of the Senate to talk about 4 judges who are not qualified, I don't believe, to serve on the Supreme Court. We are not expected to be rubberstamps. Our Founding Fathers never intended that.

I want to mention one other item that is now in the conference. It would be pretty worthwhile if we had engaged our friends on the other side to tell us what is happening in the conference on the issue of overtime pay. When people work overtime, something that for some 60 years has been in our law, it ensures people who work longer than 40 hours a week are going to be fairly treated. We have the proposal by the administration to deny that to 8 million Americans. It was defeated here on the floor of the Senate, defeated in the House of Representatives, and now it is in a conference.

Why don't we hear from the other side what has happened to that conference? Why don't we hear where they are on the issues of overtime? That makes an enormous difference to people. It makes a big difference in their lives. It is not 4 people and their livelihood, it is hundreds of thousands, tens of thousands, millions of people whose lives are going to be affected.

Right off the top of the list are firefighters, policemen, nurses. Does that ring a bell to anyone around here? They are the backbone of Homeland security. We are cutting back on their income.

We have had a bipartisan determination on that issue here. Do we hear anyone on the other side, when they are talking about 4 jobs, talk about all these numbers of Americans who are losing out?

Madam President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator has 2½ minutes remaining.

Mr. KENNEDY. I would have liked to have gone on. Maybe we will have time later.

UNANIMOUS CONSENT REQUEST—S. 224

In the meantime, I ask unanimous consent the Senate return to legislative session, proceed to the consideration of Calendar No. 3, S. 224, the bill to increase the minimum wage, that the bill be read a third time and passed, and the motion to reconsider be laid on the table.

The PRESIDING OFFICER. Is there objection?

Mr. CORNYN. Madam President, I ask unanimous consent that the Senator modify his request so that just prior to proceeding as requested, the three cloture votes would be vitiated and the Senate would then immediately proceed to three consecutive votes on the confirmation of the nominations, with no intervening action or debate.

The PRESIDING OFFICER. Is the Senator from Massachusetts willing to modify his request?

Mr. KENNEDY. Madam President, I withdraw my consent request because it is quite clear there is objection by the Republicans to the consideration of an increase in the minimum wage.

UNANIMOUS CONSENT REQUEST—S. 1853

I ask unanimous consent the Senate proceed to legislative session, the Finance Committee be discharged from further consideration of S. 1853, a bill to extend unemployment insurance benefits for displaced workers, that the Senate proceed to its immediate consideration, the bill be read a third time, passed, and the motion to reconsider be laid on the table.

Mr. CORNYN. I ask consent the Senator modify his request so just prior to proceeding as requested, the three cloture votes would be vitiated and the Senate would then immediately proceed to three consecutive votes on the confirmation of the nominations, with no intervening actions or debate.

The PRESIDING OFFICER. Does the Senator from Massachusetts modify his request with those conditions?

Mr. KENNEDY. I withdraw my request and let the Record indicate the Republicans have objected to the extension of the minimum wage and have objected to the extension of unemployment compensation for hard-working Americans who have paid into that fund.

Mr. CORNYN. Madam President, once again, we are proceeding with the Democrats' filibuster of the circuit court nominees.

Mr. KENNEDY. Do I have the floor?

Mr. LEAHY. Regular order, Madam President.

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

Who yields time?

Mr. SHELBY. I yield myself as much time as I require.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SHELBY. Madam President, I rise tonight to speak on behalf of the President's right to select qualified judges of his choosing and the Senate's duty to provide advice and consent on these judicial nominees by means of an up-or-down vote on their confirmation.

The quagmire in which we currently find ourselves I believe threatens the constitutionally-vested discretion of this and all future Presidents in appointing those judges they see fit. Second, it threatens the independence and effectiveness of the federal judiciary, and third, it threatens the future function and effectiveness of the United States Senate as the deliberative and distinguished institution it is today.

Article 2, Section 2, Clause 2 of the United States Constitution vests the President alone with the power of appointing Federal judges ''with the Advice and Consent of the Senate.'' Nowhere does the Constitution grant the Senate any power over selecting judicial appointments.

A review of over 200 years of the Senate's history and practice makes it clear that the Senate's role in Presidential nominations is either to confirm or deny their appointment by means of an up-or-down vote on the floor—nothing more and nothing less.

The unprecedented obstruction we are now experiencing is simply unjustifiable, I believe.

Why not allow the President to do his job of selecting judicial nominees and let us do our job in confirming or denying them? Principles of fairness call for it and the Constitution requires it.

Those of my colleagues who are currently blocking confirmation of the President's circuit court nominees have admitted to doing so on ideological grounds. They feel that these nominees are outside of their definition of ''mainstream''—whatever that may mean. When Senators impose a subjective litmus test on judicial nominees, they are really just seeking out candidates that agree with them ideologically. This introduces a political element into the constitutional framework of judicial appointments that isn't there—and with good reason.

The Constitution grants Federal judges lifetime tenure and salary protection precisely in order to insulate them from political influences.

The Senate's standard for confirming a judge should simply be a nominee's honesty, competence, temperament, and appreciation for the proper constitutional role of an Article III judge.

Any test beyond this substitutes the judgment of individual Senators over that of the President and unduly politicizes a position that is intended to exist outside the realm of politics. What is more, as my colleagues in the minority continue to use their ideological litmus test to justify blocking the President's circuit court nominees—four so far, with more promised—these unfilled vacancies impose a heavy burden on our judiciary.

The ability of these appellate courts to manage their caseloads and to effectively interpret and apply the law is dependent on a full complement of judges available to consider and rule on pending cases.

We all know the saying ''justice delayed is justice denied,'' and we simply can not allow our own political agendas to undermine the fair application of the rule of law.

I would encourage all Senators to take a step back from the current debate and envision the future of this Senate if the obstruction of these judicial nominees continues. Do we really want to operate in an environment where judicial confirmations require 60 votes? That is the direction in which we are rapidly headed.

I can understand that some of my colleagues don't agree with our current President's politics. That is politics. I can understand that this President's judicial nominees may not be to some of their ideological liking. That is politics. However, this does not justify denying a judicial nominee a simple up-or-down vote.

I feel quite certain that my colleagues on the other side of the aisle would not be nearly as accepting of these obstructionist tactics if they proverbial shoe were on the other foot.

I am not asking any of my colleagues to vote in favor of confirming a nominee that they oppose. I leave that determination to their discretion. I am simply asking them to allow the Senate to complete its constitutionally-appointed duty in providing the President with advice and consent on all of his judicial nominees.

Now, I would like to take just a few moments to discuss two of the President's filibustered circuit court nominees in which I take a particular interest: Alabama Attorney General Bill Pryor and California Supreme Court Justice Janice Rogers Brown.

Bill Pryor is the President's nominee for the United States Court of Appeals for the Eleventh Circuit. I have known Bill for many years and have the highest regard for his intellect and integrity. Whether as a prosecutor, a defense attorney, or the Attorney General of the State of Alabama, he understands and respects the constitutional role of the judiciary and specifically, the role of the federal courts in our legal system.

I am confident that Bill would serve honorably and apply the law with impartiality and fairness, if he were confirmed for the Eleventh Circuit. Unfortunately, Attorney General Pryor's nomination has been filibustered for most of this year.

Janice Rogers Brown is the President's nominee for the United States

Court of Appeals for the D.C. Circuit, which is widely regarded as the court second in importance only to the United States Supreme Court.

I am proud to say that Justice Brown is a native of my own State of Alabama, having been born in Greenville and raised in Luverne before moving to California.

The progression of her career to serve on California's highest court—the first African American woman ever to do so—is a remarkable story of success through hard work and dedication that serves an example for us all.

Justice Brown has enjoyed a distinguished career on the California Supreme Court, most recently receiving 76 percent of the vote the last time she came before California voters.

Justice Brown possesses the highest character and ideal temperament for this important judgeship. Unfortunately, her nomination is subject to filibuster and thus the D.C. Circuit is denied her services.

It is the role of the Senate to provide the President with advice and consent on his judicial nominations. We can only fulfill this duty by allowing each of these nominees an up-or-down vote by the full Senate.

The proper function and balance of the executive, judicial and legislative branches depends upon it.

It is my hope that we can end this impasse tonight and vote on each of these nominees. Let the majority vote. Let the majority count. If we get the majority vote, they will be confirmed, but they should not be obstructed. They should not be filibustered.

I yield the floor.

N O T I C E

Incomplete record of Senate proceedings.

Today's Senate proceedings will be continued in the next issue of the Record.

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Senate

EXECUTIVE SESSION

The PRESIDING OFFICER (Mr. CHAMBLISS). The Senator from Iowa.

Mr. GRASSLEY. Mr. President, I yield myself such time as I might consume.

Mr. WARNER. Mr. President, parliamentary inquiry: Can the distinguished Senator from Iowa—we were told to come here at certain times, and if he were to take as much as he wishes, that would preclude any other Senator speaking in the time period.

Mr. GRASSLEY. I yield to the Senator whatever time he needs.

Mr. WARNER. I withdraw my parliamentary inquiry.

Mr. GRASSLEY. I yield the Senator whatever time he wants.

Mr. WARNER. I will sit down. The Senator may go ahead.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. GRASSLEY. Mr. President, I rise today to discuss the Democrats' filibuster of President Bush's judicial nominees. The Senate Democrats still think it is Halloween and are trying to spook us into believing that President Bush has nominated a bunch of extremist individuals that cannot be good judges. The Democrats are claiming that these nominees are ''outside of the mainstream''. The truth is that these individuals will not implement a liberal agenda on the bench. The truth is that these individuals will follow the law, rather than bend to the will of the political left. But these inside the Beltway, left wing groups have gotten the Democrats to do their bidding. They have hijacked the judicial confirmation process in an unprecedented filibuster of judicial nominees, and they are denying these good men and women an up or down vote. Federal judicial seats will remain unfilled, and litigants seeking justice from those courts can expect further delays.

The reality is that the Constitution of the United States gives the President the power to appoint individuals to seats on the Federal judiciary. The Constitution gives the Senate the responsibility to advise the President in this process. And the Constitution requires the Senate, by a simple majority

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ROBERT W. NEY, *Chairman.*

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

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vote, to give its consent to the President's choices for Federal judgeships, or to withhold that consent. But through an unjust abuse of the filibuster, a minority of Senators is preventing the majority of the Senate from taking an up or down vote on President Bush's judicial nominee. That is not right.

I have always been of the position that judicial nominees should be carefully scrutinized by the Judiciary Committee because they are life-time appointments. It is my opinion that judicial nominees should have intellect, experience, character and integrity. They should also have the right judgment and temperament for the job. But most importantly, they should understand their role on the bench, which is to interpret the law and to follow the law, not to make the law and legislate from the bench. That is the most important credential in my book. And I take that job of looking at judicial nominees very seriously.

However, once the Senate Judiciary Committee has had the opportunity to review these candidates and to approve them, these individuals should get an up or down vote by the full Senate. This is the right process. This is a fair process. During my tenure with the United States Senate, I haven't always agreed with a sitting President's choices for the Federal bench. I have voted against a number of judicial nominees because I didn't believe they were qualified to be a judge, or because I didn't believe that a seat needed to be filled. But I have never filibustered a judicial nominee.

But that is just what is happening right now. We are seeing the unprecedented use of the filibuster rule to stop judicial nominees from being confirmed. An exceptional group of men and women are being used for political gain by this minority group of Senators. The nominees that the Senate is considering right now, Janice Rogers Brown, Carolyn Kuhl, and Priscilla Owen, as well as Bill Pryor and Charles Pickering, two nominees that have been filibustered, they all are distinguished individuals that deserve an up or down vote. They all deserve to be confirmed.

Let me say a few words about the men and woman that are being filibustered. These men and women are being characterized as outside of the mainstream, extremist people. They are being characterized as ''bad judges'' that have to be stopped. Nothing is further than the truth. The reality is that some left-wing interest groups are skewering these nominees' reputations with baseless allegations because they don't have a liberal ideology. And the Senate Democrats are more than happy to do the bidding of these racial outside groups. And our nation will suffer dearly for it.

Priscilla Owen is currently a judge on the Texas Supreme Court. She was unanimously rated well qualified by the ABA and enjoys a steller reputation in her home state. She's been repeatedly reelected to the Texas Supreme Court by wide margins and has served that court admirably. Judge Owen enjoys the support of her two home state Senators and has been endorsed over and over again by elected officials, fellow jurists, and attorneys alike.

Janice Rogers Brown, the daughter of a share cropper who attended segregated schools, put herself through California State University and eventually law school at UCLA. She did all this while raising two children as a single mother. She served her state in a variety of legal roles, including Deputy Attorney General and then later as a legal affairs secretary to the Governor. Judge Brown has served on the California Supreme Court since 1996.

Carolyn Kuhl has been a judge on the Los Angeles County Superior Court since 1995. She served in a variety of positions in the Justice Department, and then was a partner at a prominent Los Angeles law firm. Judge Kurl received a well qualified rating by the ABA, and enjoys bipartisan support.

Three other highly respectable nominees have already been filibustered. Bill Pryor has earned the reputation as one of the most experienced states attorneys general in the country. He graduated from law school magna cum laude, and clerked for Fifth Circuit Judge Wisdom. We have seen that he enforces the law regardless of his personal convictions. General Pryor also has overwhelming support from across the political spectrum.

Judge Charles Pickering has been a lawyer and county prosecutor, and has served as a distinguished federal district court judge for the past 11 years. He received the ABA's highest rating, ''well qualified.'' He stood up against the Ku Klux Klan, and has been a leader for equal rights, integration and inclusion in his community. The people that know Judge Pickering best support him without hesitation.

Finally we have Miguel Estrada, who was nominated to the D.C. Circuit Court of Appeals. He become so frustrated with the process that he withdrew his nomination after waiting over 2 years for an up of down vote. Yet he is the true American inspiration story. Born in Honduras, he came to America as a young boy and through determination and hard work, elevated to the top echelons of the law profession. He was an Assistant Solicitor General of the United States in the Clinton Administration, and was a partner in a prominent law firm. Mr. Estrada received the highest rating from the American Bar Association, and is well respected by colleagues and friends alike.

It is a real shame that this fine man felt he had to withdraw his nomination from consideration because of the guerilla smear tactics of the far left and because of the guerilla smear tactics of the far left and because of the Democrats' unprecedented filibuster tactic. And it is a real shame that these other fine men and women, and their families, have to go through this same miserable saga. As I think about these nominees with their stellar reputations, outstanding intellects, and their compelling life stories, it saddens me to know that the Democrats have been so ready and willing to stomp all over their good names and to deny the American people quality jurists—all this in the name of carrying the sword for special left wing interest groups.

I have served in this body for many years. And I have seen the filibuster used to leverage a better bargaining position on legislative matters. But it hasn't been used to block a judicial nominee, and especially not where that nominee enjoys majority support by the Senate. This is the first time in history that the filibuster has been used to prevent a judicial confirmation, even though my colleagues on the other aisle say that isn't the case. It is wrong and probably unconstitional. It is an abuse of the process. The Senate is supposed to provide advice and consent. The Democrats are denying the rest of the Senate our responsibility under the Constitution to give our consent—or even to withhold our consent. It is a terrible disgrace and ought not to continue.

The Democrats are leading us down a path that is just going to make matters worse. The judicial confirmation process is already in an unhealthy state of repair—we don't need to destroy it altogether. The Democrats need to stop playing politics with the judiciary. They need to stop spooking people about the qualifications and ability of these nominees to be good federal judges. They need to stop spooking away qualified nominees like Miguel Estrada. We need to stop this unjust filibuster and give these worthy nominees what they deserve—an up or down vote.

I yield the floor. I yield whatever time the Senator from Virginia needs.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. WARNER. Mr. President, I thank my good friend, my colleague from Iowa.

Mr. President, what is the parliamentary situation, and what time remains under the control of my distinguished colleague from Iowa who is managing this set of debates at this time?

The PRESIDING OFFICER. The majority controls 10 minutes, the minority has 30 minutes.

Mr. WARNER. So we have 10 minutes remaining.

The PRESIDING OFFICER. That is correct.

Mr. WARNER. I thank the Chair.

Mr. President, I commend my good friend from Iowa for a very statesmanlike coverage of the responsibilities of the Judiciary Committee on which he has served these many years.

I turn to the following. If we look back in history in the summer of 1787, 55 individuals gathered in Philadelphia to write our Constitution. It was a very hot summer, and it was a long and arduous debate, many drafts back and forth, but careful consideration was

given. Finally, in mid September, it was over. It was a monumental achievement. But the Framers did not know at that time what a great achievement they had made, one that would enable the United States, today, these 200-plus years later, to become the oldest continuously surviving Republic form of government on Earth today.

Almost every other government in existence at the time of the Constitutional Convention has fallen into the dustbin of history. So we must ask ourselves, why? It is very clear to this humble Senator that it was due, in part, to the wisdom of the Framers to have three coequal branches of the Government. I view this debate as one to determine the survivability of the coequal stature of the three branches.

I am not going to argue about all the things that have taken place back and forth, but just go to this magnificent document—the Constitution. The Presiding Officer has placed a copy of it on every desk in the Senate chamber, and many of us daily carry it in our pocket. The Constitution very clearly states that a simple majority vote is the regular order of business, with the exception of a few instances specifically enumerated in the Constitution that require super-majority votes. Had the Framers decided that we should require 60 votes for the confirmation process of the Senate, they would have explicitly written in such a requirement.

It is quite interesting to note that:

Two-thirds of the Senate must vote to ratify a treaty; two-thirds of the Senate must vote to convict on an article of impeachment; two-thirds of a House of Congress must vote to expel a Member of that body; two-thirds of each House of Congress must vote to override a President's veto; and two-thirds of each House must vote to propose an amendment to the Constitution. With regard to the advice and consent, clearly enunciated in the Constitution, and given to only one body of Congress, the Senate, there is no mention of a higher than simple majority vote. It is there to protect, again, the checks and balances. It is there to protect against an executive branch nominee which, in the fair judgment of the Senate, does not meet the high standards to become a member of the judicial branch.

The case here is very simple: Are we going to abide by what the Framers laid out, what has kept this great Nation together these 200-plus years? Or are we going to devise and contrive in our own words some system by which to prevent a simple vote up and down on a judicial nominee?

The Constitution does not include that super-majority. If the bar is to remain at 60 votes, as my colleagues on the other side have so vehemently argued in favor of, I say then the Senate would have far more power on questions of judicial nominees than was intended by the Framers. The checks and balances concept of our Constitution would be changed. And how would that affect our Republic?

Well, when the Constitutional Convention was over in September 1787, Benjamin Franklin emerged and was greeted by a crowd, some were reporters. He was questioned, ''what have the Framers wrought?'' He replied, ''a Republic, if you can keep it.''

And that is what we are doing here in this historic debate. We are determining the rules by which we keep that Republic.

Throughout this historic debate, this Chamber has resonated with the use of the word ''filibuster.'' I ask: Can any Senator point to use of that word in any of the rules of the U.S. Senate? In every desk, every Senator has their book on the rules of the Senate and procedures of the Senate. You can't find the word ''filibuster'' in that book because it is not there. But, should I be wrong, parliamentary inquiry to the Presiding Officer, can the Parliamentarian find the word ''filibuster'' in the rules of the Senate or any definition in the rules of the Senate?

The PRESIDING OFFICER. The word ''filibuster'' is not contained in the standing rules of the Senate.

Mr. WARNER. I thank the Presiding Officer. It is not in the rules. Where do you go to look for it? Webster's Dictionary. This dictionary has been in my office these 25 years since I have been privileged to serve in this body. And I use it often. I say to my colleagues, this is an interesting bit of history. The dictionary defines ''filibuster'' as, ''An irregular military adventure especially one in quest of plunder, a free-booter, applied to buccaneers infesting the Spanish American coast, later an organizer or member of a hostile expedition to some country or countries with which his own is at peace in contravention of international law.''

Go all the way down to the last definition, and you will find a reference that is most appropriate to this debate. I read:

> A member of a legislative or deliberative body who, in opposition to the proposed action of the majority, obstructs or prevents action by the extreme use of dilatory tactics such as speaking merely to consume time and so forth.

It is about the fifth definitional use of this word.

I say, most respectfully, that it is a word that is a slang word. It probably has been used to cover many types of procedures that both sides have followed under the rules for many years.

I went back and did some research in this wonderful book. It is entitled ''Senate Cloture Rule, Limitation of Debate in the Congress of the United States, Legislative History of Paragraph 2 of Rule XXII of the Standing Rules of the United States Senate.''

I do not find in this excellent treatise, put out in 1985 by the Library of Congress, printed by the direction of the Rules Committee and Administration of the United States Senate, any instance in which the situation we are faced with today with these nominees is covered. They do refer to the use of the word ''filibuster,'' but loosely.

Ultimately, with all of the confusion surrounding the word ''filibuster,'' I think you have to come down to what it was the Framers intended, what is in this book—the Constitution, which has held this Nation together these 200-plus years, this great Republic of our's.

I say to my colleagues, as Ben Franklin said, we have a Republic, and this debate is determining the ground rules by which we can or cannot keep it.

Clearly, the President has the authority to nominate. Clearly, this body has the authority of advice and consent. But remember, it is to be in a balance of powers between the executive and the legislature. I say if we are to set a precedent here that it requires 60 votes to act upon a nominee, three nominees—

The PRESIDING OFFICER. The time of the majority has expired.

Mr. WARNER. I ask unanimous consent for 1 additional minute.

Mr. LEAHY. Then I ask for 1 additional minute on our side.

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

Mr. WARNER. If we were to set a precedent that nominees reported out of the Judiciary Committee were subjected to a 60 vote requirement, this precedent would disrupt the carefully crafted system of checks and balances embedded in our Constitution by giving the Senate far more power in the judicial selection process than the Executive Branch, the President. These nominees deserve a simple up-or-down vote as provided in the Constitution by the absence of any reference to a super-majority or a 60 vote requirement.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. CARPER. Mr. President, I am honored to follow the Senator from Virginia. I want to return to the Constitutional Convention that he spoke of from 216 years ago. Among the last issues resolved at the Constitutional Convention was the question of whose job it is to select the members of this third branch of Government that was to be created.

We have an executive branch, the legislative branch with the House and Senate, and a judicial branch. At that time in this country there was a great concern on the part of those framing the Constitution and trying to craft a framework of our Government. Foremost among the concerns they had was the concern that somehow we would unintentionally invest too much power, too much authority in one person. Having dealt with the King of England and not wanting to have to deal with another figure of authority with the kind of powers of a monarch, there was a great debate over what would the powers be for this new President and how would we constrain those powers.

Among the last issues resolved at the Constitutional Convention was the

question of who selects the judges, who selects the members of that third branch of the judiciary. There were plenty at the Convention who thought that in order to make sure we didn't end up with another monarch in this country, a king, the power of selecting the judiciary should lie with the legislative branch. There were those who thought the Senate or the House or some combination thereof should select who the judges would be. There was another school of thought that said, no, maybe we should give the President, our Chief Executive, the power to select who our judges would be. As we all know, the compromise that was struck was one that says the President may nominate with the advice and the consent of the Senate.

Yesterday, as our youngest son came home from school, he shared with his mom and me some good news. He shared with us that while he won't get his report card for another week or so, he had learned the results of his scores, his grade in English language arts. He is in the eighth grade. He came home and he said: I got a 94 for English language arts in this grading period, dad. I get an A. I get an A.

We were delighted. He has a tough teacher. He has worked real hard, and he earned a 94. He is going to get an A. We hope he does as well in his other courses.

On the scorekeeping for how this President is doing with respect to getting his nominees confirmed, I think of the 172 we voted on so far; 168 have been confirmed, 4 have not. That is 98 percent. In my book, in my son's book, that is an A. That ain't bad.

Before I came here to serve in the Senate with my colleagues, I was a Governor. I know some people get tired of hearing me talk about that. But it was a great privilege to be Governor of my State. In our State, Governors nominate people to serve on the bench. The Senate can confirm. Whether it was a judge, supreme court, magistrate court, any commission, I would like to have had every single nominee confirmed. I suspect that most other Governors who similarly make nominations for appointments in their States would like to have all their nominations confirmed as well. Not all of my nominations were confirmed.

There is a give and take with the Senate in my State, just as there is a give and take with the Senate in this city for our National Government. I don't often quote Mick Jagger and Keith Richards, but there was an old song from my youth they used to sing: ''You can't always get what you want, but if you try sometime, you get what you need.''

We need from this President good nominees. I expect they are going to be Republicans. I expect they are going to be conservative. My guess is that of the 98 percent who have been confirmed, they were all Republicans. For the most part they were all conservative. I don't think it is realistic of this President to expect that we are going to confirm 100 percent of his nominees.

It sure wasn't the expectation of his predecessor, Bill Clinton. He got a majority of his nominees confirmed but not 100 percent, not 95 percent, not 90 percent, not 85 percent, but about 80 percent were actually nominated, had hearings, and their names actually ended up on the floor for a confirmation vote. That is a B-minus. Compared to the A-plus that this President is getting with respect to confirmations, I am not sure I understand fully the great dissent and the great disappointment and the great frustration our friends on the other side have shared.

Here is my frustration. I didn't come here to be about partisan politics. I didn't come here to be about gridlock. I didn't come here to pursue that agenda. I came here as one who wants to work with people on the other side of the aisle. I want to get things done.

I have voted with this President more than 75 percent of the time. I am told that only 7 Democrats have voted with this President more than I have in the last 2 years. I have tried to provide leadership on issues that both of my colleagues are concerned with, Senator LEAHY and Senator HATCH: class action, asbestos reform, bankruptcy, welfare, a comprehensive energy policy.

Meanwhile, while we are standing here tonight debating on whether or not 98 percent is good enough, we don't have an energy policy. Over half the energy we get that we use in America comes from foreign sources, a lot of it controlled by people who don't like us. We don't have an energy policy. We should be debating an energy policy and adopting it.

Standing here tonight we have a legal system that has lost its sense of balance, whether the issue is class action litigation that is being heard in small, remote courthouses around the country or whether the issue is asbestos and folks sick and dying getting the help they need. Meanwhile, the people who will never be sick will get money from those who need it. We should be debating those issues here tonight.

We have too much sulfur dioxide or nitrogen oxide and mercury in our air, putting out too much carbon dioxide, causing global warming. We should be addressing those issues.

We had a trade deficit last year that exceeded $400 billion. It is getting worse. We have a budget deficit that this year will approach $500 billion in 1 year alone. We are paying today on our national debt, just today, $800 million—plus just in interest on the debt. We ought to be debating how we rein in those budget deficits and trade deficits, not deciding is 98 percent enough or is 97 percent high enough in terms of success in nominations.

As former Governor and someone who was once privileged to chair the National Governors Association, we looked at the States as laboratories of democracy. We looked at the States to provide best practices, whether it was moving people off welfare, helping to make sure people coming out of prison didn't recidivate and go back to prison, what could we do to raise student achievement.

I want to talk about one model that works real well with respect to judicial nominations, and one I know the most about is my State of Delaware. Since 1897, the constitution of my State has called for balance with respect to our judiciary. We have year after year a legal climate and a judiciary that is acknowledged by some of the foremost attorneys who practice in this country as the best—the best legal climate, the fairest of any State in America. We are proud of our judiciary.

In the 8 years I was Governor, I nominated as many Republicans to the bench as I did Democrats. MIKE CASTLE, my predecessor, now a Congressman, when he was Governor, he nominated as many Democrats to the bench as he did Republicans.

In our State, there has to be a symmetry. Essentially, for every Democrat you nominate, the next one has to be a Republican. We have done that for over 100 years and have ended up with a terrific judiciary, widely respected at home, across the country, and even beyond our borders. There is a saying, ''If it ain't broke, don't fix it.'' That is not what we ought to say. We should say if it is not perfect, make it better.

The way we nominate judges in our National Capital for our Federal Government is broken and it needs to be fixed. Whether George Bush is President or Bill Clinton is President, we waste more and more time on judicial nominations. We are bogged down in that. We still haven't passed our spending plan for the new fiscal year, which started a month and a half ago. We are still wrestling with our appropriations bills. This system is broken.

My friends, the solution may be in Delaware, it may be in Vermont, or it may be how they nominate judges in Georgia or in Iowa. There is a better way to do it than what we are doing here. We have to find it and we have to come to some kind of closure around a better plan. When we do, instead of facing the prospect of leaving here without action on class action legislation, action on asbestos, or action on an energy bill, or without action on transportation policy, or early childhood programs, maybe we can do our jobs and even pass appropriations bills on time instead of the kind of mindless—oftentimes mindless debate we devote to judicial nominations.

That having been said, I yield to the former chairman of the Judiciary Committee, the ranking Democrat, Senator LEAHY, with my thanks.

Mr. LEAHY. Mr. President, I thank the Senator from Delaware for what he said. He has a distinguished record in the other body, as Governor and now here. We listened to him in this Chamber. I wish they would listen to him on the other end of Pennsylvania Avenue

because the person who makes the nominations is the President. I have been here with six Presidents. I have never known a time when a President is less willing to engage the Senate in advise and consent. President Ford did, President Carter did, President Reagan did, former President Bush did, and President Clinton did. I hope this White House would begin to do that also.

Interestingly enough, today I was given a petition signed by 310,000 Americans from all over the country. This petition supports a filibuster of extreme judicial nominees of the President. In fact, in the last 72 hours, 172,000 Americans signed these petitions. I went through them, thanks to the ability to search electronically, and picked out some from my State of Vermont.

In Moretown, VT, someone wrote:

> It is a disgrace how this administration is attempting to pack our Federal courts with right-wing extremist judges that seek to undermine the hard-fought pillars of legal precedent that reflect the values of a vast majority of Americans. I wholeheartedly support the efforts of the Senate Judiciary Committee Democrats to oppose this blatant abuse of the majority power. . . . The Senate GOP leadership should be ashamed of wasting precious legislative time to engage in what amounts to a publicity stunt. . . ..
>
> Shame on them. They don't deserve the seats that the people have entrusted in them.

Moretown, VT, is a little town a few miles away from where I live. It is straight down the valley; you can look straight down the valley from the front lawn of my home. We used to go to mass there on Sunday. It is where one of my grandmothers was born. So I was pleased to see that.

I received this petition from West Townshend, VT:

> Thank you very much for all your hard work and valuable work. We appreciate it.

West Townshend is a very small town in Vermont. People are very independent there.

This one is from South Burlington, VT:

> I support any measure to prevent Bush's extreme judicial appointments. Keep up the good work.

This is from Barre, VT:

> Please be strong and stand against the Republicans. Ashcroft has already taken away too many of our civil liberties; we cannot have judges doing the same.
>
> Barre, VT, is considered the granite center of the world, with the largest granite quarries in the world. My grandfather, Patrick J. Leahy, was a stonecutter in Barre, VT. My father was born in Barre, VT. The people of Barre, VT, are as strong and independent as the beautiful granite in their quarry.

I have one from South Ryegate, VT:

> You must protect the cherished rights of women to control their own bodies. Do not approve judges whose records show that they do not believe in women's rights.

South Ryegate, VT, is a beautiful little town on the eastern side of Vermont. I know it well. When my maternal grandparents immigrated to this country from Italy, not speaking a word of English, they came to South Ryegate, VT, where my Italian grandfather was also a stonecutter. My mother, a first-generation American, was born there, her first language was Italian, but she learned English at school. I remember my grandfather, so proud of the judicial and constitutional system of this country, and so proud of taking the oath of citizenship. My father, in Barre, VT, was so proud of the separation of powers in this country—the legislative branch, an independent branch of Government, equal to the other two; the executive branch, independent and equal to the other two; and the judicial branch, independent and equal to the other two.

I remember him sitting in the gallery when I was first sworn in as a Senator, knowing I was part of that triumvirate of powers in this country, which is why our democracy has lasted this long. But throughout it all, it was so important that one branch was outside of politics, that one was independent of either of the political parties, and that is the judiciary. It should not be a Democratic judiciary or a Republican judiciary.

The battle we are having now is because this White House does not want it to be an independent judiciary. They want it to be the most extreme possible. They want it to be an arm of the Republican Party.

One hundred sixty-eight to four. We have confirmed 168 of President Bush's nominees. We stopped four of the most extreme. Lordy, the crocodile tears that have been shed here, at great cost to the American taxpayers, over the last 24 hours—the crocodile tears that have been shed for that.

I do not remember one single Republican standing on the floor and saying how terrible it was when the Republicans blocked 63 of President Clinton's nominees, but, oh, my, it is like Niagara Falls, the crocodile tears, when we blocked four of theirs.

I received another one from Burlington, VT:

> The courts need to represent all Americans. Keep extremists out. Thank you for fighting for representation of all Americans by blocking the extremist judge nominees. Shame on President Bush.

I mention Burlington because I was married there 41 years ago. I still vote there. My children were raised there. I know the people in Burlington, VT. They are independent, good people—people who care for an independent, not a political, judiciary.

Little Hardwick, VT, stands at that junction between Montpelier and St. Johns and Barre. They say:

> Stay awake. Stay vigilant. Protect civil rights, a woman's right to choose, public education and worker's rights. We stand with you.

Hardwick, VT, let me tell you, I stand with you, and I will stay awake and be vigilant. The people on this side of the aisle will stay vigilant and we will protect an independent judiciary. We will not allow the judiciary to be an arm of any political party.

The President said that he wanted to be a uniter and not a divider. Oh, how much I wish he were. If there was ever a time that this country needs a uniter, not a divider, it is right now. But, instead, in deference to groups on the far right, the President has nominated judicial activists about whom one cannot help but raise questions regarding their ability to act impartially, with justice for all. We need an independent judiciary.

We are fortunate in Vermont because we have the most independent Federal judges you can imagine—people with total integrity, who will treat whoever comes into their court with impartiality regardless of whether they are Republican or Democrat or independent. That is what all courts should do.

Time and time again, Democratic Senators have acted in good faith to fill vacancies Republicans kept vacant by blocking a Democratic President's judicial nominees. After Republicans blocked 63 of President Clinton's nominees, when a Republican President came in, they said: Look at all these vacancies. My God, we have to move as fast as we can to fill them. This is terrible. This is a crisis in the judiciary. How could this possibly have happened? How could this possibly have happened; there are 63 vacancies here. My Lord, the sky is falling down.

Where did those vacancies come from? They came from one person, one Republican, holding an anonymous filibuster. If one Republican said, I don't want this judge of President Clinton's, the nominee went no further. Notwithstanding that, some of them had the highest qualifications this country has seen. Notwithstanding that, some of them were the most brilliant judges. Notwithstanding that, they were Hispanics, women, African Americans, people of faith, and people of great conscience. They were not allowed to go forward because one member of the Republican Party said he or she did not want them to go forward. But notwithstanding that the Republicans created all those vacancies, notwithstanding that, the Democrats said, we will help you fill them.

Notwithstanding the arrogance and the one-person filibusters on the other side, the Democrats started filling those vacancies with President Bush's nominees. We have filled 168 vacancies. We stopped four of the most extreme nominees. And now, lordy, lordy, lordy, the Niagara Falls of tears comes from the other side—crocodile tears, hypocritical tears, from those who said not a word, not a word when they blocked 63. Not a word. Not a word. They blocked 63. Not a word. We stopped four of the most extreme, and you would think the world was coming to an end.

What Democrats have done is that we have stood up for our principles and for the independence of the Senate in its constitutional role in the judicial confirmation process. The Republican leadership has decided to spend, I am

told, upwards of a quarter of a million dollars of the taxpayers' money to have this debate. I apologize for that. I am not the one who wanted to do this. I apologize to all the staff—the police officers, who should be home with their families, the doorkeepers, those who keep the journal of these proceedings—who are some of the finest men and women I have worked with in nearly 30 years here.

But that quarter of a million dollars the Republican leadership is spending on this charade of crocodile tears could almost be worth it if one thing comes out of it. If the President would realize that this whole process begins with him, not with the Senate. The President has an absolute right to nominate anybody he wants. The Senate has an absolute right to advise and consent, to determine whether nominees are confirmed, especially to lifetime jobs.

I ask him once again, work with the Senate. Every President through history has sought the Senate's advice and consent. In those instances when they did not, they did not get their way. There was another President named George, the greatest President in this Nation's history, George Washington. He was the most popular man in America in the time he lived and probably the most popular person America has ever had. He was a man who brought us together as a country, who set the precedent to make this a great democracy. But George Washington nominated judges the Senate felt he should not have. The Senate exercised its constitutional authority, and not all of George Washington's judicial or executive branch nominees were confirmed. President Washington knew he had to come back and seek the Senate's advice and consent before his nominees would go through.

A great hero of mine, not just because I am a Democrat but because I remember what he meant to people like my parents, who owned a small business in Montpelier, VT, was Franklin Delano Roosevelt, also one of the greatest Presidents to ever serve this country. He kept this country together, kept the world together at the time of naziism and fascism, and the Japanese attack on Pearl Harbor. He brought us out of a recession, and he did this even though he was physically crippled. He worked so hard for this country, it finally killed him. But even Franklin Delano Roosevelt, when he tried to pack the court and change the independence of our Federal judiciary, a Democratic-controlled Senate said he could not do that. In fact, not only did Franklin Delano Roosevelt not get every one of his judges confirmed, but his court packing plan was filibustered.

No matter how partisan anybody is here, I don't think anybody is going to suggest the problems began here. The Senate said no to Washington. The Senate said no to Franklin Roosevelt. The Senate can say no to George Bush. Tradition is there. The Constitution is there. Our rights are there.

Basically, we have taken all this time spending a quarter of a million dollars of the taxpayers' money to talk about this because we don't want to vote on minimum wage, or workman's compensation, child programs, or the appropriations bills that, by law, we are required to have voted on by September 30. We still haven't. We don't want to vote on veterans benefits even though the administration seems hell-bent on cutting veterans benefits.

We don't want to do any of those things. We will spend a quarter of a million tax dollars on the Republican's charade. I say the same thing today that the Senate said to George Washington and said to Franklin Roosevelt: We are going to ask for advice and consent. The Senate is going to stand up for its rights. I yield the floor.

The PRESIDING OFFICER. Does the Senator yield back his time? He has 56 seconds.

Mr. LEAHY. Mr. President, let me say this. Again, I have been here with six Presidents, Republican and Democrat. Presidents have always sought advice and consent. They have not always liked what they have heard. Five of the six Presidents have been willing to work with us on judicial nominations: Presidents Ford, Carter, Reagan, former President Bush, and President Clinton. I urge the current President to follow their example. Things will go far more smoothly. I do yield the remainder of my time.

The PRESIDING OFFICER. All time has expired. Who yields time? The Senator from Alabama.

Mr. SESSIONS. Mr. President, I appreciate the remarks of the distinguished ranking member of the Judiciary Committee. He has been around the Senate and the confirmation process for a long time.

He said he wanted to apologize for people staying here and having to work tonight. It is unfortunate that we are here. We are here because we have a filibuster organized and sustained by the Democratic leadership against six nominees. We have more in the pipeline to be blocked, so it is not just four. I want to ask, would the Senator want to apologize for his remarks that he made in 1998 when he, Senator LEAHY, in the CONGRESSIONAL RECORD, said:

> I cannot recall a judicial nomination being successfully filibustered. I do recall earlier this year the Republican chairman of the Judiciary Committee and I noted how improper it would be to filibuster a nomination.

That was when President Clinton was in office and Chairman HATCH, a Republican, was chairman of the Judiciary Committee. Chairman HATCH said on the floor of the Senate and in committee and in private Republican conferences that a filibuster was not good. Senator LEAHY and the Democratic leadership all said filibusters were not good. We did not have those filibusters.

So it is amazing to me, now that within a year or two after making statements such as that, and taking that position, we now have those very same people leading a filibuster. I would say apologies need to come from the other side.

Let me mention a few basics about confirmations under President Clinton: 377 nominees were confirmed, 1 was voted down on this floor in an up-or-down vote, not blocked by a filibuster, and no filibusters were had against those nominations. That is what happened.

There were 41 left pending and unconfirmed. Many of those were nominated late, after the August recess. Some of them had FBI background problems, including drug use or other unresolved issues. So there were 41 left pending and unconfirmed; 18 nominees were withdrawn by President Clinton before the final term. So I guess that is how they get 59, 60 nominees who they say got blocked. But that is what happened.

When former President Bush was President and he left office and the Democrats controlled the Senate, they left 54 of his nominations hanging. So under Senator HATCH's leadership and under TRENT LOTT's leadership, only 41 were left unconfirmed when President Clinton left office.

They say you blocked them with holds. Holds were put on nominations, just as they are today. Senator LEVIN has a hold against four circuit judges for the Sixth Circuit. They say they are only holding up four; this is not truth; with the nominees being blocked by Senator LEVIN they are holding at least eight. In fact, there are 13 circuit judges who are being held up and blocked by the Democrats right now. It just so happens we are only in full-blown filibuster of five, one having withdrawn, making six.

I will say one more thing. My colleagues on the other side of the aisle just blithely and consistently and repeatedly say these nominees are extreme, extreme, extreme. ''Most extreme,'' I believe is the phrase I have heard: Most extreme possible; extreme judicial nominees. As if saying this can make it so.

When we talk about judges, each judge is a human being. Each judge is entitled to a fair and decent consideration on the floor of this Senate and in committee. If they are not extreme, they ought not be called extreme. That is wrong for us to do that.

I know these attack groups, People for the American Way, the Alliance for Justice, the National Abortion Rights League and that crowd are the extremists.

They accuse and call our nominees extreme. That is for sure. These groups are not accountable. The problem is when these extreme notions are picked up by Senators. This should not happen. Senators are the ones who are elected. Senators are the ones who have taken the oath. Senators in this body have a responsibility not to call a nominee such as Priscilla Owen extreme. She got 84 percent of the vote in Texas and was given a unanimously

well-qualified rating by the ABA to be a judge—she is not extreme.

Judge Janice Rogers Brown from California, who got 76 percent of the vote in the State of California, not a conservative State, for justice of the supreme court in that State, is not extreme. And neither is Carolyn Kuhl, who rated the highest rating possible by the American Bar Association, who has received incredible bipartisan support from the hundred or so judges in her area where she practices as a State judge. She was editor of the Duke Law Review and clerked for Justice Anthony Kennedy and is a brilliant nominee of the highest order. These are outstanding nominees. They are not extreme.

The extremists are the groups and the people calling them extreme. These nominees teach Sunday school. They serve on the Altar Guild. They are involved in civic groups in their communities. They have held important positions in their States. They are the kind of people we ought to have on the bench. It is wrong for them to be accused of being out of the mainstream.

President Bush knows what the people want in Federal judges. He has nominated that kind of Federal judge. The people will support him on that, and it is very disturbing to hear them called extremists when they are mainstream and effective judges and nominees.

I now recognize the Senator from Colorado. I believe he is prepared to make some remarks.

The PRESIDING OFFICER. The Senator from Colorado.

Mr. CAMPBELL. Mr. President, this evening I am pleased to join my fellow Senators—including my good friend from Utah—Judiciary Committee Chairman HATCH—for this ''Justice for Judges'' Marathon. I doubt if anyone will change their minds, but the debate is one we need to air.

First of all, I would like to thank Senator HATCH for the excellent work he has been doing—just as he consistently does day after day and hearing after hearing—as the Chairman of the Judiciary Committee.

I also thank Chairman HATCH for his support for another bill I am sponsoring this year, the Law Enforcement Officer's Safety Act of 2003. Every one of our Nation's leading law enforcement organizations—including the Fraternal Order of Police—consider this bill to be one of their top legislative priorities. I am especially pleased that this bill now enjoys the strong bipartisan support of 66 cosponsors—including 41 Republicans and 25 Democrats. I also want to point out that Senators LEAHY and HATCH are lead original cosponsors of this important legislation, and thank them for their support. Unfortunately, this bill is a perfect example of how the intent of the U.S. Senate can be subverted by the few opposed to a bill.

I also want to point out that even though this bill enjoys bipartisan support, and easily enough to get it passed by the Senate in an up-or-down vote—or even to invoke cloture—it is still being held hostage by a few Senators who have dug in their heels and refuse to let it pass.

It is not fair nor just in a body where fairness and justice is paramount that a minority of a few can hold up the will of 67 Senators.

I want to let my fellow Senators know that I will be pushing for the passage of the Law Enforcement Officers Safety Act early next year.

The challenges we are now facing in the form of the unprecedented filibustering of Circuit Court judicial nominees is in no way the result of Senator HATCH's ability as a Chairman or as one of the Senate's great gentlemen.

Unfortunately, we are now facing a situation in which judicial nominees that clearly have the bipartisan support they need to be confirmed by the Senate in an up-or-down vote simply cannot get the vote they deserve.

Repeated refusals to allow Circuit Court nominee Miguel Estrada the straight up-or-down vote he deserved unfortunately led to him withdrawing his nomination.

As a Coloradan, I am not alone in my assessment that an injustice was done, and not just to Miguel Estrada, but to our finely balanced system of Constitutional government as handed down by our Founding Fathers.

We all know the history of Miguel Estrada. He is a great American success story. He is a man of impeccable credentials dedicated to upholding the law. Unfortunately, he has committed the high crime of being a conservative. He does not deserve the insult of being called a ''lemon'' as one Senator has done today. Whether to vote against nominees is each Senator's decision, but they do not deserve insults. On September 10, 2002, the Pueblo Chieftain editorial stated:

> One would think that Democrats in the Senate, who claim to hold diversity in such high esteem, would be amendable to Mr. Estrada's nomination. But he committed the political sin of being conservative.

The Pueblo Chieftain went on to say:

> For the first time in the Nation's history, Senate Democrats filibustered the nomination. By doing so they turned the Senate's historic practice of advice and consent into a litmus test for liberal interest groups. The Democrats also have launched filibusters to stall the nominations of a half-dozen other candidates.

The editorial continues:

> Mr. Estrada asked President Bush to withdraw his nomination, which had languished in the Senate for nearly two years. Mr. Bush did so, with regret.
>
> Mr. Estrada should have been confirmed. He was just as qualified as a dozen other judicial nominees who were eventually confirmed.
>
> But Democrats have resorted to the filibuster to stop those judicial candidates feared to be opposed to abortion. But when asked about the Roe v. Wade abortion ruling during confirmation hearings, Mr. Estrada said, ''It's the law. I will follow it.''
>
> In the long run, Democrats may have hurt themselves and their outreach to Hispanic moderates and independents by denying all Hispanics a historic moment—the first and highest-ranking Hispanic on the Federal bench who also had strong backing from a wide range of Hispanic groups.

Mr. President, let me speak about a towering figure in Colorado history. Byron White, a football star and then a conservative U.S. Supreme Court Justice who retired in 1993 after 31 years on the Federal bench. After having lived a long and fruitful life, Justice White passed away on April 15, 2002. I met Justice White. His many achievements made most but not all Coloradans proud.

Justice White was appointed to the Nation's highest court by President John F. Kennedy in 1962. I knew Justice White—he had a handshake that would make you wince, even in his 80's.

Byron White combined physical prowess—as a nationally acclaimed football star in the 1930's who went on to become a Rhodes scholar and, eventually, a leading jurist.

In 1937, Byron ''Whizzer'' White was an All-American football player with the University of Colorado Buffaloes. He led the nation in both scoring and rushing yards while leading an unbeaten team. He never liked his nickname ''Whizzer''. But sports writers did so he was stuck with it.

He also was an outstanding football player in the earliest days of professional football, playing running back for both the Pittsburgh Steelers and the Detroit Lions.

He used his professional football signing bonus to pay his way through Yale Law School. He graduated first in his class.

During World War II he served as an intelligence officer with the U.S. Navy. It was Byron White who wrote the official report on the sinking of John F. Kennedy's patrol boat, the PT–109.

White ''had excelled in everything he had attempted'' President Kennedy said admiringly when he appointed his long-time friend and the Deputy Attorney General as our Nation's 98th Supreme Court Justice in history.

However, despite the outstanding strengths and qualifications, as articulated by President Kennedy, Justice White had some views that most likely would have led to filibuster by today's Senate. In fact, if it had been a Republican President who nominated Byron White in 1965 instead of a Democrat, he probably would not have been confirmed even then.

For instance, he dissented from the historic 1973 ruling that declared that women have a constitutional right to an abortion.

In 1986, he stirred a storm of controversy by writing the Supreme Court's opinion that constitutional protections of privacy do not extend to homosexual conduct.

Justice White consistently opposed restrictions on law enforcement officers, which led him to dissent from the famous 1966 Miranda ruling that police

officers inform a criminal suspect being arrested of their rights.

Justice White also dissented from rulings that outlawed voluntary prayer for children in public schools.

By the late 1980's, Justice White had joined conservatives in opposing ''affirmative action'' programs on the grounds that they amounted to reverse discrimination.

The point is that he was appointed by President John F. Kennedy—but even so—under today's atmosphere, including political correctness and in-your-face special interests—with litmus test approaches to public policy—Justice White would have almost certainly been relentlessly filibustered and would probably not be confirmed.

I am not sure that I would have voted for his confirmation had I been here, because I disagree with some of his decisions, but I would have been given the chance.

The way that today's Senate is treating judicial nominees stands in even starker contrast when it is pointed out that Justice White was confirmed by the Senate by a voice-vote, and without objection. Not one Senator objected—''D'' or ''R.'' That was on April 11, 1962.

A lot has changed since then. Some for the better and some not. One thing that has certainly not gotten better is the way judicial nominees are being treated. Questioning has given way to badgering. Civility has given way to discovery. Playing ''Got Ya'' is a poor substitute for an impartial hearing.

The question is not whether the President's nominees should or shouldn't be confirmed. That is a smokescreen. The question is should we, as duly elected Senators be accorded our constitutional responsibilities of advise and consent by voting on each nominee. The minority is denying me the right to an up-or-down vote through their filibusters—and thereby are denying the people of Colorado the right to be represented through my vote. I have heard time and again from our colleagues on the other side of the aisle that 168 nominees have been confirmed and only four have not. What are they talking about? I haven't been given the chance to even vote on those four. Not a question of numbers. It is a question of fairness.

We need to do what we can do to reverse and correct the emerging practice of filibustering judicial nominees.

There is no question in my mind that many deserving and well-qualified people will refuse the call of public service after watching the kangaroo court they might now face in getting confirmed. It doesn't make any difference who is in the majority. No nominee should have to be verbally flailed in the confirmation process.

Mr. President, it is not too late to turn back, reverse course, and give all judicial nominees the up-or-down votes they deserve.

I yield the floor.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. I thank the Senator from Colorado for his remarks. It is true, we need to treat these nominees with civility. That is the least we can do in this body.

I believe we have one more Senator to speak, the Senator from Wyoming, and we have about 14 minutes.

Mr. ENZI. Mr. President, first, I wish to concentrate a little bit on some of the comments I heard during the 3½ hours I chaired last night.

A lot has been made of this number, 168 to 4. But you cannot compare district court judges with circuit court nominations. Instead, you should look at the situation for what it is, an attempt to obstruct the confirmation of circuit court judges.

Since January 2003, President Bush has nominated a total of 29 circuit court judges. Of those judges, only 12, or 41 percent, have been confirmed. Of the remaining 17, my colleagues across the aisle have obstructed or threatened to obstruct 11 qualified and talented judges. In other words, almost 50 percent of the circuit judges ready to come to the floor for confirmation have been held up by the Democratic side for political purposes.

Last night I heard this 98-percent factor, and I heard it said that if my child came home with a test and he got 98 percent, I should congratulate him and work hard to get the other 2 percent.

I will tell you what ought to happen if your kid comes home with only 50 percent, and that is what we are talking about when we are talking about circuit court judges, we are talking about failure of the system, a total breakdown of the system.

You have to look at the concentration that there is on the circuit court. That is because those circuit court folks could become Supreme Court Justices. And Lordy, we don't want to pass any who might make it to that.

Every day the Senate is in session we begin with a prayer and the Pledge of Allegiance. I know my colleagues on both sides of the aisle are firmly committed to this country, and that as we say the words of the pledge, like me, they mean every word of it and they honestly pledge their alliance to the flag and to this Nation. But I have to wonder if they haven't forgotten the meaning of all of the words in the pledge, especially when I hear them put forward the argument that we do not need to vote on all the judicial nominees because we have already voted on most of them.

The last six words in the Pledge of Allegiance, ''with liberty and justice for all,'' mean we do not preserve justice or liberty for just a few people or for most of the people and leave a few or even an individual behind. It means we have justice for all, for everyone. That is 100 percent. We pledge that and we don't make exceptions because we have a high percentage of success.

In fact, this is one of the situations that the courts were created to protect: the rights of the individual. I think it is a little ironic that there are those in the Senate who would be willing to withhold justice and rights from some, in this case four highly qualified individuals, and the cases they could be hearing, if they were confirmed.

That is justice being denied as well. That is justice only for a few, or maybe most, but not all—just because the individuals don't have the same political philosophy as those across the aisle.

While it may be true—the percentage of judges we have voted on—when you are the one who is left out and are not allowed justice, that is 100 percent of your life—the one who is being affected, and 100 percent of justice that is being denied as an individual.

I think this is wrong. I sincerely hope we move off this obstructionism and have an up-or-down vote on the highly qualified individuals with talent, experience, and integrity, and who could be considered as the ideal we want in all judges.

I think everybody knows about the qualifications.

The comments made last night are what we are seeing here for the first time—a change in the way we do judges. The problem with it is it probably will continue and at some point there will be a reversal of roles. We will spiral down and down until we are not approving judges. It won't be 2 percent counting all of the district judges and not doing the true statistics on just the circuit court judges. It will not be approving a majority of them.

I have to tell you, I have been through that spiral once before. When I first got here, there was a judge nominated. She would only sentence a person to 90 days in jail who had raped a minor because she didn't like the rehabilitation system of the prisons in her State. I was appalled by it. In our State, there are a lot of people who would think that maybe he should have been shot. He raped a minor.

I put a hold on that person so we could have a debate instead of a unanimous consent. I eventually got the debate.

I had an unrelated piece of property that some people had been paying taxes on for 70 years which they had bought from the BLM but the title had never changed. It took an act of Congress to change the title. Because I put that hold on, it took me 3 years to get that piece of property transferred to the people. Do you know what those people said? They appreciated what I had done on that judge.

But I have to tell you that unless an up-or-down vote happens on that judge, that is the way it is supposed to be.

It was exactly 200 years ago, in 1803, that the Supreme Court and our Nation's judicial system went through its first and most dramatic change since it was established by the Judiciary Act of 1789. This change occurred when then Chief Justice John Marshall issued his decision in the landmark case, Marbury vs. Madison. In that decision

Marshall established the responsibility of the Federal court to review the constitutionality of congressional actions. His action brought the courts out of almost obscurity, seen as the weakest and most timid of the three branches of government, and gave it a prominence and power that is not equaled by any other court system in the history of the world.

Before Justice Marshall was appointed to the court in 1801 the court seemed to lack direction. There was no clear idea of purpose or vision about whether or not the court could consider itself to be an important entity. The very first Supreme Court Session was held in New York City in 1790. It was almost postponed when only three of the original six justices arrived for the court's opening session. The court had to wait and put off doing business until a fourth justice arrived and they had enough judges to constitute a quorum.

Justice Marshall himself did not initially consider the court to be a prominent institution. At the time of his appointment to the court, he was also serving as Secretary of State for President John Adams and he had turned down an earlier appointment to the court in order to run for a seat in the U.S. House of Representatives. After President Adams finally talked him into serving as Chief Justice of the court, Justice Marshall served as both Chief Justice and Secretary of State for 2 months because he felt it wasn't worth giving up the position of Secretary of State to serve on the Supreme Court.

Over the next 34 years Justice Marshall reinvented the court and provided the leadership it needed to assume the prominent role it plays in our court system today.

One has to wonder what Justice Marshall would think about what is going on in the Senate today. Would he agree with my colleagues across the aisle that it is all right to put partisan politics and partisan bickering ahead of the rights of judicial nominees if those impacted are just a small fraction of society. Would he agree with them that justice denied for a few was acceptable? Or would he hold true to the basic tenets of the Constitution that all men are created equal and that everyone has the right to their day in court?

A lot has been made about the numbers 168 to 4. You really can't compare district court judges with circuit court nominations. Instead we should look at this situation for what it really is, an attempt to obstruct the confirmation of circuit court judges. Since January 2003 President Bush has nominated a total of 29 circuit court judges. Of those judges only 12 or 41 percent have been confirmed. Of the remaining 17, my colleagues across the aisle have obstructed or threatened to obstruct 11 qualified and talented judges, or in other words, almost 50 percent of the circuit court judges ready to come to the floor for confirmation have been held up by the Democrats for political purposes.

Every day that the Senate is in session we begin with a word of prayer and with the Pledge of Allegiance. I know that my colleagues, on both sides of the aisle, are firmly committed to this country and that, as they say the words of the Pledge, like me, they mean every word of it and that they honestly pledge their allegiance to the flag and to this Nation. But I have to wonder if they haven't forgotten the meaning of all the words in the pledge, especially when I hear them put forward the argument that we do not need to vote on all of our judicial nominees because we have already voted on some or most of them. The last six words in the Pledge of Allegiance, ''with liberty and justice for all,'' mean that we do not preserve justice or liberty for a few people, or for most of the people, and leave a few, or even an individual, behind. It means we have justice for all, for everyone, 100 percent and that we don't make exceptions because we have a high percentage of success.

In fact, this is one of the situations that the courts were created to protect, the rights of the individual. I think it is a little ironic that there are those here in the Senate that would be willing to withhold justice and rights from some, in this case four highly qualified individuals, and would not extend justice to all, just because those individuals don't have the same political philosophy.

While it may be true that the percentages of judges that have been voted on is high, when you are the one that is left out and are not allowed justice, that is 100 percent of your life that is being affected and 100 percent of justice that is being denied you as an individual.

I think this is wrong, and I sincerely hope we move off this obstructionism and have an up or down vote on these highly qualified individuals, whose talents, experience and integrity can easily be considered the ideal for what we want in judges.

We often talk about the ideal in our debates in the Senate. We hold up a picture of what things should look like and how things should be done in the hopes that someday, we can move our Nation forward to the point where the ideal is, more often than not, reality. One of those ideals that has been presented is a world where our judges and our courts are more representative of America. Our courts have often been accused of being elitist. The Bush Administration has been working hard to change that image by making sure our judges are more diverse. By nominating people like Miguel Estrada, Carolyn Kuhl, Janice Rogers Brown, Priscilla Owen, William Pryor, and Charles Pickering, President Bush has set an example of the ideal by selecting people from different backgrounds, with different styles, who share the same passion and enthusiasm for the law.

The list of judges that is before the Senate represents a group of candidates who are well educated, fully talented, and well qualified for the posts for which they have been nominated. Unfortunately, for some, this list also represents the unfairness of the system—a system which, in theory, guarantees each nominee a vote—but—in practice, can be used to deny a nominee a vote.

So here we are, well down the road, holding a list of candidates that still haven't received a vote. In spite of all their qualifications and the personal integrity they have shown throughout the process, these judges have been forced to wait as the Senate decides whether or not we can simply hold an up or down vote on them. Why? It's pretty clear to just about everyone. Because these are good nominees and in a fair and just world, they'd win the vote hands down. Therefore, the only way to avoid having these candidates confirmed is to deny them their constitutional right to an up or down vote.

What is most tragic about this situation is that these delays have not come without cost. These nominees aren't the only ones who are being denied their rights. Let's not forget the other victims in this situation who have been denied their right to a fair and impartial judicial process because there are not enough judges to hear all their cases. The real victims of these delays are not the nominees, or the Bush administration, or even the Republican Party. No, the real victims are the people whose rights have been denied to accommodate some increased partisan bickering.

There is a saying ''Justice delayed is justice denied.'' We make people with very real needs and very real issues wait while we try to score a few points in the game of politics. We drag out their court costs, their attorney's fees, and delay their restitution and damage payments all because we want to get one up on the other party.

We have a crisis in our courts that we can solve today. I urge my colleagues to step up to the plate and become a part of the solution. I urge them not to accept the belief that justice for some is sufficient. I urge them to allow the Senate to conduct its constitutional duty and hold an up or down vote on these judges. If you don't agree with them, or feel they are not qualified, then vote against them. That is your prerogative and duty as a Senator. But do not continue to deny justice for the nominees or the courts any longer.

Mr. SESSIONS. Mr. President, the Senator from Montana is here and I know he would like to finish up.

The PRESIDING OFFICER. The Senator from Montana.

Mr. BURNS. Mr. President, a lot of questions are being asked about this debate as we roll along. We went late last night and there are probably some folks who have been short of sleep.

Let there be no doubt about it, as we close this half hour, this is obstruction.

A week ago tomorrow, we argued about definitions. Now we are worried about ideologies and how we appoint our judges. Here is one way you can have an issue and you can be on both sides of it and never worry about the consequences. That is healthy for us. We passed that through this Senate with strong bipartisan support and only 14 folks voting against it. Now we can't name conferees. ''Well, I voted for it.'' But we do not want it to get to conference.

I am fighting for two judges, Janice Rogers Brown and Carolyn Kuhl. Both of them are nominated to the Ninth Circuit. Why am I fighting so hard for them? Let me tell you why.

I am sponsoring legislation to split up the Ninth. It is too big. It covers California, Arizona, Nevada, Idaho, Washington, Oregon, Alaska, Hawaii, and my home State of Montana. It covers 14 million square miles—that is a fairly good sized pasture—with 45 million people. The second highest population is the Sixth Circuit with 29 million. It has the highest number of active judges with 28. The average number per judges per circuit, including the Ninth, is 12.

Let me tell you another reason why. The decisions that have been handed down by the Ninth lately—from 1996 through 1979—the Supreme Court heard 228 cases from the Ninth Circuit, and 27 of those decisions were overturned, 17 of them by unanimous decision.

From 2001 through 2002, 12 of the 17 Ninth Circuit decisions were reversed, and 7 of those were unanimous.

How would you like to have that track record? And we live in that circuit. Then you wonder why we get excited about the appointment of judges to that Ninth Circuit.

It is absolutely unbelievable.

I am an original cosponsor of S. 562. We must get it done.

What we are talking about here is people in a circuit who can't handle the work and come up with decisions that can't stand the test in the Supreme Court. That is pretty bad—1 in 27. That is almost as bad as 0 and 1 in a gunfight in judicial terms.

I am not an attorney. I don't think I will ever be one. But I will tell you that you can read and you know where the American people are, and those people are denied representation on the Ninth Circuit.

Definitions: We have heard it. If we cooperate, things would really get along good here. If we cooperate—we did—that is healthy for us. Now we can't name conferees to finish the job that is in front of us.

This is not my first rodeo. I know what is going on here. They should be ashamed—ashamed to contradict their own conscience.

Obstructionism: Give these judges a vote up or down. That is the way you got here. They deserve the same.

I yield the floor.

The PRESIDING OFFICER. The Senator from Alabama has 3 minutes 30 seconds remaining.

Mr. SESSIONS. The Senator from Virginia.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. ALLEN. Mr. President, I wish to speak about some statements that have been made in the past and the inconsistency of these statements with the ones we are hearing today.

Let me quote for my colleagues some sentiments with which I very much agree, and I then I will ask you all to guess who said it: ''I find it simply baffling that a Senator would vote against even voting on a judicial nomination. Let the Senate vote on every nomination.''

Here is another quote. See if you can figure out who said this: ''I don't know how Members tell the Hispanic community we are being equally as fair with them as we are with all non-Hispanic judges when that simply is not true. Hispanic or non-Hispanic, African-American or non-African-American, woman or man, it is wrong not to have a vote on the Senate floor. What are they afraid of? What are they afraid of? What is wrong with a vote?''

Another quote from one of our colleagues who quoted Chief Justice Rehnquist: ''As Chief Justice Rehnquist has recognized, the Senate is surely under no obligation to confirm any particular nominee but after the necessary time for inquiry it should vote them up or vote them down. An up-or-down vote that is all we ask.''

Have you guessed the speaker yet? No, that is not ORRIN HATCH; it is not Senator SESSIONS; it is not Senator ENZI and it is not me. That is Senator TOM DASCHLE, the Democratic Minority Leader. These quotes are from October 5, 1999 and October 28, 1999.

Senator KENNEDY said nominees deserve a vote. He said: ''If our Republican colleagues don't like them, vote against them. But give them a vote. Don't just sit on them. That is obstruction of justice.''

My goodness. Senator DASCHLE and Senator KENNEDY certainly had the right idea 3 years ago.

Senator DASCHLE also said that Senators ''have a constitutional outlet for antipathy against a judicial nominee. Vote against that nominee.''

Senator DASCHLE, the Democrat leader in all of this obstruction and delay, said in 1998: ''All we are asking of our Republican colleagues is to give these nominees a vote and hopefully the fair consideration they deserve. We will press this issue every day and at every opportunity until they get the vote.''

Doesn't that sound familiar as to what we have been trying to do for the last several years?

Senator DASCHLE is also on record complaining about how long it took for some cases and decisions that had been pending for months. He said for ''anyone to be held that long is just an extraordinary unfairness not only to the nominees but to the system itself.''

The PRESIDING OFFICER. The time has expired.

Mr. ALLEN. If I may, with consent, have 2 minutes that is attributed to our time at 9 o'clock.

The PRESIDING OFFICER. Is there objection?

Ms. STABENOW. Reserving my right to object, my colleague, I appreciate the time, but in order for us to stay on schedule and given the fact I have been waiting here at this point, I would appreciate his wrapping it up. If he would like to take 1 minute to wrap up, I would not object to that.

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

Mr. ALLEN. I would like to close with a final quote from Senator DASCHLE that he made in September 1999: ''It is so incredibly unfair to me that they would continue to persist in the determination not to allow these very qualified people to even have a vote.''

Mr. President, that is what all of this is about. Tomorrow morning we will have a chance to end debate on these nominees and allow for fair up or down votes. In addition we will be able to determine the veracity, truth, and sincerity of our colleagues that I have previously quoted. If they were willing to tell the truth 3 or 4 years ago, they will have an opportunity to stop this spiral of unfair actions and delays which only bring more retaliation and more delays.

Senators will then be upholding the Constitution and will be accounting to their constituents, as well as giving fairness to the nominees.

I thank the President and I thank my colleagues.

The PRESIDING OFFICER. The Senator from Michigan.

Ms. STABENOW. Mr. President, as I said before on the floor, all the statements that are being made, and all the time we spend in relation to our values and our priorities, I also believe we get things done when we work together, when we work in a bipartisan way. That is what our constituents expect us to do.

I see the esteemed chairman of the Judiciary Committee on the floor. I thank him publicly for working with the senior Senator from Michigan as we work through difficult issues that relate to Michigan. I appreciate his willingness to do that. That is how we get things done—when we work together.

When we look first at the record of legislation taken up on this floor, I think it shows we work together. I think when we have worked together to confirm 168 judges, most of those I have voted for overwhelmingly, and when we see that we have only had a disagreement on 4, I think that shows bipartisan cooperation. I think that shows what the people of this country, and certainly the people of Michigan, want to see done. There is no question in my mind that this demonstrates our willingness to roll up our sleeves, to be fairminded, to look at the facts, to look at the nominees, and to work together.

It also shows, though, that we are willing to make a critique, that we are not a rubberstamp for this administration, nor should we be for any administration of either party. It shows we are willing to make a judgment. When the nominees go too far, we say no. That is what happened four times.

What I am most concerned about now, though, in this 30 hours—which now, instead of ending at midnight, is going to go until 9 in the morning—is that we are saying our values and priorities are spending time talking about four people who already have jobs and want to get a promotion that will last a lifetime. These are lifetime appointments.

My concern is that we need to be spending time on this floor not only talking but doing something about the 3 million people who have lost their jobs in the last 2½ years—3 million people. They do not have a lifetime job. They would just like to know they have a job tomorrow for their families. They would like to know that the job probably carries health care with it and will be there so they can put food on the table and they can pay the mortgage, the car payment, send their kids to college, and know they can have a good life in America that they assume if they work hard they will be able to achieve.

That is the debate I have said a number of times that we need to be having. One-hundred and sixty-thousand-plus of these 3 million are people who have lost their jobs in Michigan; people who have lost good-paying jobs, good-paying jobs with health care and pensions. They find themselves in very difficult circumstances and they are asking us to help them.

I am very proud of the fact that Michigan is the first in the production of automobiles. Thirty-one percent of all the automobiles in this country are produced in the State of Michigan.

My dad and my grandfather owned a Cadillac dealership in Claire, MI. We have been proud to be a part of supporting the Michigan automakers.

We also are first in the production of trucks, producing 17 percent of trucks. We have the three leading office furniture manufacturers in Michigan and produce nearly half of the office furniture.

Why do I say this? Because we have a crisis in manufacturing in this country that we need to be addressing in this Senate. Jobs can't all be in the service industry. We need to make things and we need to grow things. That is what we do in Michigan. We make things and we do it well. We will compete with anybody any time. Just give us a level playing field. We also grow things. We are willing to compete with anybody any time. Just give us a level playing field. We don't have that right now. We don't have that level playing field. We are not addressing that.

We are not addressing what is happening with the fact that China is violating the WTO or that China and Japan basically have put a tax on American goods and services sold in this country by manipulating their currency. We are not doing anything about that.

As a member of the Banking Committee, I sit and listen to the Treasury Secretary basically acknowledging that something is not right but not wanting to step up and take the tough action on behalf of American manufacturers and American workers.

We need to be talking on this floor and taking action on behalf of the men and women who have been the backbone of this country in manufacturing and have created the middle class that separates us from other countries around the world.

Why aren't we having that debate? Not a debate about 4 people who already have jobs, who want to get promoted. Three million people do not have a job and are now struggling with their families.

I want to share a few comments that I have heard. Earlier today I shared some headlines from newspapers in Michigan about what is going on. I want to share one of those this evening with my colleagues. It is from the Ludington Daily News, in northwest Michigan. It says: ''Tough Loss, Straits Steel closing sad news for plant's 180 employees.'' Then it starts out by saying:

> Despite the looming possibility over the past few months that their plant might close, workers at Straits Steel & Wire Co. kept their production quality high and their attitudes positive, said General Manager Tyndall.
>
> But on Friday, Tyndall was forced to tell his co-workers and friends that corporate officials decided to close the Ludington plant, 56 years after it began operations in 1947.
>
> Making the announcement twice—to the first shift in the morning, then the second shift in the afternoon—was not easy for Tyndall, who joined workers on the floor of the production plant as he shared the bad news with the group.
>
> ''People are down,'' he said Friday afternoon. But he stressed the plant's closing is not related to performance. ''When we walk out, we can hold our heads high and go chest to chest with anyone on the street and say we did our jobs well.''

They did their jobs well. But because of what is happening and the unfair competition around the world and the stress and struggle as it relates to cost, the plant closed.

Why aren't we dealing with issues that will help this Straits Steel and Wire Company in Ludington, MI? Those are the jobs I want to be talking about. Those are the jobs people in my State want us to be trying to fill.

Let me mention a few letters I have been receiving from people in Michigan that say it better than I can. First from a gentleman who says: I am writing you regarding the health of my business. I have a high tech business servicing industrial lasers, much like the ones that are no doubt cutting metal subassemblies for our armed services use as well as civilian businesses. My business has the flu. It is feverish and sluggish almost to the point of no business at all. Our country was initially built on small businesses providing services and employment. Our government encourages small business growth yet at the same time small businesses are being destroyed one by one because our economy is in such dire straits that business orders are essentially flat, which in turn is causing my business to fail. Occasionally I call the few customers I have left and ask questions about how they feel about the economy and what they think will happen in the near future. They say they are very concerned about the future. Some are laying off personnel. Others take pay cuts to keep their jobs. Still others feel they are sinking with no relief in sight. My business is now on the verge of collapsing and the only reason is the economy. I find it extremely difficult to believe that because of a few positive economic reports showing up here and there that our economy is getting better. The only real indicator of an improving, recovering economy, in my opinion, are reports coming in of companies rehiring people and putting them back to work. No other indicators, in my opinion, mean a thing until people start going back to work.

I agree with that. It is about putting people to work and having businesses recover from the flu.

Also from a Michigan resident: I am a tool die maker for over 40 years. I now find myself out of a job and unable to find one in my field. I have no health insurance. Why has America farmed most of our manufacturing jobs out to other countries? I think America has got to be not only the greatest thinking country in the world but we have to also regain our status as the greatest producing country in the world, as we did in World War II. That is, as you remember, the reason we won.

From Bridgman, MI: I would like to say I have worked in manufacturing for 20 years. This is the first time in my career that my hours have been reduced. I have a house payment, utility bills, children to feed and clothe, doctor bills, car payment, insurance, school lunches and preschool. This is just a few of my expenses. We are hanging on by a thread, day by day living. This is not the way Americans should have to live, especially in this day and age.

I agree. If people work hard, they get up in the morning and they go to work and they work all day, they ought to be able to know they are going to be paid a good wage, that they can count on that job being there, that we want them to be able to have health care. We want them to be able to put money aside for a pension, and we want them to know they will have the security of being able to take care of their families and plan for the future as part of the great middle class of America.

Our manufacturing economy has given us that. We are losing that. We

are losing that. We need to pay attention. We need to talk for 30 hours on the floor about jobs and how to help our manufacturing sector. We need to talk for 60 hours or 90 hours. More importantly, we need to act to do something so we can level the playing field. As I have said before, I will put our workers and our businesses up against anybody, if it is a level playing field. Just make it fair and we will compete. We need to address issues of health care. We know one of the biggest challenges right now for our manufacturers is the explosion in the prices of health care. I also know from talking to our automakers about half of that is because of prescription drug prices, the lack of competition, and the explosion in prices. We ought to be doing something about that.

We have bills in front of us right now in the Medicare conference where we could do something, if we wanted to, about that to lower prices. I would love to have a 30-hour debate on that because there is nothing right now more challenging to businesses and workers than the issues of health care. Workers are finding they are being asked to pay more in premiums and deductibles or their salary is capped in order to pay for health care increases or, worse yet, they are losing their jobs because of the increases. That is a debate worth having. That is a debate that would result in our focusing on something that means something very important to the people of this country. I would look forward to that debate.

Let me read a couple more letters: I've worked in manufacturing for 23 years, and this is the first time in my career I have had my hours reduced. I am worried about losing my job. My family is suffering because of my reduced income and planning for the future of my trade. I am a mold maker, and this has always been a solid trade. My trade is faltering, not only because of the economy but also because of foreign competition. How can we compete with countries that pay drastically reduced wages with no benefits?

We have to address that, not by saying you have to work for less, Michigan workers. You have to work for less and you have to take no health care and no benefits. We have to be fighting for our middle class and creating a way to raise the standards of living around the world instead of lowering ours, which is exactly what is happening right now. It is probably the most serious threat to our future in terms of maintaining our economy and our middle class. That is worthy of a 30-hour debate.

There are many more letters I could read that are the same. So where are we, when we are talking about 3 million jobs lost and counting just in the last 2½ years, a little less than 3 years. What is the response from the administration to this number? Are we pulling everybody together to figure out what we can do to lower health care costs? Are we figuring out what we can do to level the playing field and stop China and Japan from using advantages and manipulating their currency and creating a situation that is unfair to us? Are we looking for ways to stop the small manufacturers from going and moving their plants overseas? No.

What is the response from the administration? The first thing is to propose to cut people's overtime pay, people who already are working. We are going to cut their overtime pay. That is one of the major points the administration is fighting for right now in the appropriations process. They fight every effort to extend unemployment for the people who are currently unemployed. In the past, on a bipartisan basis, every President from Nixon and Carter and Reagan and Clinton, every President we have during times of recession, we have extended unemployment compensation for those who are unemployed. We have to fight now at every turn on behalf of the unemployed. I have mentioned earlier the administration has not been willing to get tough with China, has not been willing to deal with what is happening in Japan as well, that has so affected our automobile industry and our manufacturing economy.

We need leadership to step up and do more than just words to get tough on them, to create a level playing field. We have seen the administration not be willing to address the high cost of health insurance and do those things that will bring prices down. Earlier today I offered a unanimous consent request to increase the minimum wage $1.50 an hour so 7 million people, a large share of them women with children who are working for the minimum wage and trying to make it and don't have health insurance, paying their child care every day, trying to make it, trying to do what we are asking them to do in this country, could get a raise. It was objected to by colleagues. So we are seeing the people who earn the least can't get a raise. The administration won't support 7 million folks getting a raise. They want to take overtime away from the folks who are already working, not wanting to deal with those who are out of work with unemployment, not wanting to level the playing field so we can keep our manufacturers here and keep those good-paying jobs.

Over and over again, we see efforts that block what we need to turn this number around of 3 million jobs lost and counting.

That is the reality of what is happening. Frankly, I am disappointed we are not willing to spend time. If we are going to ask people to stay up all night and the staff to be here and so on, let's address something that affects them and their families and everyone who is listening and watching, and that is how we move this economy forward, how we protect manufacturing, how we support our businesses large and small, and our workers working harder and harder every day just to make ends meet, so we can make sure the quality of life and standard of living we want for our families is maintained in this country.

We are the greatest country in the world. But we are truly in crisis, I believe, as it relates to what is happening in our economy and with our manufacturing sector.

Let me take an opportunity to read a few more of the letters I get every day, unfortunately, from the people of Michigan. A letter that says: I have never written to a Michigan Senator before, but for me, now is the time. You see, I am one of the discouraged unemployed in Michigan. After over a year of fruitless searching for a nonexistent job in my field as a CAD designer, I have given up. It breaks my heart to leave the field I love. I must just ask you this: Where are all the automotive engineering jobs? Is it true that we in Michigan have lost much of our employment base as it relates to engineering through outsourcing? I know many colleagues who are also out of work and many who have left the field altogether, as I am contemplating. I just want you to know how one of your constituents is feeling about the employment situation here in Michigan.

Of the 3 million jobs that have been lost, over 2.5 million of them are in manufacturing. These are jobs that pay well, that bring health care with them, that bring a pension, that create middle-class America, those folks who can buy the houses and the cars—we want them to all buy them American made—who buy the boats and the snowmobiles and the cottage up north, who send the kids to college and believe in the American dream: that if you work hard, you can be successful in this country and you will have the opportunity to have the dignity of work.

From Union City, MI: I am writing this letter because there seems to be some confusion about our economy. Our government seems to think that a tax cut will help but I don't think so. Since the year 2000, there has been over 3 million manufacturing jobs that have been lost, gone to China. My wife and I own a small machine shop in Union City, Michigan. At one time we had 7 employees. Now my wife, my son and myself are all that is left. Most of the time we don't even have enough work for ourselves. I have watched as many of my friends and competitors have gone out of business and just closed their doors or filed bankruptcy. While we fight the war on terrorism, if we are not careful, we will lose a much bigger war to the rest of the world without a shot being fired.

From Clyde, MI: My husband, a 25-year mechanical engineer, designer of automotive special machines, has been laid off for seven months. The company he worked for was bought by Fiat and within two years, began outsourcing the engineering to countries such as Bosnia where engineers will work for $6 an hour. Our workers can't compete with that obviously. The engineering department is now closed completely,

everything is outsourced. He is 55, laid off, 2½ weeks short of his retirement, vesting at 100 percent, can't draw Social Security, and has been unable to find work. The market is flooded with engineers because outsourcing is happening all over. I work two jobs and a third when I can get the work. If we want to maintain the quality of our environment and keep our families fed, we need legislation to address the inequities in manufacturing standards globally, balancing tariffs, something. Our workers can't compete with the salaries outsourcing provides from other countries but for which foreign workers can maintain their own standard of living.

Again, I have received letter after letter after letter saying the same kinds of things. I also receive letters from furniture makers. I have had the opportunity to be in Grand Rapids, MI, and talk with furniture makers who have lost their contracts to Chinese contractors or subcontracting has moved over to China. They say: Well, it is because they can't compete. It is just the way the economy works.

Well, no, it is not. China manipulates their currency and it amounts to about a 40 percent tax on goods and services we send to China. They are not playing by the rules. They don't play by the rules. Why aren't we standing up for us? My constituents are saying: What about us? What about our jobs? We appreciate the fact that four people who wanted to be promoted as judges have not had the opportunity to do that. One hundred sixty-eight, yes; four, no.

But I hear from people representing this 3 million people saying: What about us? What about a marathon for us? What about spending time on the floor debating solutions that will create jobs for the people in this country that represent the majority who believe in this country, who work hard every day, who want to work hard, who want the dignity and respect of work? They don't want a handout. They want to work. They are finding their jobs are leaving, and they need our help.

Our manufacturers, large and small, and the people who work for them, need our help. They are asking us to work on a bipartisan basis. These folks are not Democrats or Republicans. They are Americans. They are Michigan citizens. They are asking us to turn our focus to those families, those people in our country who need our help. What we do is always about values and priorities—always. It is always about values and priorities.

I believe this debate is about misplaced priorities and we need to return to what is most important in the precious hours we have here and the time we have to get something done for the American people, because there is a lot at stake, including the quality of our way of life as a country. We cannot afford to lose our manufacturing base. We cannot afford to lose the middle class of this country, which has made us strong. If we are not careful, that is exactly what is going to happen.

I call on my colleagues to spend this time on how we move forward and take this number of 3 million jobs down to 2 million and to 1 million and get it down to zero, because that is the number that truly counts for all of us.

Thank you, Mr. President.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAIG. I inquire of the time. Where are we?

The PRESIDING OFFICER. The minority still has 41 seconds remaining.

Mr. REID. We are happy to yield 41 seconds to the majority.

The PRESIDING OFFICER. Does the Senator from Idaho seek time?

Mr. CRAIG. The chairman of the Judiciary Committee is on the floor. I will yield to him.

The PRESIDING OFFICER. The Senator from Utah is recognized.

Mr. HATCH. Mr. President, I apologize to those listening in and to my colleagues for having laryngitis.

Mr. REID. I want my 41 seconds back with that voice.

Mr. HATCH. Your voice is not much better than mine, from what I can hear.

Whenever you are losing an argument, you try to bring up something that might help you to win. This argument about jobs is very important, but I remember all last Monday being wasted by our colleagues on the other side. I can list all of the obstructions that have occurred this year, time after time, when we tried to do something that might be good in that area. This phony chart of 168 to 4, it doesn't take any brains to realize that is totally false.

Tomorrow, we are going to have two cloture votes on two more, so there are at least six. If you go through all those they really do plan to filibuster, you get up around 15, 16, or 17. This is the first time in history this has happened.

I rise to speak about the judicial nominees being filibustered by a minority of Senators. I have served in the Senate for 27 years, and I can honestly say President Bush's nominees are among the best I have ever seen. They are experienced, intelligent, ethical, hard working, respected in their communities, and they have given their lives to public service. We honor these great men and women for volunteering to serve their country. They have put forward their good names for evaluation by the Senate and they deserve a simple up-or-down vote—just the dignity of the vote. Our priority is to vote on these nominees. We owe them no less.

By June of this year, we had two well-qualified nominees blocked by filibusters. These filibusters were the first two in the history of this body. By the end of July, we again made history, adding a third filibustered nominee. By October, we had four nominees filibustered, another record. Shortly, we will have two more filibustered nominees, yet another record. The number continues to rise.

Those who are watching this, don't believe this phony chart. That has never happened before. Like you say, it is one thing to say we gave the 168 a trial. Most of them are district court judges now. So we gave 168 a trial, but we only lynched 4 of them—6 of them now, or 8 probably next week. It will be up to 17 before long.

I promise not to talk about the color of somebody's tie or my favorite fast food. I want to talk more about numbers tonight. I want to talk about President Bush's nominees to the Federal court. Ambrose Bierce defined nominee as a ''modest gentleman [or gentlewoman] shrinking from the distinction of private life and diligently seeking the honorable obscurity of public office.'' That may or may not be the case, but I want to highlight several of the distinguished and respected judicial nominees who are currently being filibustered by the Democratic Party members, Justice Janice Rogers Brown, Justice Priscilla Owen, and Judge Carolyn Kuhl. We can talk in terms of numbers, but I prefer to talk about why these three distinguished judges deserve a simple up-or-down vote on the Senate floor, and why they deserve to be confirmed as Federal judges.

We started hearing from the other side that, according to my colleagues, these nominees have despicable views, or are wildly out of the mainstream, or from the hard right, are mean people, have embarrassing records, are far out and off the charts, are unqualified, are activist, are extremists, or right-wingers who would like to take the country back to the 1890s, are deeply hostile to and actively seeking to undermine civil rights, women's rights, and workers rights—gee—seek to turn back the clock on constitutional rights, have records of not really helping women, seem to have little regard for the rights of women, and represent the ''worst of the worst,'' as one colleague on the other side put it the other day. Those were the nice things they have said.

Actually, Judiciary Committee hearings often remind me of an old Far Side cartoon showing three cowboys on Main Street in the Old West. One cowboy lies sprawled on the dusty street, with a revolver lying next to his arm. The cowboy on the left stands with a smoking gun, staring at the fallen man, and saying: ''OK, stranger . . . What's the circumference of the Earth? . . . Who wrote the 'Odyssey' and the 'Iliad'? . . . What's the average rainfall of the Amazon Basin?'' The cowboy on the right stands stunned, with his hands to his face, saying, ''Bart, you fool! You can't shoot first and ask questions later!'' In a similar vein, Ambrose Bierce wrote that to nominate someone was to ''designate for the heaviest political assessment. To put forward a suitable person to incur the mudglobbing and deadcatting of the opposition.'' I often fear we do not give

our judicial nominees a fair chance before shooting them down.

The other side, before they heard one word out of Janice Rogers Brown's mouth, was already shooting her down; they didn't give her a chance.

I hope we can move past applying labels to the fine men and women who have volunteered to serve their country through judicial service. Our duty under the Constitution is to determine whether judicial nominees possess the experience, intelligence, and temperament needed for judicial service. Our constitutional responsibility is to judge whether judicial nominees are willing and able to place the rule of law above all other concerns in rendering justice. The Senate cannot fulfill its constitutional duty when a minority of Senators refuses to allow an up-or-down vote for the President's nominees. As it stands, a bipartisan majority of U.S. Senators stand ready to vote on and confirm each of these excellent nominees.

Mr. COLEMAN. Will the Senator yield for a question?

Mr. HATCH. Yes, I am happy to.

Mr. COLEMAN. A concern we have with nominees is they are competent and able to do justice and do the right thing. There are ways to measure that. I ask the chairman, is it true the three nominees we are debating have been rated qualified or well qualified by the American Bar Association? Is that an objective standard by which nominees can be rated?

Mr. HATCH. That is true. Remember, all throughout the Clinton administration, on all their nominees, our friends on the other side were saying if the ABA approves them with a qualified rating, then they deserve to have an up-or-down vote. When they have a well-qualified rating, the highest rating you can possibly have, then there is no question they deserve an up-or-down vote. Like the three cowboys in the street I talked about, they shoot them down before they even get a chance to have that vote up or down.

Mr. COLEMAN. Sometimes the people can rate judges, when judges are up for election. I ask, is it true Justice Owen was elected to the Texas Supreme Court by 83 percent of the vote in Texas?

Mr. HATCH. Absolutely true.

Mr. COLEMAN. Is it true Janice Rogers Brown was retained to serve by 76 percent of California voters?

Mr. HATCH. Yes. I might add Justice Owen, to get back to her, had 84 percent of the vote in the year 2000. That is the highest support of any State supreme court justice that year. Most every major newspaper in Texas endorsed her. Our colleagues on the other side say she is out of the mainstream. Give me a break.

In the case of Justice Brown, she won 76 percent of the vote. I think there were four, if I recall correctly, supreme court justices up for election. She won the highest vote of all of them in a State not known for conservative politics. Yet they have tried to paint her like she is some sort of a rightwing nut. Well, just look at NBC News. They made it pretty clear she is no rightwing nut. She is a very good person.

Mr. COLEMAN. I ask the chairman, sometimes judges can be graded by peers, folks who served with them, who know firsthand the quality of the work they do. Is it true Judge Kuhl has the support of over 100 California judges across the political spectrum?

Mr. HATCH. Yes, of both Democrats and Republicans. She is one of the most highly rated judges in California. She is outstanding. Frankly, these are Democrats saying she made one of the best judges on the Ninth Circuit Court of Appeals.

Mr. COLEMAN. I ask one last question. How is it the opponents of these nominees can claim these nominees are extreme or out of the mainstream, or not qualified?

Mr. HATCH. Well, I suppose the overwhelming majority in the most populated State, in the case of California, is out of the mainstream. I guess the overwhelming majority in one of the largest States in the Union, Texas, is out of the mainstream. You know, I suppose having the support of her fellow judges, in the case of Carolyn Kuhl, across the board, Democrats and Republicans, is out of the mainstream. According to these people over here—I will tell you who is out of the mainstream, it is these people over here who are filibustering judges for the first time in history and really endangering this process. It is ridiculous. It is wrong. I think the American people have to rise up and let them know it is wrong.

Mr. COLEMAN. I thank the Senator.

Mr. ALLARD. Will the Senator yield for a question?

Mr. HATCH. I am happy to.

Mr. ALLARD. I am a veterinarian by profession, and we have a code of ethics in our profession. I understand we are expected to abide by the code of ethics, and I understand the American Bar Association has a code of ethics for judges. My understanding is the code of ethics says you will not take a position, when you are in the process of seeking a position on the bench, that might prejudice your ability to decide a case. Every one of these individuals up for consideration is highly respected by their peers. I suspect it is because they are honorable and they live by the code of ethics.

I am disturbed by the specific questions that come from members of the committee when, in my view, it makes it difficult for the nominee to answer those questions because it would make it difficult for them to be objective in the way they look at a case that comes before them. I wonder if you would share with me about the code of ethics and the question on how is that practical, and do you have any reason to believe these are horrible individuals who would not measure up to the highest standards of the court, based on their peers who recommended them as highly well qualified?

Mr. HATCH. I have been on the Judiciary Committee for 27 years. I have to say I have not seen any better nominees in that whole time. As far as ethics, the only one the Democrats demanded an answer to every question—questions about future cases that will come before them—not the only one, but the main one, was Bill Pryor. The other one was Miguel Estrada. To make a long story short, it has been a very unfair process for these people. We have more than made the case that Miguel Estrada was treated completely different from John Roberts. Both of them served in the Solicitor General's Office. They asked these stupid questions about documents that are the most highly privileged documents in the Government today, and seven former Solicitors General said these cannot be given, and they used that as a phony excuse to shoot down Miguel Estrada, who is well qualified by the American Bar Association. When Bill Pryor answered all the questions, they said you answered too many questions. You are damned if you do, damned if you don't.

It is pretty clear, they just wanted to shoot these people down right from the beginning. To come out here and make such a fuss about jobs when they have been obstructive all year long is so phony that I have to admit, it almost brings tears to my eyes. Maybe it does bring some tears to my eyes because phony things tend to do that.

Mr. ALLARD. I thank the Senator for responding to my question. I have one other followup question. You mentioned jobs and it seems to me we have an efficiently operating judiciary. We don't have a lot of lawsuits that help the economy. That means we need to move out of filibuster and get these nominees voted up or down and get them on the bench, particularly in the circuit courts where we have a lot of pending cases. One of the best things I think we can do is to get these nominees on the bench and fulfilling their duties. Do you agree?

Mr. HATCH. I do. Sometimes the district courts are involved and that is why we need the circuit court of appeals. Yet this President is treated different than prior Presidents, including President Clinton. About two-thirds of the circuit court nominees haven't even had a vote. Usually by this time in a President's career about 90 percent have had a vote.

Ms. COLLINS. Will the distinguished Senator yield for a question?

Mr. HATCH. I am delighted to.

Ms. COLLINS. The Senator from Utah is an extraordinary lawyer, and he also has a distinguished history in the Senate and has served so ably as the chairman of the Senate Judiciary Committee. I wonder, given the Senator's breadth of experience, if he happens to know the origin of the word filibuster and could he enlighten the Members of this body and those who

are watching tonight as to its origin and meaning.

Mr. HATCH. I was hoping somebody would ask that. We have a chart prepared. They put it up. Filibuster comes from a Spanish word ''filibustero,'' meaning a pirating or hijacking, one word for obstruction. That is what it is. Look, I have no problem with filibusters on the legislative calendar because the Senate can set its own rules. But when it comes to the Executive Calendar, that calendar depends on your exercising restraint by advising and consenting, which means a simple majority vote up and down.

In the Clinton years, every Clinton nominee who came to the floor got a vote up or down. We did have a few who wanted to filibuster Clinton nominees. I personally stopped that because I recognized it would be disastrous for the Senate if we went down that road. As you can see, it is disastrous. We are in the middle of going down that road. We have already gone down it because our colleagues on the other side just don't seem to understand how important it is for them not to filibuster Federal judicial nominees. But I thank my colleague for bringing it up.

Ms. COLLINS. I thank the Senator for his clarification. That is indeed fascinating and we have learned a great deal here this evening.

Mr. SESSIONS. Will the Senator yield for a question?

Mr. HATCH. I will be happy to.

Mr. SESSIONS. Addressing the distinguished chairman of the Judiciary Committee, who has served so ably for so many years on these matters, I would like to follow up on that question that was just asked.

During your tenure as chairman of the Judiciary Committee when President Clinton was President, and he was nominating judges that sometimes would not have been our choice, or your choice for a judge, did you have occasion to express your opinion as to whether a filibuster was appropriate or not?

Mr. HATCH. As the Senator will recall, right in the middle of a couple of very controversial nominees, Judge Paez, now Judge Berzon, there were some on our side who legitimately felt they should filibuster both of those——

Mr. SESSIONS. I hate to interpret the Senator, but his microphone is distorting pretty badly. Maybe the cord is broken?

Mr. HATCH. Maybe I can bring it down here. Maybe it will work better here. I have it too close to my mouth. I am glad the Senator corrected that.

Judge Paez had been an activist judge in the eyes of many of our colleagues on the district courts out there in California. Marsha Berzon was one of the leading labor lawyers in the country. We had some who wanted to filibuster them. I stood up in caucus and said that is not going to happen. To his credit, the then majority leader TRENT LOTT stood up and said that is not going to happen.

We are both leading conservatives, but we knew that was a disastrous thing to do in this body because it would lead to animosities you could never quite—that would remain. It would lead to partisanship. It would violate the Constitution, it would violate the very advice and consent clause, the great power we have been given by the Founding Fathers.

Frankly, as the distinguished Senator has pointed out, I stood up and said that is not going to happen and it did not.

Did we have some cloture votes? Yes. But the cloture votes were to get to the nominee so we could vote. Every Clinton nominee who came to the floor, who was brought to the floor, got a vote up or down. Only one was defeated and that was Ronnie White, on a straight vote up or down. But every other one, all 377 of them, the second highest total in history, passed.

Did I agree with all those judges? You bet your life I didn't. But they were qualified. The fact I didn't agree with them ideologically was irrelevant. What is relevant is, Are they qualified? I certainly would not take away the opportunity of serving in the Federal Government for an otherwise qualified person just because I disagreed with that person on abortion or on any other issue, for that matter.

Mr. SESSIONS. Will the Senator yield for a further question?

Mr. HATCH. Yes, I yield.

Mr. SESSIONS. I remember that very well. I remember you speaking clearly that the filibuster was inappropriate. You both said it publicly and in the Republican conference when the issue was raised by people who did not have your experience in this matter. TRENT LOTT, the Republican leader in debate—I voted to end debate, TRENT LOTT voted to end debate, you voted to end debate and allow an up-or-down vote, and when that occurred I voted against the nominee. But I agree with your argument that a filibuster was not sound.

Let me ask you this. At that time, when Senator DASCHLE was the Democratic leader and Senator LEAHY was ranking member on the Judiciary Committee, did they take a public position that a filibuster of Clinton judges was not appropriate?

Mr. HATCH. Virtually every Democrat said it, took the position a filibuster should never take place. All they asked for was an up-or-down vote. That is all they wanted, if we would just be decent enough to give them an up-or-down vote. We did. We were decent enough.

What does that imply about what is going on on the other side? I will let the public draw their own conclusions. But we were decent. We did what was right. We gave them up-or-down votes. Frankly, what is going on here is just appalling.

Mr. SESSIONS. Let me follow up. Now that President Bush is in the White House and he is sending judges over, has your position on whether a filibuster is appropriate or not changed in any way?

Mr. HATCH. No, it has not, because a filibuster is inappropriate when it comes to judicial or even executive nominees, especially judicial nominees. Our ability to give advice and consent means if you don't like the nominee, vote against him or her. If you do, vote for them. But, above all, don't obstruct, which is exactly what they are doing here, obstruction, from the Spanish word, ''filibustero,'' meaning a pirating or hijacking. Just one more objection. Now we have six more objections, as of tomorrow—actually they require cloture votes to be filed on Janice Brown, and of course Carolyn Kuhl, so we now have six. I could name up to 17 they have threatened to filibuster and probably will.

To keep bringing that phony chart up here is an insult to everybody on this floor. It is an insult to everybody watching. It just shows they are void of any real arguments. To now try to change the nature of the debate to jobs, when they have obstructed all year long, is an insult.

Mr. SESSIONS. Will the Senator yield for one following question?

Mr. HATCH. I will be happy to.

Mr. SESSIONS. Senator HATCH, so it is clear to me, it is your position, the position of TRENT LOTT, has not changed as to whether a filibuster was appropriate, and neither has that of our majority leader, BILL FRIST?

Mr. HATCH. It has not changed. But their positions have changed.

Mr. SESSIONS. Let me ask you with regard to TOM DASCHLE, the Democratic leader, and Senator LEAHY, the ranking member on the Judiciary Committee, who argued so aggressively against filibusters just 2 or 3 years ago, has their position changed today? Are they, in fact, participating in an unprecedented procedure, an unprecedented filibuster of judicial nominees?

Mr. HATCH. No question. They were very forthright and very strong that there should never be filibusters of judicial nominees. Now all of a sudden when it is to their advantage, they think—I think it is to their great disadvantage. They lost the 2000 election in part because of the way they are treating judgeship nominees. I think they are going to lose a lot of standing in this country. The way they are treating southern nominees is abysmal, like Bill Pryor. Like Charles Pickering.

It doesn't take any brains at all to realize they just don't think these two able people are worthy of being on the bench when in fact they are more worthy than many of the nominees we approved for them in the 8 years of the Clinton administration.

Mr. SESSIONS. I thank the Senator for his leadership. I asked those questions because it was suggested last night in debate that somehow those on this side had changed our view. I think it is quite crystal clear the only views that have changed and only positions

that have been changed are those on the other side. Unfortunately, it has changed the historical principles of this Senate with regard to filibusters of nominees.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAIG. Mr. President, will the chairman of the Judiciary Committee yield for a question?

Mr. HATCH. I will be happy to.

Mr. CRAIG. The chairman in earlier questioning by the Senator from Minnesota alluded to the fact that NBC News tonight featured as their lead story Janice Rogers Brown, Supreme Court justice from California. I am a freshman on the Judiciary Committee so I have not had the experience you have had, going through numerous years of confirmation hearings. But I must tell you I was so impressed with this woman's talent and her clarity in answering questions.

What is her background? What was her beginning, if you will? I think it is the great American story, I am told.

Mr. HATCH. She was born a sharecropper's daughter. This woman had it rough all the days of her life. She put herself through college and law school as a single mother. She has worked in State government now for I think it is 26 years. And they are trying to say she is against government? My gosh, she has worked there and been supportive for I think 26 years. She is one of the best nominees I have ever seen.

If we had done to three woman nominees what they are doing to these three—Priscilla Owen, who broke through the glass ceiling, getting women a right to be partners in law firms; Carolyn Kuhl has the support of 100 of her fellow judges out there, Democrats and Republicans; Janice Rogers Brown, sharecropper's daughter, has risen to the top of the heap, who has fought her way all her life—if we had done this to any of their nominees they would be screaming about it right up to today. It is unbelievable they are trying to do this on these three women nominees. They want a regimented liberal approach to everything, and if it is not there, then they are out of the mainstream, according to them.

I think most people in this country are in the middle and, I think, the middle or moderate conservative. But, be that as it may, these are competent, qualified, well-qualified women, and they are treating them like dirt. I don't understand it, myself.

Mr. CRAIG. Will the Senator yield for another question?

Mr. HATCH. I will be delighted to.

Mr. CRAIG. It was also mentioned in that questioning by the Senator from Minnesota that Justice Brown had received—I think your response was—74 or 76 percent of the vote of the State of California in a reconfirmation of her position. We have heard a great deal about judges who dissent too much. She was criticized by the Democrats for some of her speeches, that she was ''out of the mainstream,'' even though she received this phenomenal vote in California. Didn't Justice Brown write more majority opinions than any other justice in the Supreme Court of California—in the last term, I believe is what they are saying?

Mr. HATCH. Yes, the distinguished Senator makes a good point. She was elected by 76 percent of the vote. I would have to say, she wrote a majority of the majority opinions, and joined in some 73, if I recall correctly, unanimous opinions. In other words, she is not only in the mainstream, she is one of the best justices, State justices in the country. They are treating her like dirt. I don't understand that kind of treatment.

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

Mr. CRAIG. I thank the Senator for his answers to my questions.

The PRESIDING OFFICER. The Senator from Nebraska.

Mr. NELSON of Nebraska. Mr. President, I rise this evening to express what might be best described as my disappointment in what has occurred during the past 24 hours, now I understand perhaps another 12 hours. I ask we move the process forward.

Mr. HATCH. Will the Senator yield for a unanimous consent request? It will only take a few seconds.

UNANIMOUS CONSENT AGREEMENT

I ask unanimous consent at 8:30 a.m. on Friday the Senate begin an hour of debate equally divided prior to the first cloture vote; further, that the last 20 minutes be equally divided, the first 10 minutes under the control of the Democratic leader or his designee and the last 10 minutes under the control of the majority leader or his designee.

Mr. REID. No objection.

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

Mr. HATCH. I thank my colleague.

The PRESIDING OFFICER. The Senator from Nebraska.

Mr. NELSON of Nebraska. Mr. President, I rise tonight to express disappointment over what has happened over these past nearly 24 hours, or past 24 hours-plus, and perhaps another 12 hours. I just ask we move the process forward.

I would like to make very clear a few statistics I think are appropriate tonight. We have seen many statistics or many different versions of the same statistics over these past many hours. Tonight I would like to make very clear a few statistics with respect to my voting record on confirmation of judicial nominees, which is really based on the principles I hold as a Member of the Senate.

I voted to invoke cloture 13 times. That is a 100 percent voting record on judicial nominees. To date, I have never voted against invoking cloture on a judicial nominee, not one.

I have voted in favor of confirming all nominees except one, and I voted for cloture to move the process forward, even on a nominee I cannot support.

I have done all these things because I believe in moving the process forward. As Governor of Nebraska, I had the great privilege of appointing judges to the bench. I appointed the entire Nebraska Supreme Court and the entire Court of Appeals over my 8 years, and nearly 50 percent of the judges in Nebraska. I may not be good at it, but I have had a lot of experience.

I would hope we could move forward this process. If we cannot agree, then at least we ought to move on. What is happening right now during these hours of debate is not about moving the process forward. In fact, what is being accomplished seems to me to be just the opposite, setting us back. This debate has served only to further frustrate the work of this body, delayed action on critical legislation that must be addressed, and has further polarized the competing sides on these very controversial appointments.

The question I ask tonight is, Does using a tactic of delay to criticize and attack another tactic of delay cause you to make the point or lose the point?

To add further frustration to this matter, this delay occurred only after we were forced to choose between missing votes on Tuesday, Veterans Day, or cancelling the many obligations most of us made to our constituents to participate in events to honor veterans back home. The leadership basically decided having these hours of debate seemed to be more important than honoring those who fought and died while protecting the freedoms that under ordinary and normal circumstances are debated and defended in this very Chamber every day. By having votes on Veterans Day, I could not participate in that exercise, and I didn't appreciate having to choose between Nebraska veterans and votes on legislation before this body. Like others, I chose to be with my veterans. I missed two votes. I would do it again in a heartbeat.

But it is not only our veterans who were not given the consideration they deserve. It is also our seniors, who are anxiously awaiting a prescription drug benefit. What do I say to George and Lee back home when they ask me, ''Why haven't you been able to get a prescription drug benefit but the Senate could debate on other issues for 30-plus hours''?

It is those who suffer from mesothelioma who desperately await an asbestos reform bill. What do I say to a widow of a recently deceased judge in Nebraska who was waiting to collect money because of the bankruptcy of a particular company? She is unable to collect it, but would have the opportunity, under an asbestos reform proposal, to collect on behalf not only of herself, but on behalf of her young children.

I am just one of 100 in this great legislative body, and I am very honored to be here. Even though I am relatively new to the scene, I think it is very

clear each of us is entitled to his or her own opinion. I have to say some of us are moving the process forward. I find it difficult to explain to others why we cannot be independent in our thinking about judges. Someone might say there is not too much of a difference about this judge or that judge. That is what this process is all about. But when we can't come to an agreement about a particular judge and we can't move forward, we cannot delay in this situation, but we must in fact move on.

I oftentimes try to impress upon myself and my family and my friends and others that reasonable people can and will disagree. But when they are unable to agree, it is unreasonable to expect the process to come to a halt regardless of the rules, but it is important to go ahead and move on. I embrace that philosophy because I too would always like to have everything go my way. I would like to see every bill read exactly as I wish and every nominee be the one I choose. Instead, I do embrace that philosophy because I believe we can have those differences of opinion, hold different views on the issues, serve different constituencies from diverse regions of this great Nation, and we can, in spite of all that, and in many instances because of that, achieve progress in addressing the critical issues of our entire Nation.

I don't believe these hours of debate have helped us move closer to resolving our differences on these 4 nominees. In fact, I am afraid it has achieved just the opposite. I fear this exercise may have poisoned the well, leaving this body with such stark disagreements, and any progress on the issues that matter to my constituents—a prescription drug benefit, an energy policy, asbestos reform, welfare reform—and the bills that run the Government may not be now attainable.

Many Americans question the motives of both sides as this spectacle continues. I am not going to suggest a motive for all of this, but I can surmise a conclusion: These hours have been needlessly carved out while the critical issues remain unresolved. My constituents sent me here to get things done—not to pander, not to be a partisan, not to disrupt, delay, object, or deny, not to waste 30 minutes or 30 hours.

In the interest of moving forward, making progress, and doing good work for the American people, I urge my colleagues, not in any partisan way, to think long and hard about what is being orchestrated here for these hours and what the American public expects of us during the final days of the session—so we can deal with the prescription drug benefit, so we can deal with the energy needs, so those folks who are today worried about the cost of natural gas and the high cost of energy sources in the future know there is a solution in sight.

Drought relief: I can go back to Nebraska and say, Well, we couldn't get a drought bill. I guess it was OK that we debated 30 hours on other issues, but in fact when you are losing your family farm as a result of the continuing drought, that isn't probably going to sell.

Highway reauthorization: Many States today are waiting for the highway reauthorization so they can continue to build and improve their infrastructure, because that relates to jobs—jobs in construction, but also jobs because of the improved infrastructure.

Many States are worried today about FAA reauthorization. I have airports in smaller communities in Nebraska that are worried about being able to build and expand and improve their airports due to part of the reauthorization.

What do I say to them if that doesn't get accomplished? What do I say to those who are waiting for asbestos legislation? What do I say about class action? When are we going to get that accomplished?

When are we going to say enough is enough? If these 30 hours-plus that are now going into more hours had been used to debate health insurance, the full funding of special education, dealing with the Federal unfunded mandates, or some of us had worked previously on State fiscal relief, or in finding more ways to create jobs and improve the jobs and the markets we have today, looking for ways to make trade not only free but fair so we don't export jobs but we do import and export our products at the same time—if we had spent the time on that, then this time could have been productive.

In many ways perhaps there can be a catharsis as we move forward on finding new ways to deal with the judiciary. I have looked back and forth over the years looking at the role of the judiciary to see if there is anything anywhere that ever gives the judge the right to legislate or to make law. The one thing I made clear with every judicial candidate was: Are you going to be in the position of a judge or do you want to be a legislator? Are you going to legislate or are you going to adjudicate? The position of a judge is not to legislate. It is to interpret law, to apply law, and to adjudicate.

To win constituency groups in Presidential elections, the unfortunate thing for some time has been to say I am going to appoint judges to do certain things, to rule certain ways on the Supreme Court bench, to rule in certain ways on certain issues that will appeal to a constituency or to win constituency groups.

Sometimes I think we politicize the judiciary, and that is why we are where we are today. We need to move away from worrying about ideology, political philosophy, and to make sure judicial activism is not a part of what we do. If Presidential candidates say they are going to appoint Supreme Court judges not to be conservative or liberal, but those who will fairly apply the law and those who will do what they think is right under the law, not to make the law, then I think it is important. Politicians do keep promises. In the view of many, maybe not many promises. But politicians do keep promises when they say they will appoint judges of a certain kind. Then they are obligated to constituency groups to do that.

That is the root cause of our problem—moving away from ideology and political philosophy so we only deal with judges who come to the bench with the idea they are there to apply, to interpret the law, not to legislate, not to make the law. Until we do that, we are going to be hopelessly bogged down from time to time. But I am here to move the process forward. If the rest of us can't get together to move the process forward as a body, then we at least ought to move on.

Thank you, Mr. President. I yield the floor to my colleague from West Virginia.

The PRESIDING OFFICER. The Senator from West Virginia.

UNANIMOUS CONSENT REQUEST—S. 1853

Mr. ROCKEFELLER. Mr. President, I ask unanimous consent that the Senate proceed to legislative session and that the Finance Committee be discharged from further consideration of S. 1853, a bill to extend unemployment insurance benefits for displaced workers, the Senate proceed to its immediate consideration, the bill be read a third time and passed, and the motion to reconsider be laid upon the table.

Mr. CRAIG. Mr. President, reserving the right to object, I ask unanimous consent that the Senator modify his request so that just prior to proceeding as requested, the three cloture votes would be vitiated and the Senate would then immediately proceed to three consecutive votes on the confirmation of the nominations with no intervening action or debate.

Mr. ROCKEFELLER. The Senator from West Virginia will not do that.

Mr. CRAIG. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. ROCKEFELLER. Mr. President, I am extremely frustrated that the Senate continues this debate, or whatever it is. It is already more than a day. We are dealing with the nominations of a handful of judges. That is not trivial. I understand that. As a Senate, we have a responsibility to address the most urgent issues facing our Nation. Unemployment insurance for those who are unemployed, I think, happens to be one of them. Today we are, embarrassingly, failing to live up to that responsibility.

This morning I talked at some length about the crisis facing our Nation's manufacturing sector. I will not relent on that subject. As factories close down, people across this country are losing jobs, losing health care benefits and retirement benefits. As a country, we are losing the industrial base that is responsible for the greatness of this Nation.

Some of the statistics I mentioned this morning I am going to repeat.

Manufacturing employment is at a 41-year low, and more than 2½ million

manufacturing jobs have been lost in the last couple of years.

This morning I described legislation I introduced to address this manufacturing crisis. I happen to feel very strongly about that legislation. As I explained, the bill I crafted would offer relief to American manufacturers in three ways:

First, by lowering the effective corporate income tax rate by about 3 percent; second, by providing employers tax credit up to 75 percent to help cover the cost of health care coverage for retirees who had worked for that company; and, third, by strengthening our trade protection laws. There is a plan I laid out to help stem the terrible flow of manufacturing jobs from the United States overseas. I recognize other Senators have different ideas about the best way to help our Nation's manufacturing companies compete. I welcome the vigorous debate. I believe we ought to leave no stone unturned when looking for a solution to this crisis which is so vital to so many of our people. That is why, frankly, I am so frustrated and disappointed we are going through this 30-hour charade.

On the 1st of October, the Senate Finance Committee, on which I am proud to serve, approved legislation known as the JOBS Act. That stands for ''Jumpstart Our Business Strengths.'' The legislation enjoyed broad bipartisan support in the Senate Finance Committee and passed out of it. But 6 weeks later it is still awaiting action by the full Senate.

I do not necessarily agree with every provision of that bill, but that did not happen to be important to me because it represents a serious effort to help America's factories and the people who work in those factories. I care about those people. I represent those people and I will fight for those people.

The more important provision of the bill reduces the corporate tax rate, much the same as my own legislation would do. Unfortunately no debate has been scheduled for this important legislation. Some seem to believe we will not have time to consider the legislation before adjourning this year. That is tragic for the people who are not working. This Presiding Officer faces that in his own State, the State of Illinois.

I cannot understand that thinking. How can we possibly have 30 hours to air our grievances about judicial nominees when we all know exactly what the result is going to be? There is no time to debate a way to protect American factory jobs. I could pick on many other subjects and would be happy to do so, but I pick one subject tonight.

I believe if the Senate took up the JOBS Act, we could have a thoughtful, constructive debate and we could pass it. In fact, as I look about the Senate floor, I see the Senator from Nebraska, the Senator from Maine, and the Senator from West Virginia, and the last time we were on the floor together, we passed a bill which spread out to the States $16 billion of Medicaid assistance which they desperately needed—two Democrats and a Republican. It could have been two Republicans and one Democrat. It makes no difference. We got the job done. The bill passed, and the States benefited from it.

But what are we doing now? We are talking. We could pass legislation on all kinds of things. I would ask all of my colleagues to think for a minute about the Americans who right now as we speak are hard at work on the evening shift in factories around the country. They are making everything from cars to contact lenses. Many of these factory jobs are exhausting. They require concentration and heavy lifting. They cause injuries. They require concentration. When Americans are toiling away in our factories right now, we cannot help but be inspired ourselves to concentrate and to do some heavy lifting of our own. We must work hard and do our jobs. It is our job as Senators to look at the serious policies that make our country work or work less well. People having a job and putting food on the table is a very major part of that.

Much to my dismay, we are not engaged today in serious debate about ways to create and maintain jobs in America. That is the subject of discussion in my State. We are not a wealthy State. We are a good State. Our people are as good or better than anybody in any other State. I fight for then. But they need work. Instead, our factories continue to struggle and are forced to shut down. Millions of Americans are out of work. Because so many of our factories are leaving the country, it is more and more difficult for Americans to find new jobs.

People always think when you lose a job, you can get another job. There was a day when that was true. That is no longer true. Indeed, economic experts have concluded the vast majority of job losses suffered in the last few years are permanent, are not replaceable. Factories are closed and will not reopen.

Let me take a moment to discuss the economic situation in my own State of West Virginia. Our steel industry has been struggling to recover from years of unfair and illegal competition against steel that was dumped on our markets and sold in America at below the cost that it cost to produce it in the country it came from—dumped steel, illegal steel, breaking our national law.

What was once our State's largest employer, Weirton Steel, recently announced it will cut an additional 800 jobs. I can remember when 13,000 people worked at that company. If President Bush backs down on the steel tariffs, of course, it will hurt the industry just as it is poised to recover. Ending the tariffs early will cost many more Americans jobs and at a time we know that new factories are not being opened in steel. We have to protect those steel jobs we have. I mean ''protect'' in the best sense of the word by using the American law and by being faithful to our own conscience.

Employment in the coal fields is also affected. The coal industry has long supplied our steel industry with the finest quality coal in the world. That has continued to decline. There are not many coal miners left anymore in West Virginia. Indeed, the manufacturing base all over my State continues to shrink drastically, and, as it diminishes, so do jobs with good wages and good benefits. That is the American dream.

In the southern coal fields, two other established prominent manufacturers—EIMCO, a Norwegian company that manufacturers mining equipment, and the Dean Company, with which I spent most of my life, a maker of wood veneers—are closed; they went overseas.

The past year has brought the closing of two long-time manufacturers in north-central West Virginia, the Clarksburg Casket and Glassworks Company. In the Mid-Ohio Valley in Parkersburg, two long-time manufacturers, Johns Manvillle and Ames True Temper, closed plants. Just 3 weeks ago, it was announced another 50-year-old plant was scheduled to close in Parkersburg, putting almost 200 workers at Schott Scientific Glass out of work. Their jobs went overseas.

In the Kanawha Valley where this Senator lives, two well-established chemical companies are closing, Flexys in Nitro and FMC in South Charleston. These closings mean hundreds of jobs lost.

Where are these workers supposed to turn? Their average age may be 45 to 55. What are they meant to do? Take up computer sciences? Biochemistry, physics? They can't do that. There is no place for them to go. There are no replacement jobs. Some of them take temporary jobs where they don't get benefits and try as best as they can to work with their families.

I was extremely pleased at the recent news of the strong economic growth in the third quarter of this year in this country. This does not translate into new jobs in West Virginia. New jobs is what we look at. People do not feed their families and do not pay their mortgages with news of strong economic growth. They need paychecks. It comes from jobs.

This Congress has not done enough to protect the paychecks of hard-working Americans. We have failed to stem the flow of jobs overseas, a subject about which I could speak for 6 hours. We have not done enough to provide temporary assistance to workers who have lost their jobs. Currently, 9 million Americans are unemployed and almost 2 million Americans have been unemployed for more than 6 months. In West Virginia, almost 42,000 workers are facing the holidays without a job.

Today, the Senate ought to be addressing the needs of these workers. Therefore, I am pleased to be a cosponsor of legislation introduced by Senator KENNEDY that would extend the

unemployment compensation for those Americans of which I speak who are still struggling to find work in our so-called jobless economic recovery.

As factory after factory closes its doors, or freezes hiring, workers are unable to find new jobs. They are running out of unemployment benefits at an alarming rate. As many as 80,000 workers per week are expected to exhaust their unemployment compensation in December itself. Senator KENNEDY's bill would continue Federal unemployment benefits for an additional 6 months. The legislation would also provide 33 weeks of additional Federal benefits in States with especially high unemployment rates.

This bill provides crucial assistance for long-term unemployed workers. There are more than 1 million workers who have already exhausted their extended benefits but have not been able to find a new job.

Let me be clear. Men and women in West Virginia and across the country would rather have a paycheck than an unemployment check. We all know that. However, the jobs are not available. The choice is not theirs. They have families to feed. The Federal Unemployment Insurance Program was specifically created to help workers when the economy suffers prolonged downturns. Workers have paid into the unemployment compensation fund and they deserve to collect benefits from the fund during such a weak jobless recovery.

Currently, the unemployment insurance trust funds have $20 billion sitting in a bank. The benefits outlined in Senator KENNEDY's bill would cost $16 billion. To me it is unconscionable to leave the funds in the bank when they are needed by workers during hard times. Moreover, by making additional unemployment benefits available, Congress will also obviously be helping our economy.

I am afraid that the charade we are engaged in at the moment is a lose-lose proposition for the American people. I do not diminish the importance of judges, but I do not diminish the importance of unemployed workers whose self-esteem is destroyed and whose skills are ready to be put to work. It does nothing to help 9 million Americans who have already lost their jobs to have this debate. It does nothing to protect the jobs and factories that are currently struggling to compete to have this debate. I would also suggest that it hampers the ability of Senators to come together to address the urgent business of the Nation because of the nature of this debate.

There is certainly no shortage of important business before the Senate. We need to pass a prescription drug bill, and there are many other issues I could discuss.

I will end with simply this thought: I love America. I love my State of West Virginia. I love its people. I know they need to be well represented by judges. But I also know they have to work or else it probably doesn't make much difference to them.

What I am talking about tonight, what I talked about this morning is the ability for Americans to have jobs, to hold jobs and, if they lose them, to get unemployment insurance.

I yield the floor.

The PRESIDING OFFICER (Mr. ENZI). Who yields time for the majority?

Mr. HATCH. Mr. President, I appreciate our colleague's comments about the necessity of jobs. I agree with him. We are debating the third branch of Government, without which there wouldn't be any jobs for anybody, without which the Constitution wouldn't be alive today, without which we wouldn't have the freedoms we have.

In all this talk about jobs, I haven't heard any real ideas as to how we get more jobs. It is as though they think Republicans aren't concerned about jobs. Of course, we are. We are debating something that is equally important; in fact, over the long run, much more important than almost anything else we can debate. That is, are we going to have an honest, decent judiciary to uphold the Constitution?

I have seen this body and the other body pass unconstitutional legislation many times in my 27 years. I have seen Presidents act unconstitutionally a number of times in my 27 years, and before that. It has been the judiciary that has saved the Constitution. It has been the judiciary that has corrected matters. It has been the judiciary that has helped small business, where the jobs are. It has been the judiciary that has given justice to this country, that has protected Americans from criminals, that has done so much good for this country. That doesn't mean all judges are perfect or right. But by and large, it has worked very well. That is why we make these positions lifetime appointments, so they don't owe anything to anybody but the law.

Here we have a distortion for the first time in history, filibustering judges and phony, untrue charts of 168 to 4. Let me tell you, they wouldn't have allowed the 168 to go through had we not been fighting as hard as we could and forcing them to allow those judgeships to be brought up. We would have nowhere near 168.

With regard to the four, we are already up to six. We were there last night. We were there months ago when they indicated they were going to filibuster Janice Rogers Brown and Kuhl, in addition to the other four who have been mentioned. Then there are probably at least 13 others who I can name. There will be more, because there is an arrogance here, it seems to me, that goes beyond doing what is right for this country.

Very few things rise to the dignity of the importance of judges and getting a good Federal judiciary. I am for jobs like everybody else, but because they don't have any other arguments, that is why they are doing that.

I would be happy to listen to my colleagues on any suggestions they have with regard to jobs. Usually it is another big Federal program that literally doesn't create any jobs. It just creates another burden for taxpayers. That is what they think creates jobs.

I am happy to yield to the distinguished Senator from Virginia.

Mr. WARNER. I listened carefully as our distinguished chairman was referring to other nominees who have been acted upon by the distinguished members of the Senate Judiciary Committee. I have been studying extensively the very impressive record of achievement of a number of these individuals who are awaiting action on the floor.

You mentioned Justice Janice Rogers Brown, a distinguished jurist of 25 years on the California Supreme Court. The record shows that she was born to very proud parents but ones of modest means. Sharecropping was their profession.

This distinguished, hard-working young person worked her way through college, worked her way through law school, and has now served the people of California for a quarter of a century, including the last 7 years as a California Supreme Court justice. That is remarkable.

Further, we heard that she was elected or reelected to the California Supreme Court. I think the chairman should explain the distinction between our Supreme Court, which is subject to the process we have been discussing these several days. But in a number of States, they do have a State election. All of us in this Chamber are here by virtue of the support of people in elections. But how many of us have been elected to the Senate with 76 percent? I don't think my distinguished junior colleague from the State of Virginia got that.

Mr. ALLEN. Far from it.

Mr. WARNER. Well, I was pretty close to it, I mention to the Senator. But I don't claim 76 percent. That is quite a record. We have heard that she has ruled for the plaintiffs in many civil rights and consumer protection cases. She is supported by her colleagues in California, those who know her best.

But could the distinguished chairman advise the Senate with regard to his opinion with respect to the nomination as it is hopefully brought before the whole Senate?

Mr. HATCH. Well, of course, she is subject to the same advice-and-consent rule of article II, section 2 of the Constitution, as are all of these Federal judges. But she deserves the dignity of an up-or-down vote.

The senior Senator has brought out she is an African-American woman who has come from nowhere, in a sense, a sharecropper's daughter, to being a justice on the California Supreme Court.

Mr. WARNER. That is a dream of millions of students all across this country, to have that opportunity to

come up through our system, to gain their degrees, to take their place in society, to stand for the cause of freedom in this great country, and some few do manage to get on the judiciary of the States. I know that Presidents look to the jurists in States, because they have a proven record, to select them for the Federal judiciary.

Mr. HATCH. That is right.

Mr. WARNER. I do hope this distinguished nominee will fare well and be treated with fairness when that name is brought before the Senate.

Mr. HATCH. I appreciate my dear colleague. But we will find out tomorrow that the other side is going to vote against cloture. They are filibustering this terrific African-American woman justice who has made it on her own throughout life, who wrote most of the majority opinions in the California State Supreme Court while joining unanimously with others in over seven cases just last year.

They have tried to paint her as though she is out of the mainstream. I would like to suggest who is out of the mainstream. It is a high percentage of those on the other side of the aisle who think that only the left has any ideas in this country. Because she is a conservative black woman and she is not monolithically in step with what they think black people ought to be, they are against her. If we did that to one of their nominees, the whole world would come down on us.

Mr. WARNER. She is proud of her African-American heritage. I hope the Senate gives her fair treatment.

Mr. HATCH. I do, too. I hope the Senator is right. But from what I have seen here, she is going to be filibustered right along with the rest of them.

I recognize the distinguished Senator from Virginia, and then I will come to the distinguished Senator from North Carolina.

Mr. ALLEN. Mr. President, following up on my esteemed colleague from Virginia's comments and observations on Justice Janice Rogers Brown, she is the first African-American woman to serve on the California Supreme Court, having come from segregated schools in the South, worked her way up.

I find it very interesting that the following quote was made a few years ago: Whether it is Hispanic or non-Hispanic, African American or non-African American, woman or man, it is wrong not to have a vote on the Senate floor. What are they afraid of? What are they afraid of? What is wrong with a vote?

Tomorrow the person who made that statement on October 28, 1999, Senator TOM DASCHLE, Democratic leader, is going to lead a filibuster against Justice Janice Rogers Brown.

Mr. HATCH. That is my understanding.

Mr. ALLEN. Clearly, a prior inconsistent statement showing duplicity. I would ask, when you referred to some of their arguments that she is out of the mainstream, I was looking at the record from the hearings. I understand Justice Brown was criticized for a single ruling she made on a parental consent case. We have parental consent laws in Virginia. The vast majority of people, even some who consider themselves pro-choice, recognize that if an unwed minor daughter is going through the trauma of an abortion, that at least the mother or father ought to be notified, ought to be involved, because it is a medical procedure that even for ear piercing or tonsils being taken out, you need consent. So for something as traumatic as the surgery of abortion, which is physical obviously, but also something that is emotional, parents should know when their 17, 16, 15-year-old daughter is going through such a procedure.

She is being criticized for that. I don't find that, at least from Virginia standards, or if the Senator could share with us, do you consider that out of the mainstream? From what I can see from surveys, 80 percent-plus of all Americans, regardless of the color of their skin or their ethnicity or gender, think parents ought to be involved when their unwed minor daughter is contemplating such a procedure.

Mr. HATCH. Well, the Senator raises a good point. But not according to that side. It is out of the mainstream. Just think about it. The Senator is correct. Eighty-two percent of the people are for parental notification laws. Challenging the reasonableness of parental notification statutes lies somewhere between hard and impossible. That is why an overwhelming majority of Americans support those laws, including the parents of Holly Patterson. Holly was a young girl who died 7 days after taking RU–486, the abortion drug.

Her father learned about her abortion just hours before her tragic death. If there was a parental notification statute, Holly might still be alive today.

Parents do have some rights here. Most people acknowledge that. But that is one of the big reasons why our friends on the other side are against all three of these women nominees, I suppose. If there had been a parental notification statute, young Holly would be alive today.

It is ridiculous to criticize these two fine nominees for their opinions upholding parental notification statutes. Justice Brown's opinion on the parental consent statute is well within the legal mainstream. The U.S. Supreme Court has routinely found notification statutes constitutional.

So the Senator has raised a very important point. But that is considered out of the mainstream by our colleagues. Again, we know who is out of the mainstream. It certainly isn't Janice Rogers Brown.

I will just point to the side that is out of the mainstream. Yet they are trying to make everybody march in unison, in accordance with their liberal plan for America. That is not right. I turn to the distinguished Senator from North Carolina.

Mrs. DOLE. Mr. President, will the distinguished Senator yield for a question?

Mr. HATCH. I would be delighted.

Mrs. DOLE. I have heard that the Senate minority leader called Priscilla Owen unqualified. Yet I understand Justice Owen attended Baylor University and Baylor University Law School, graduating cum laude from both institutions. I understand that she finished third in her law school class and earned the highest score on the Texas bar exam. And she accomplished these remarkable achievements at a time when women were a distinct minority in the legal profession.

Isn't it true that 15 past presidents of the Texas State bar, both Democrats and Republicans who hold a variety of views on important legal and social issues, agree that Justice Owen is an outstanding nominee and should be confirmed as a Federal judge?

Mr. HATCH. Absolutely true. By the way, one of the arguments that the side across the aisle from us is out of the mainstream again is over parental consent, a dissent that she had written, upholding the finder of fact in the lower court. The majority just ignored those facts and overruled the right of parents to consult with their daughter before the daughter had an abortion.

She is not out of the mainstream. Guess who is out of the mainstream? I thank the Senator.

Mrs. DOLE. Senator, is it not the case that former Texas Supreme Court Justices John Hill, Jack Hightower, and Raul Gonzalez, all Democrats, say Justice Owen is unbiased and restrained in her decisionmaking?

Mr. HATCH. That is correct. These are people who know her or who have worked with Justice Owen on the Texas Supreme Court. They are all Democrats. They are all partisan Democrats, by the way. They think she would make a fine judge on the circuit court of appeals.

Mrs. DOLE. As I understand it, some of our Democratic colleagues oppose Justice Owen because she is too pro-business, her opinions are results-oriented. Didn't the leading tort law professor, Victor Schwartz, look at Justice Owen's opinions and find those opinions, those characterizations of the opinions to be untrue?

Mr. HATCH. Victor Schwartz is one of the law professors who wrote the book on torts. He is one of the most distinguished legal thinkers in the country. In fact, Professor Schwartz wrote:

> Any characterization of Justice Owens as pro-plaintiff or pro-defendant is untrue.

But we are getting used to that. The reason they are all talking about jobs, it is a political reason, of course. They are trying to get people to not pay attention to this debate. But the reason they are talking about jobs is because they don't have a good argument against Priscilla Owen, nor do they have one against Janice Rogers Brown, nor do they have a good argument

against Carolyn Kuhl. And three outstanding women who, if we treated three of their women justices like that or nominees like that, all hell would break loose.

In all honesty, Professor Schwartz said that just isn't true.

Ms. LANDRIEU. Parliamentary inquiry.

The PRESIDING OFFICER. Does the Senator from Utah yield?

Mr. HATCH. Not yet, I yield to the distinguished Senator from Texas.

Mrs. HUTCHISON. To follow along with what the distinguished Senator from North Carolina was saying, Justice Priscilla Owen, a personal friend of mine who I have known for years, isn't it true that she was endorsed by every newspaper in Texas when she ran for reelection to the Supreme Court of Texas, every single one?

Mr. HATCH. The distinguished Senator from Texas knows that is true. That is not easy in the State of Texas. There are some very liberal newspapers down there that scrutinized every aspect of her life.

Mrs. HUTCHISON. It was really phenomenal. In fact, isn't it true that she got the highest number of votes of any person running for the supreme court that year?

Mr. HATCH. No question about it. She is a terrific person.

Mrs. HUTCHISON. I heard one of my colleagues on the other side of the aisle say: There are not enough hours in the universe that would be sufficient for debating Justice Owen's nomination. I thought that was very interesting because, the fact is, if we had 1 more minute of debate, it wouldn't matter, because she already has a majority vote in the Senate. Isn't that true?

Mr. HATCH. That is true. In fact, all three of them do.

Mrs. HUTCHISON. If she has the majority vote on the floor of the Senate, and the Constitution says that advise and consent is not a supermajority, that is what it implies because it didn't ask for a supermajority, then why isn't she sitting on the Fifth Circuit bench right now?

Mr. HATCH. Well, I think it is because she is not a liberal. That seems to be the only mainstream the other side is interested in. I cannot say she is all that conservative either. But the fact of the matter is, she is not a liberal Democrat. Here is a woman who has every credential in the world, as the Senator from Texas pointed out, who broke through the glass ceiling for women so women can now become partners in law firms, when that was tough to do. Here is a woman who has fought every day of her life to excel, who has excelled. Yet look how she is being treated, like she is ''outside of the mainstream.''

Since they don't have any real legal arguments, any real philosophical arguments—they don't have any real arguments, and that is why we are getting a filibuster on one of the best nominees I have seen. By the way, she got the highest rating from the not-conservative American Bar Association, which during the Clinton years was called the gold standard. If you got a ''qualified'' from the ABA and you were a Clinton nominee, that meant you were OK, you were in the mainstream.

Here is a woman with a ''well qualified,'' the highest rating from the ABA, and they are trying to say she is outside of the mainstream. That is just another misuse of terms because they don't have a real argument against her.

Mrs. HUTCHISON. You know, the distinguished Senator from North Carolina is a graduate of Harvard Law School. She went through when it was very tough. I am a graduate of the University of Texas Law School, and there were five women in my class of 500. So we know what it is like to go through those hard times and graduate from law school. Frankly, we would have a hard time finding a job.

Priscilla Owen went through that. She has known the tough times. She has known herself to be superior. That is why I appreciate the Senator from North Carolina talking about my friend, Justice Owen, and why I am standing up for her today, because I know what she has been through. She has come out on top. She has come out on top in everything she has done, and she would have gotten a majority vote on the floor of the Senate. She deserves to be sitting on the Fifth Circuit today.

I will ask this final question. Why in the world would the Senate put a blemish on the record of a woman who has high moral standards, who has faced the electorate and won overwhelmingly, who has been endorsed by every newspaper in Texas, and got the highest number of votes the year she ran? Why would the Senate keep her from getting the appointment she is so qualified for?

Mr. HATCH. I cannot see a good reason. It is a mystery to me why our Democratic colleagues refuse an up-or-down vote. Like the distinguished Senator from Texas said—and I really admire the Senator from Texas, who is a lawyer, from the University of Texas, and the Senator from North Carolina, Senator DOLE, who is a lawyer, who graduated from Harvard Law School. I think the other side ought to be listening to the two of you, especially with regard to an eminent woman jurist named Priscilla Owen, and another jurist named Janice Rogers Brown, and another one named Carolyn Kuhl.

To make a long story short, if they don't like these nominees, then vote them down. The reason they are stopping them is because all three of them have a majority of the Senate willing to vote for them. They are flying in the face of the advise and consent clause, refusing to give them the dignity of an up-or-down vote. I think women across this country ought to be outraged by it—liberal women, moderate women, and conservative women. It is a slap in the face to every one of them, the way these three women are being treated by the other side. I have heard for 27 years how much greater they are for women. Don't believe it. If they were, they would not be arguing against these wonderful women nominees. Don't believe that for one second. It is all politics.

The only reason they are talking about jobs, in all honesty, is because they don't have the arguments against these eminent women lawyers and judges. It is pathetic.

Mrs. HUTCHISON. I thank the Senator from Utah.

Mr. HATCH. How much time is left?

The PRESIDING OFFICER. There are 6 minutes 15 seconds.

Mr. CRAPO. Will the Senator respond to a question?

Mr. HATCH. I surely will.

Mr. CRAPO. The Senator from Utah spent time responding to questions about the nominees we are going to vote on tomorrow. I note those who oppose this vote often bring up a chart that says 168 to 4, noting they have only filibustered 4 judges in this Congress. I think it is important to point out, though, that number 4 is the first time in the history of this country, in the history of the Senate, a filibuster has been sustained against a judicial nominee of the President of the United States.

I think it should be clarified to the American people that the fact we are now seeing a filibuster sustained against nominees of the President turns the Constitution on its head and begins a very dangerous precedent with regard to how the nominees for the judicial branch are treated by this Senate.

Mr. HATCH. No question about it. That 168 to 4 doesn't even begin to tell the story, because if it had been up to our colleagues on the other side, there would not be 168. We had to fight for every one of those people, and we had to fight hard fights. We had to force them to vote. They cannot vote against everybody. So there is not just four. We have already got six. We had to file cloture on Carolyn Kuhl and Janice Rogers Brown, which will be up tomorrow. I can name probably another 11 they are going to filibuster. So that is a blatant, outright lie.

Mr. CRAPO. Would the Senator from Utah tell us how many of the nominees of President Clinton to the bench were filibustered during his Presidency?

Mr. HATCH. Not one. Our side would not permit that because of the detriment to the Senate, the detriment to the Federal judiciary, the detriment to the Constitution, the detriment to just good reasoning. We didn't filibuster one.

Mr. CRAPO. Isn't it also true that out of the last 11 Presidents—and I think we used 11 Presidents because it was 1949 when the filibuster became possible—not one of their nominees, until today, until this Congress, not one of the President's nominees has

been successfully filibustered in the Senate of the United States because of the understanding of the fact that the Constitution gives the President the right to a vote?

Mr. HATCH. That is right. Once they hit the floor, they have had a vote up or down. And 377 Clinton judges are serving in the Federal judiciary today because we had the decency to give them the dignity of votes up or down—something not being accorded our nominees.

Mr. CRAPO. It is my understanding that 2,300 nominations have come to the floor since the filibuster was possible.

Mr. HATCH. It is 2,372.

Mr. CRAPO. Zero were filibustered this year, and this year four have been successfully filibustered, and what is it, five, six, or seven more are scheduled to be filibustered?

Mr. HATCH. That is right. Actually, it is more than that. We have two more tomorrow. That gets us up to six. Then probably there are another 11 I can name. I won't take the time to do that now. There hasn't been one filibuster by us. There have been cloture votes, but they were used for time management purposes to get us to a vote. In every case, the Clinton nominee got voted up, except for one.

Mr. CRAPO. I thank the chairman. I think it is important to look at this and understand what this debate is about and why we are giving it this time, to focus on the threat to the Constitution that is being posed by the treatment of judicial nominations in this Congress. I thank the Senator.

Mr. HATCH. I thank my colleague. The real number, for the past 11 Presidents of judicial nominees confirmed versus the filibustering they are doing, is 2,372 that were confirmed. None were filibustered, until President Bush became President. He is being treated wrongfully. It is unfair to him, unfair to these nominees. I like what the Senator said earlier. I think he said we gave a fair trial to 2,372—actually 168. We gave a fair trial to them and with regard to the four, we just hung them. That kind of shows in that one sense it is great to give a fair trial, but we are not giving a fair trial to these four. They are arguing it is all right for four because it is only four. Well, it is not all right if people are hung without a fair trial. They are certainly not getting a fair trial.

Mrs. HUTCHISON. Mr. President, will the Senator yield for a question?

Mr. HATCH. I surely will.

Mrs. HUTCHISON. I think in hearing the debate, the most egregious misrepresentation I have heard is about Judge Carolyn Kuhl and a case she had, where there was a woman who was being examined who had breast cancer, and there was someone in the room who was not a doctor, a person from a pharmaceutical company. It was said she callously let the pharmaceutical company be dropped from the case. Isn't it true, though, there was also an action against the doctor who was negligent, and she kept the lawsuit alive so that woman could have a recovery?

The PRESIDING OFFICER. The time of the Senator is expired.

Mr. HATCH. I ask unanimous consent for 30 more seconds.

Ms. LANDRIEU. I object.

Mr. HATCH. Let me just say that it is true.

Ms. LANDRIEU. I object. I know the distinguished chairman has been on the floor for a while making some truly offensive statements to colleagues on this side of the aisle that, in my opinion, are beneath the dignity of the committee on which he serves as chair. I ask the chairman if he recognizes the number on this chart. Could he state for the record what it is.

Mr. HATCH. I don't recognize the number. However, I do recognize the argument.

Ms. LANDRIEU. The Senator from Utah——

Mr. HATCH. Let me answer the question, if I may.

Ms. LANDRIEU. The distinguished Senator from Utah has answered the question.

Mr. HATCH. May I please finish?

Ms. LANDRIEU. He has answered my question. He said he didn't know what the number was. I would like to explain to him and to the other Members.

Mr. HATCH. Will the Senator yield?

Ms. LANDRIEU. No, I will not. The number is 98 percent——

The PRESIDING OFFICER. Senators will address other Senators through the Chair.

Ms. LANDRIEU. The number the distinguished Senator from Utah did not recognize—I don't know why he would not recognize it since he is chairman of the committee, but he says he doesn't recognize it. The number is 98. Ninety-eight percent of the judges that were sent to this Senate by President Bush we have approved—98 percent. There are not many people in America, not white people, or black people, or Spanish people, or women, or men, who think the Senate should approve 100 percent of any President's nominees. It is beyond the realm of reason, particularly a President who did not win the popular vote.

Earlier in the debate, the chairman, who also doesn't recognize this number, this 98 percent, also fails to recognize the numbers in the last election. The numbers of the last election were Bush 50,456,169; Gore 50,996,116. So 500,000 more people voted for Vice President Gore in the popular vote than President Bush. He won by a handful of electoral votes in Florida, and we know that. The Court decided it. I am not complaining about it, but numbers are important. Let me tell you another number——

Mr. SESSIONS. Will the Senator yield for a question?

Ms. LANDRIEU. I will not.

Mr. REID. Regular order.

Ms. LANDRIEU. I will not yield for a question.

Another number is 63. I want the public who is watching this—and I think a lot of people are watching this, and I am glad because this is what the next election is going to be about, and I am very excited to help lead this fight. Sixty-three nominees were blocked. It wasn't an open filibuster. It wasn't debated in the open, like tonight where there are no secrets and we can all speak about what we believe. This was done in secret, and not by many Senators who represent millions of people, but maybe by one Senator who just decided he or she didn't like the nominee, and so they would not sign the slip.

The chairman of the committee reigns over this. He understands this number 63. They didn't even have the decency of getting a vote or a hearing in committee because the chairman from Utah had a system in place that blocked them.

Mr. HATCH. Will the Senator yield?

Ms. LANDRIEU. No, I will not yield.

Mr. HATCH. I have a question.

Mr. REID. Regular order, Mr. President.

Mr. HATCH. I object to that, Mr. President.

Mr. REID. How rude that is.

The PRESIDING OFFICER. The Senator from Louisiana has the floor.

Ms. LANDRIEU. Thank you, Mr. President. I will not yield the floor, and we are not going to yield this point.

Technically, the majority is correct that there has not been a technical filibuster successfully completed. But there have been filibusters on this floor that have been tried, but they weren't strong enough to stand up to them because their arguments weren't strong enough. The only way a filibuster can survive is if the arguments and the truth is strong enough to stand up to lies. That is the only way a filibuster survives. That is why this filibuster survives, because the truth is always stronger than a lie.

This 63 people never could come out of committee. I am not even going to go into that. I am going to talk about something else.

How much time do I have remaining?

The PRESIDING OFFICER. The Senator has 24½ minutes.

Ms. LANDRIEU. Good. I am going to take every one of them.

I want to tell the Republican majority something quite simple. This country, no matter your best efforts, will not be divided. No matter your vicious rhetoric about Protestants and Catholics and blacks and whites and Hispanics and women, we refuse to be divided. In a time of war, which we are in, when the country is under assault and we have men and women dying in Iraq, it is the height of disrespect and un-Americanism to come to this great floor and talk about the pettiness and say this woman Senator, who has spent 25 years in public office, and every woman who has ever served, that there is something wrong if I don't want a woman as a judge or I don't want African Americans to be here.

The Senator from Utah must forget where I am from. I would like to remind him where I am from. I am going to fight for Louisiana. In the 63 years before Rosa Parks decided to sit down in her seat because her feet were so tired she could not move, a man named Homer Plessy decided he would get on a rail car that was entitled ''whites only.'' He got on it in New Orleans, my hometown. He rode on the train and he knew he would be arrested. But a group of lawyers, African-American free men of color, had decided that he would be the right one. Why? Because he was white enough to pass, to get on the train, and black enough to be arrested. And that is exactly what happened.

Forty years before the Civil Rights Act, Plessy rode that train and the great movement began to free people who had been slaves for 300 years.

I have to sit in the Senate Chamber and listen to the Republican majority argue that, in the whole country, they can't find a better African-American woman than this Janice Rogers Brown to serve on the bench, to hold up Rosa Parks, to honor the work of Louis Martinet, and to honor the memory of Plessy. The only person they can find to serve on the bench is a woman who says—and I want to read what she says so the people in this country can just decide for themselves. Don't listen to all the technical parts. I am just going to read to you what the woman said and you decide for yourself if you think this is mainstream or not:

> Some things are apparent. When government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. The result is families under siege, war in the streets, the precipitous decline of the rule of law, the rapid rise of corruption, the loss of civility and the triumph of deceit. The result is a debased, debauched culture which finds moral depravity entertaining and virtue contemptible.

What do you think Rosa Parks thought when the Federal judge came down to Alabama and government intruded and said: Lady, you don't have to suffer anymore. You think that Rosa Parks thought that government was bad?

Let me go on to say what this mainstream woman thinks of all the grandparents in the United States.

> My grandparents' generation thought being on the Government dole was disgraceful, a blight on the family honor. Today's senior citizens blithely cannibalize their grandchildren, because they have a right to get as much ''free stuff'' as the political system will permit them to extract.

Excuse me, but on behalf of all the grandparents I represent, this is an insult to every single one of them who raised their children, and then when some of their children got into trouble, raise the grandchildren and the great-grandchildren on their Social Security paychecks of $672 a month, which the Republican side refuses to raise, and a minimum wage which is $5.50, which they won't raise, and you are asking me to put a woman on the court that insults the grandparents of Louisiana? Take your dossier and go somewhere else.

Now, if these people are in the mainstream, then I don't know what mainstream we are talking about, because it is not mainstream in Louisiana. That is what this debate is about.

The Senate Democrats didn't want to have this filibuster. We are made to have this filibuster because the Republicans on that side think they can divide the country and split us up and cause trouble. I will tell you what people at home want. We are in a war. They want us to be united and fight together. But they have us fighting against Catholic, Protestant, rich, poor, young and old. It is a disgrace, and it is not the Democrats fault. It is the Republican majority.

I will just say this. I know the men and women who serve over there and individually they are fine. But, boy, collectively they can sure get themselves up into a lather. The country deserves better. The people want better.

We have an Energy bill to pass; we have appropriations bills to pass; I have 400,000 veterans in my State who are looking for help, and they turn on the television to see the chairman from Utah saying something about the women in the Senate don't want women on the bench, and we don't want Hispanics on the bench, and we don't want African Americans on the bench? Whoever heard of such ridiculousness?

I beg this body, let's stay on the facts. The facts are that we have approved 98 percent of President Bush's nominees. We have rejected people such as Janice Rogers Brown, and no matter how many times they bring her up, she will be rejected because she makes statements like this that are an insult. She is not going anywhere. We will vote on her 100 times. She will never get on the bench. Whether or not we have a vote on her, she is not going to get on the bench.

Let me say I just made a call—how much more time do I have?

The PRESIDING OFFICER. The Senator has 16½ minutes.

Ms. LANDRIEU. Good.

I just made a call to the National Bar Association, which is the most distinguished group of African-American lawyers in the country. I am sure maybe there are smaller groups that other people might think are, but this is the most well thought of group of lawyers. This group of lawyers, more than almost any other group, would surely know the history of the civil rights movement. They would surely understand the characters and people I have talked about, and all the stories and all the drama. You would think that President Bush, who ran on compassionate conservatism, and the Republicans who keep saying we are reaching out to African Americans—we want to reach out to African Americans, we want to go and put African Americans on the bench—you would think that sometime in the last 3 years they would have called the National Bar Association, or the President would have called the National Bar Association and said: Look, I'm a conservative. You all probably are more liberal as a group, although there are probably some conservative members. Why don't you give me a recommendation, knowing that I can't support a real liberal judge. But if you work with me we could get some really good African Americans on the bench that are highly qualified, that the Democratic majority would like. I would feel happy about that. We are in a war. It would be really important for us to unite our country.

Do you think he ever consulted with them? No. The President, this White House, or the Republican leadership never called the National Bar Association, which is the most prestigious group of African-American lawyers, to just ask them. Is there any conservative judge, moderate conservative judge you all would think would be good that I could appoint?

This is not about doing what is right. This is about winning elections and ginning up the far right in the wings. I understand that. It has been done before. But not during a war. Not when people are dying. It is just not right.

So we could stay on the floor all night, all tomorrow, all next week, but I tell you the people in this country are going to have enough of it pretty soon because they don't believe this is right. They can tell when something is not moving in the right direction.

I will end with this. No matter how hard the Republican majority tries to divide us, we will not be divided. We are going to stand united. We are going to speak the truth. We will debate in the open why these nominees do not deserve to sit on the bench and why we will filibuster these nominees.

We will continue to do that until the people decide in the next election what kind of America they want. In my heart I believe they want an America that is united, not divided.

I see my colleague from New Jersey is here. We have a few moments left. I thank him for his patience.

Mr. CORZINE. I thank the Senator from Louisiana. I think you have spoken brilliantly tonight, about the idea of trying to divide us over something that is basically a disingenuous issue to start with.

You talk about the 98 percent. Over the last 24 hours, we have seen this 168 to 4 over and over. No one could speak more eloquently about the facts; 98 percent is a hell of a number.

Ninety-five percent of judicial positions in this country are filled. When President Clinton left office and President Bush took office, it was at 75 percent. The reason was because those 63 that the Senator from Louisiana was talking about never got a hearing, never got a chance to get a vote in committee, never got reported to the Senate to get voted on. Sixty-three

judges were blocked. It is a different technique under the rules of committees as opposed to here on the floor, no committees, no votes, no reports—63 qualified judges, at least in the opinion of the then-President, never had a chance to fill that void, and 25 percent of seats went unfilled. Now 95 percent are filled.

When there is cooperation—I can tell you there has been cooperation in New Jersey. We have had five district court judges and a circuit court judge, we worked with the White House and the Judiciary Committee, and it has worked very smoothly. It can work if we reach out and work with each other, which we have to do in this society if we are going to get good things done—not by dividing us.

You know, it strikes me that we spent a lot of time talking about four judges or six judges. One of those 63 judges—by the way, who couldn't get a hearing, it went on for a year and a half—is now the dean of the Harvard Law School. It is hard to understand how he wasn't qualified to be considered for the bench but is qualified to be the dean of the Harvard Law School.

By the way, this shows it in a pictorial sense. This is the list of 63. This is the 4. It is very clear.

I want to dwell on something else. The real issue is not 4 people who are not being approved on this Senate floor. The real issue are the 3 million people who have lost jobs since 2000, the 9 million Americans who do not have a job, the 2½ million Americans who have lost manufacturing jobs, and the real agony we have in the country because we are not creating jobs fast enough in this country.

We have gone fast enough to get 98 percent of the judicial positions filled, but we have not gone fast enough to take care of the 3 million Americans and the 9 million unemployed and the 2.5 million manufacturing jobs lost.

I think we have our priorities wrong. We have been debating 4 people while there are 9 million Americans out of work. We have been doing that now going on 24, 26 hours. We are going to go on some more.

Americans know what impacts their lives: their ability to take care of their kids, their families, their grandparents, their future. They are interested in having a job. Jobs count. We are talking about 4 while 9 million are missing in action in our debates on the floor of the Senate.

I think it is disingenuous. I think it is clearly staged. I think we are off on the wrong target.

I point out today I went through some of the press reports that came out over the AP wire today. The U.S. trade deficit grew to $41.3 billion in September—$41.3 billion. We are going to have a $500 billion current account deficit in this country, and what we are going to have, more importantly, is a deficit in manufacturing jobs because they are all going overseas. We ought to have a debate here about economic policy that puts Americans to work—a $41.3 billion trade deficit this month. It is going to be $500 billion for the year.

We have had discussions in committee—which, by the way, we had to cancel all our committee meetings—about whether we have the proper trade policies, the proper positioning with China where we are losing jobs right and left across the manufacturing sector. We had the biggest trade deficit with China we have ever had in the month of September.

Why are we talking about 4 jobs when we are losing millions of jobs, 2½ million jobs, because we have an economic policy that is out of kilter with the needs of the American people?

If that is not enough, the poverty rate has grown 1 percent in this country in the last 3 years. That is about 1.7 million people. We have seen the uninsured in America, those without health insurance, go up a little over 2 million. We are having no discussion on issues that impact people's lives who are watching this debate. We want to have real debates that make a real difference in people's lives. We ought to be talking about these jobs. We ought to be talking about health insurance. We ought to be talking about that trade deficit, ripping out the heart of middle-class America's jobs.

I don't understand why we have our priorities on 4 people when we have a 98-percent positive ratio of confirming judges. It doesn't make sense, particularly when we can argue about whether they are mainstream or they have made the kinds of statements the Senator from Louisiana quoted from one of those individuals who is going to be considered tomorrow for confirmation. It doesn't make sense.

There are all kinds of things we could be doing right now. We could be raising the minimum wage. That would improve the lives of about 4 million Americans. We could pass a transportation bill that would create, by almost every estimate about 1 million jobs. It is lingering in committee. We don't want to talk about it on the floor, but it is a million jobs. It builds America; it invests in our future.

We could talk about increasing investment in higher education or maybe do something about making sure we don't take 8 million Americans away from having the opportunity to make overtime pay so they can operate and live in this community of America in a more secure way.

Then, the greatest tragedy, in the last 13 days we have had 42 Americans killed in Iraq. We have changing policies. We have generals in Iraq saying we are not living in the real world. We are not talking about it as if it is a war. General Sanchez today said we are not walking away from using the word; we are going to win this battle—no, we are going to win this war because the people back in Washington need a dose of realism in their debates about this issue.

Then we have a meeting to discuss the intelligence report that was leaked by someone with regard to what is happening on the ground in Iraq, and nobody shows up because we are debating 4 judges.

It strikes me we have our priorities wrong in this country when we are talking about 4 judges when we have 9 million people unemployed, when we have lost 2.5 million manufacturing jobs, when we have 2 million people losing their health insurance. We have a tie-up on the prescription drug benefit bill and the Energy bill and we can't get these bills out. We have generals in Iraq saying we don't have a realistic view of what is going on in the debates we have here in Washington. There are real issues that matter to real people across this country, in the millions—in the millions, not 4—not when 168 are approved and 4 are not.

I don't know where our priorities are when we turn our attention to such an issue when there are real debates about whether they fit into the mainstream or not, whether we ought to have a real debate. By the way, other people used other techniques at another time when it was convenient to do it. It is disingenuous to say, use the rules of the Senate which are authorized under the Constitution. I hear all this ''unconstitutional'' view. That is not unconstitutional. We should change the rules if we don't like the rules of the Senate, just the same way that we can change the rules in committees.

It is not sensible that we are not putting our priorities on the loss of jobs and taking care of the American people in the way they expect us to—to debate and put in the time and effort.

This whole debate, which has now gone on for 26 or 27 hours, should be about jobs—not 4 but 9 million. It should be about the important issues that impact people's lives, the people who are uninsured, the people who haven't had an increase in the minimum wage in 7 years—7 years. We can't get a vote on that. We can't get a vote on the Transportation bill that would create a million jobs. There are all kinds of things we can't get votes on around here because people don't want to have them. They use the rules for those purposes.

Four out of 172, 98 percent have gotten votes. It is very hard to see how we have our priorities straight in this area tonight and have had properly placed priorities for the last 26 or 27 hours.

I hope we can get focused on something other than 4 jobs. We should get focused on the 3 million people who have lost them, the 9 million people who don't have jobs. We ought to be talking about extending unemployment benefits to the 80,000 people a day who are going to lose those in another 30 days when we are not in session.

It is incredible—our priorities. It is incredible. I believe as much as anyone else that we ought to cooperate. We have in many, many places. That is how we got 168 judges approved. That is how we got to a 95-percent fill ratio on the number of judges' slots that have

been filled. But we have major problems with employment and the economics of this country. It is time we get our priorities straight.

I yield the floor.

The PRESIDING OFFICER. Who yields time? The Senator from Utah.

Mr. HATCH. Mr. President, it has been a good debate. But I have noticed the folks on the other side of the aisle want to shut down the debate on judges because they don't have an argument. Jobs is where it seems their only argument is, and more Federal Government programs. In fact, they don't even have very good arguments there. It is ''increase the minimum wage.'' I am not sure it will create jobs. And ''re-up insurance,'' which certainly doesn't create more jobs.

On the other hand, I am not saying they are not compassionate. They are decent people wanting to do those things. But when you do not have any arguments against the judges we are talking about, then you change the subject. That is exactly what they have done.

If the distinguished Senator from Louisiana were here, I would ask her why she took the number 129 because, of course, that is a number of confirmed judges that were left off her chart. We have had distortions of the facts. We have had distortions of the statistics. You can prove anything with statistics if you want to manipulate them. There are 129 judges left off that chart she was showing. We confirmed 377 Clinton judges—not 248. If you want to be factual, be factual. Don't distort the facts.

I was a little surprised that now at the 29th hour of debate an awful lot of Democrats come on the floor without any arguments that are really valid against these nominees we are talking about. They are changing the subject because their arguments don't hold water.

As for Democrat claims that they have been blocking only the most extreme Bush judicial nominees, let us look at the facts.

Priscilla Owen won 84 percent of the vote in her last election for the Texas Supreme Court. Bill Pryor won 58 percent in his last election for the Alabama attorney general's position. Janice Rogers Brown won 76 percent in her last election for the California Supreme Court. And Charles Pickering was confirmed to the Federal district court in 1998 by this body by unanimous vote. Yet he has been treated like dirt. You wonder why people in the South are getting sick of it.

By the way, the unanimous consent vote included the support of 24 of the Democrats currently in the Senate, 23 of whom now refuse to give him the dignity of an up-or-down vote. Why? Because they know he would be confirmed.

These nominees are hardly extremists as painted by the other side who claim that is what they are talking about. Give me a break.

Let us look at this a little differently. What is more extreme? Receiving 84 percent of the votes in Texas, the second most populous State in the Nation, as Judge Priscilla Owen did in her last election? They are filibustering a qualified nominee for the Fifth Circuit for the first time in American history. That is what they are doing, without any real arguments against her. They don't have any. They do not have the facts on their side so they change the subject.

I think jobs are important. I will tell you, there will not be any jobs in this country if we lose our freedoms because we don't have the Federal courts staffed by competent and decent judges.

Mr. COLEMAN. Mr. President, will the Senator yield for a question?

Mr. HATCH. I would be happy to yield.

Mr. COLEMAN. I listened to the Senator from Louisiana. She was talking about filibusters. I was glad to hear her say unequivocally that it was a filibuster. We will filibuster these nominees. There is no question.

Mr. HATCH. We are not going to let these people through.

Mr. COLEMAN. She also said, I believe the only way filibusters survive is the truth—truth. I have only been in this body for less than a year. I know there is history in this body. The history is not always the greatest history when it comes to filibusters. There were attempts on the floor of this Senate to make sure that minorities didn't have certain rights; that minorities had poll taxes; that anti-lynching laws were filibustered. I have a chart here that talks about filibusters.

I ask the distinguished chairman whether under F.D.R. civil rights was filibustered; under Truman, civil rights was filibustered; under L.B.J. civil rights was filibustered.

Again, would it be the Senator's belief that necessary laws that were filibustered is something to be ashamed of and they were not the truth; filibusters were not the truth; the attempts to provide civil rights and opportunities for Americans for good things and they were filibustered, and filibustered was not the truth?

Mr. HATCH. Absolutely right. In every case it was Democrats who led the filibuster. In every case, including this one. It is not the truth.

Janice Rogers Brown, 76 percent of the vote, State of California Supreme Court; Priscilla Owen, 84 percent; William Pryor, 59 percent of the vote.

What is more extreme, receiving 76 percent of the vote in California, the most populous State in the Nation, as Janice Rogers Brown did in her last election to the California Supreme Court—filibustering a brilliant nominee to the DC Circuit, the Nation's second highest court? If Justice Brown is so extreme and leftwing, California voters certainly would have recalled her, but they didn't. Three-quarters of them voted to keep her on the bench.

By the way, the late Justice Stanley Mosk on the California Supreme Court was the California Supreme Court's well-known liberal voice for decades. In that same election, she got 76 percent. He only got 68 percent of the vote in the last retention election.

Does anyone want to guess whether the Senate Democrats would call him more extreme than Justice Brown in left-leaning California if he were up for the District of Columbia Court? Of course not. He would be in the mainstream.

Once more, extreme—receiving 59 percent of the votes in Alabama, as Bill Pryor did in his 2002 election to the office of attorney general of that State. They are filibustering a nominee with broad bipartisan support across the Eleventh Circuit for a judicial emergency vacancy on that appellate court. In each of these cases, these unprecedented filibusters of qualified nominees to the appellate courts are undoubtedly extreme.

There is extreme action by our colleagues on the other side. There is nothing else you could call it. It is demeaning to this body. I don't care how excited someone gets on the other side. Sooner or later they run out of arguments and start talking about jobs because they have to change the subject and hopefully get the American people off of the importance of putting people on the Federal bench.

The Senator brings up a very important point. Every one of those unjust filibusters was conducted by Democrats. It was the Republicans who basically pushed through the civil rights law, along with some good Democrats as well. I want to make sure credit is given on both sides.

The fact is, the leaders of those filibusters were Democrats. But in this case, 168 to 4, virtually all Democrats—not all. I know one or two who do not believe filibustering should be done to the judges. But all the rest of them are leading this unjust filibuster.

Mr. BROWNBACK. Will the distinguished chairman yield for a question?

Mr. HATCH. Yes, I would.

Mr. BROWNBACK. I want to follow up on a question by my colleague from Minnesota. I think this is the point. He points out that you have a couple of filibusters on major issues to change the country. The issues that were filibustered ultimately got through, and I believe these judges will ultimately get through when the public gets the RECORD and has a chance to read it. These issues were things that were changing the country—when you talk about the law, civil rights laws, things that were being brought forth. Isn't that what is really being addressed here today? We are not talking about 4 judges or 29 who are being blocked on circuit courts. This is really about a group trying to block a certain set of individuals who may, as some say, have deeply held beliefs being on the Federal bench and trying to purge that set of philosophies or thoughts from the Federal bench. Isn't this a much bigger

issue than the appointees? Those law changes were bigger than filibustering one law. This is about the impact on all of society, on a whole culture.

Mr. HATCH. That is right. Frankly, yes. It is as important as these four and tomorrow's six. Next week, who knows how many nominees are being filibustered. It is demeaning to the Senate. It is detrimental to the country. It is detrimental to the judiciary. It is unfair to the President. It is unfair to these qualified nominees who have been rated so highly by the ABA—their gold standard, by the way, during the Clinton years. If you got a qualified rating from the ABA, that is all you needed, you should be confirmed. We did confirm 377 of them, the second highest total number of confirmations in the history of this country—Bill Clinton's judges. We did it because we were fair. We didn't filibuster those judges. Every one of them got a vote. It was 377 to 0. We didn't filibuster them.

For all I have heard from the other side—I heard some of the emotional remarks—I was the one, along with Senator LOTT, who made sure we didn't filibuster their nominees. I don't think they are in a position to criticize me.

By the way, in the past, there were 11 Presidents' judicial nominees confirmed versus those who were filibustered, the past 11 is when the filibuster rule came into being in the current filibuster rule. We can go all the way back to the beginning of this country 214 years ago. We have never had a filibuster before these folks on the other side have been doing it this year, 2,372 judges have been confirmed to zero filibustered.

The history of the successful Senate filibuster, from July 4, 1789, to March 6, 2003, there is no question about the successful or unsuccessful because there were not any until March 6, 2003. March 2, to the present, we have had four so far as successful filibusters. We are apparently going to have two more tomorrow even though all six of these folks would win an up-or-down vote in the Senate.

One of the Senators said we are going to vote on these judges tomorrow. No, we are not going to vote on the judges. We will be voting granting the right to vote on these judges. Since only 41 Senators are necessary on this side to stop us from granting that right for these judges to have an up-or-down vote, there will be six of them tomorrow. I suppose when we go down the line there will be as many at 17.

Let me make a couple of other points that I think are important. Look at three of the President's nominees who have been accused by the Democrats of being out of the mainstream. They don't look to me like outside the mainstream. They have received overwhelming support in each of their home States. Apparently, these are not only a majority of the Members of the Senate outside the mainstream who support them but a vast majority of the citizens of California, Texas, and Alabama are all outside the mainstream, too, I guess.

Democrats seem very fond of their 268-to-4 chart and believe this number 168 of President Bush's judges who have been confirmed since he took office will distract people from the important fact that the Democrats have filibustered four appellate nominees, Miguel Estrada, Priscilla Owen, William Pryor, Charles Pickering, and now Janice Rogers Brown and Carolyn Kuhl for the first time in American history.

The point is that no raw number of confirmations means anything in and of itself while these unprecedented filibusters continue. While the number of filibusters as of today stands at four, Senate Democrats are virtually certain to add others to the list, including Janice Rogers Brown nominated to the District of Columbia Circuit and Judge Carolyn Kuhl nominated to the Ninth Circuit. That makes a total of six.

There are other filibuster targets on the horizon, a Fourth Circuit nominee Claude Allen and Terrence Boyle, North Carolina District Court nominee, James Dever and Bob Conrad. They are also potential for filibuster. These are just some of them who we have already been told will be filibustered.

That figure is extremely misleading, all the while more vacancies in our Federal courts continue to be classified as judicial emergencies.

Mr. SESSIONS. Mr. President, will the Senator yield for a question?

Mr. HATCH. I would be happy to yield.

Mr. SESSIONS. I notice the Senator, when this 98-percent chart was put up the Senator didn't recognize it and neither did I. Isn't it true that the President has nominated some 200 judges and 160 or so have been—and the idea that the 98 percent of his nominations have been confirmed is certainly not accurate; is it?

Mr. HATCH. The President has nominated 209 judges; 168 have been approved. So 20 percent of his nominations have not made it.

Mr. SESSIONS. I do not know where the eight came from.

Mr. HATCH. I don't know. I knew what the distinguished Senator from Louisiana was driving at. Again, a distortion of the facts.

Mr. SESSIONS. I ask another question: They show a chart that says 168 to 4. Is that the 4 they were filibustering last week or is that the 4 who have been held hostage? What 4 are they talking about? There are well over 10 nominees who are being actively filibustered or obstructed at this point.

Mr. HATCH. That is right.

Mr. SESSIONS. I do not know how that chart comes about, either.

Mr. HATCH. This chart is just the beginning of what they intend to do to the Federal judiciary. Democrats have also implied that it is just fine to prevent an up-or-down vote on at least these four nominees because we blocked 60 or so of President Clinton's nominees. That is extremely misleading. I think their number is 63.

Let me briefly break that down. First, 18 of those nominees were withdrawn by Clinton himself—18 of them. Second, 25 of these nominees were either nominated after the August 2000 recess, do not have home-State support because the Clinton administration did not consult at all with the relevant Senators, or there were confidential investigative reasons that prevented the nominations from moving forward. At most, there were about two Clinton nominees who the Republican Senate did not confirm.

The numbers are even more stark. If you look at the difference between 168 and 209, you can see that it is about the same. The numbers are even more stark when you compare the number of nominees left hanging at the end of the first Bush administration by Senate Democrats with the number of Clinton nominees awaiting confirmation at the end of the Clinton administration.

Let me refer to this chart. There were 54 judicial nominations not confirmed at the end of Bush 1. That is when the Democrats controlled the Senate. Fifty-four of the first President Bush's nominees were unconfirmed at the end of 1992.

In contrast, at the end of the Clinton administration, only 41 nominees remained unconfirmed. But 9 of those were put up so late there was no way we could have confirmed them. There were really only 32.

At almost the end of the Presidencies you have that or more who just can't get through the system. Looking at that, according to the Senate Democrats, they don't even deserve the dignity of an up-or-down vote. Contrast this with the prior 3 Presidents' confirmations for their first 11 circuit nominees.

In every case, less than 100 days, Senate Democrats in the 107th and 108th Congress have been the most obstructionist of the President's judicial nominees in recent U.S. history. It is that simple. Confirmation times for the first 11 circuit nominees, Reagan-Bush, it was one. George Bush, look at how much that has gone up, and it is growing. This President is not being treated fairly. Neither are his nominees.

Furthermore, there are more Federal appellate vacancies today, 18, during President Bush's third year in office, than there were at the end of former President Clinton's second year in office, where there were 15. Over half of President Bush's appeals court nominees in this Congress have not been confirmed. There are 41 total vacancies on the Federal district and appellate benches, 22 of which are classified as judicial emergencies by the nonpartisan Administrative Office of U.S. Courts. A staggering 67 percent of the vacant appeals court slots are judicial emergencies.

There is a different scorecard that I find more significant. That is the 377 to

zero. President Clinton, with 6 years of a Republican Senate after 1994, had 377 of his judicial nominees confirmed without a single filibuster by Republicans, even though Republicans had to swallow hard on a lot of them. Only President Reagan, with 382, had more of his judges confirmed, 5 more than President Clinton. But Reagan had 6 years of a Republican Senate to help him. Clinton only had 2 years of a Democrat Senate. Yet he came out with almost the same number as Ronald Reagan. He was treated fairly. Clinton is No. 2 in U.S. history, even though his opposition controlled the Senate for 75 percent of his term.

Just to give you a sense of how unprecedented Democrat current filibusters are, here is another scorecard we have talked about: 2,372 judges have been confirmed in the last 11 Presidents and zero were filibustered. The 11 Presidents that precede the current President Bush, back to President Franklin Delano Roosevelt, never had a judicial nominee filibustered and had 2,372 nominees confirmed. So these filibusters are empirically unprecedented.

How about this scorecard? Years since the Judiciary Act in 1789 that we have gone without filibustering judges until this President. Since the beginning of the year, beginning with Miguel Estrada, there have been four, and there will no doubt be two more tomorrow. How many more? Up 10 percent, 15, 17? Up to 10 percent as Senator SCHUMER suggested last week in the Judiciary Committee? If there is some filibuster percentage the Democrats have in mind, what is it? The majority of the Senate and President Bush would really like to know. I think the American people would really like to know, too.

One final word on the Democrat scorecard. Even one filibuster of a judicial nominee is too many, because every judicial nominee who reaches the Senate floor should be afforded the dignity of an up-or-down vote. We owe our third branch of government no less. By way of analogy, would it be acceptable to enforce all but four of our criminal laws? Would it be acceptable to defend all but four of the constitutional amendments that comprise the Bill of Rights? Of course not. It is no more acceptable to allow up-or-down votes on all but four and counting of the President's judicial nominees. Vote them up or vote them down. But just vote. That is all we are asking.

The Democrats have a right to consent. They have a right to advise. If they don't want to give their consent, then they have a right to vote against any of these nominees. That I will find no fault with. I might disagree, but they have a right to do that. What they don't have a right to do is to subvert the Constitution for the first time in history and allow 41 Senators to prevent an up-or-down vote of these judicial nominees.

The distinguished Senator from Minnesota, with his chart on the terribly wrong filibusters, brought out a very good point. I don't want to compare rankings or anything, but this one is just as important as the others because without a good Federal judiciary, our civil rights would not be enforced. Explain the chart one more time, because I think people need to hear it. But in all four of those, those filibusters were conducted by Democrats, and every one of them was wrong, especially this 168 to 4 we are going through right now, but especially the other three as well.

Mr. COLEMAN. Will the Senator yield for a question?

Mr. HATCH. I am happy to yield.

Mr. COLEMAN. Again, I listened to the words of my friend from Louisiana, where she made the comment that the only way a filibuster survives is if it is the truth.

I was reflecting on the history of filibusters. I read about it when I was a young man. Certainly preceding my youth, going back to the times of Harry Truman and FDR, unfortunately, there is a terrible history in this body of opposing efforts to provide civil rights opportunities, opposing efforts to ensure that there were antilynching statutes, opposing efforts to get rid of things like the poll tax. This is a sad part of the history of this body. I ask the distinguished chairman, who has a much better sense of history than I, is it true the tool that was used to oppose those efforts, oppose good things, the tool was the filibuster, and the filibuster did not represent the truth? Would that be a fair statement?

Mr. HATCH. The Senator is absolutely correct. Here we have a situation where we have a terrific African-American justice on the California Supreme Court who won 76 percent of the vote, who came from nowhere to somewhere, who fought her way throughout life to be what she is, who has ruled in favor of plaintiffs, civil rights claimants, the poor, the disadvantaged throughout her career, who is being treated in this shabby fashion with a filibuster.

Mr. COLEMAN. Would it be the truth in regard to these nominees, in regard to Owens and Kuhl and Pickering and Estrada, who we haven't talked about, that in each and every case the measures of their competence, be it the bar association, the gold standard my colleagues across the aisle have talked about for so long, be it the recommendations of their colleagues, other judges with whom they have worked, be it the recommendations of the voters when they put themselves up for a vote—in each and every case, they received the highest recommendation; that is the truth, is it not?

Mr. HATCH. That is right. And let me just say this: Filibusters are not the only means the Democrats are using to obstruct. During the 3 years of the Bush administration, the Senate has taken 108 rollcall votes on judicial nominees at Democrats' insistence. Eighty-seven percent of these votes have been unanimous, 87 percent, calling into question why we needed these rollcall votes at all. Contrast that to 8 years of the Clinton administration during which the Senate took only 46 rollcall votes out of 377 judges, only 39 percent of which were unanimous. Couldn't we have been passing appropriations bills or creating jobs instead of wasting the time on unanimous votes?

Look at this chart. Clinton, 18 votes, 2.25 average votes per year, 486 minutes were consumed, 8.1 hours, 61 average minutes per year; Bush, 104 votes, 34.7 average votes, these are unanimous rollcall votes, 34.7 average votes per year, 2,808 minutes were consumed, 46.8 hours, 939 average minutes per year. In this body that is delay, obstruction, complete shutdown of the body while we have these votes everybody knows will be unanimous. It is just another illustration of how far they have gone to obstruct on these judges.

Finally, who is wasting time? Unanimous rollcall votes on judges, compare Clinton; we didn't require rollcall votes on unanimously to-be-approved judges. Look what they have done to the Bush administration. This President is being treated very unfairly.

When you hear them talking about jobs, look, I am as interested in jobs, and so is every other Republican, as they are. The only reason jobs is coming up is because they know they can't handle the criticisms that are coming their way for the way they are treating these judicial nominees. They just can't. They can distort the facts. They can distort the statistics. They can distort the record. But they really can't justify what they are doing.

Again, go back to your chart, the distinguished Senator from Minnesota. Every one of those unjust filibusters that took away rights from people and kept people enslaved to a large degree, every one was led by Democrats.

The PRESIDING OFFICER. The time of the majority has expired.

The Senator from New York.

Mr. SCHUMER. Mr. President, I yield myself 15 minutes and the remaining 15 minutes to my colleague from New Jersey.

I have enjoyed these debates. I said at the very beginning these debates would be good for our side. They have proven to be. One little chart here, this chart seems to be under all of my colleagues' skin because they are debating it and coming with up with their own numbers, et cetera. But let me tell you, this one chart has won this debate. You can come up with as many others as you want, and tonight what have we debated, why 168 to 4 is not true? That is what the other side has said.

I said at the beginning of this debate this would help us. Because this one chart was equal to 30 hours of palaver. To my good friend from Utah, he is a good man. He is my friend. But do you know what he just said? Rollcall votes are a form of obstructionism. I would just like my colleagues to have recalled the words of my good friend

from Utah: Rollcall votes are obstructionist.

My goodness. What are we called on to do here if not vote. And letting people know how you voted, isn't that the whole mark of democracy?

I realize my colleagues on the other side of the aisle are frustrated, and so they have had to come up with all kinds of sophistic arguments. But this one tops the cake. The fact Democrats have asked for rollcall votes on judges is a means of obstructing. Maybe we should just, when the President nominates somebody, not have a hearing and not have asked questions and not have any votes and just let the President appoint all the judges. Next we will be hearing from my colleagues on the other side of the aisle that is what the Founding Fathers really wanted.

Again, to all of those who are listening, I hope there are a few left, 168 to 4. That fact is immutable, unchangeable, irrefutable. The reason it has such resonance is because the other side fails to mention it. Whether it be our colleagues when they speak, whether it be the rightwing radio shows when they say we are obstructing all of the President's judges or most of the President's judges, whether it be the editorial pages that try to kneecap us, 168 to 4, 168 to 4, 168 to 4. Don't forget it. There is no judiciary in crisis. There is no obstructionism.

There are some judges—whether they be Black, Hispanic, women, Catholic, Jewish, Muslim, Baptist, southern, northern, eastern, western—who are so far out of the mainstream that they should not be on the bench, and we are upholding the Constitution by doing that.

Now the arguments of my good friend from Minnesota, these charts, are getting to the point of ridiculous. They are what logicians and lawyers would call ''outcome determinative.'' We want an outcome so we put together numbers. Successful filibusters. I ask my colleagues, if a filibuster is against the Constitution, why is an unsuccessful anymore unconstitutional than a successful filibuster? Why is a filibuster of an executive branch nominee any different than a filibuster of a judicial nominee?

Do you know what the other side is saying? We are just going to take judges in green shoes and give you the numbers on those and not judges in pink shoes or purple shoes.

They are differences that don't make a difference. What we are talking about here, again very simply, is how many judges have come before this Chamber and how many have been approved. One hundred sixty-eight to four. No denying it. No refuting it. No getting around it. The truth hurts because the American people know—30 hours, I guess now it is 39 hours, you can debate this for 390 hours, 3,900 hours, 39,000 hours, and all your words are not equal to 168 to 4.

For those who watched this debate, this has been elucidating, because what the hard right and their allies tried to spread throughout America is, we were holding up all the judges, most of the judges, a judiciary in crisis, a huge number of vacancies. My colleagues, do you know what answers all of that hyperbolic falsity? One hundred sixty-eight to four.

We are going to keep that chart up. I realized when I first put the chart up, one of my colleagues objected. I understand it gets under your skin. I understand it pulls the rug out from the argument.

Now, do you want to talk about judges rejected? Do you want to talk about judges who didn't get a majority vote? Then talk about them. Here we have two charts. Sixty-three of President Clinton's judges didn't get a majority vote. It doesn't matter whether they didn't get it by filibuster or by not bringing them up for any vote. Again, that is like green shoes versus pink shoes. They are all judges.

Here are some names. Did every one of these people twist in the wind? You bet. Some longer, some shorter. Were some withdrawn by the President? Of course. Some withdrew their names themselves. My good friend from Utah, who I dearly love said: Well, some of the names were withdrawn by President Clinton. Does that mean we can erase the name of Miguel Estrada from this debate? He was withdrawn. That is not going to work. He was blocked. So were the others.

One final thing I would say, because I do want to spend about half my time now, or less than half, talking about one of the nominees. The Senator from Louisiana was correct. We are opposing judges because of their views, not their ratings by the bar association, which talks about their education and legal training, and not their sex, ethnicity, or religion.

The other side seems to think that should be a determination of who becomes a judge. Shame on the women because they won't just rubberstamp any woman. Shame on the Blacks or on the rest of us because we won't rubberstamp every Black, shame on everybody, me. They called me because I didn't agree with Miguel Estrada, but should I have let him go because he was Hispanic? That is un-American. It is not right. It is un-American. It is below the belt.

My good friend from Louisiana—I have never heard her more eloquent—had every right to be angry and upset. To say the women should be ashamed of themselves because they are not voting for another woman. What do you think the American people would think if they thought that ought to be our norm? Every Baptist should vote for every Baptist and every Catholic should vote for every Catholic and every Jew should vote for every Jew. What kind of logic is that?

Let's get back to the reality here. The reality is a handful of these judges are way out of the mainstream, at least in the opinion of a good number of us. Enough to block them. The one that I would like to talk about for the little bit of time I have left is Justice Brown.

I don't agree with her views on affirmative action, but that is not dispositive to me in this case. What is dispositive to me is that we have not seen—I have not seen, in the 18 years I have been here, a judge further out of the mainstream than Justice Brown. I want to read to you what she said in a case called San Remo Hotel v. City and County of San Francisco:

> Turning a democracy into a kleptocracy does not enhance the stature of the thieves, it only diminishes the legitimacy of government.

What does she mean by that? She was against zoning laws. Do most people think zoning laws are a kleptocracy in 2003? Maybe that went on in 1900, when we could have factories built next to homes and when workers' lungs would be polluted. But no more.

Here is what else she said in a speech to the Federalist Society:

> Where government moves in community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. The result is [this is when government is around] families under siege, war in the streets, unapologetic expropriation of property, the precipitous decline of rule of law, the rapid rise of corruption, the loss of civility, and the triumph of deceit. The result [this is what government brings] is a debased, debauched culture which finds moral depravity entertaining and virtue contemptible.

Many colleagues on the other side of the aisle believe in limited government. That is legitimate. I, for one, feel in certain areas Government goes too far. But this view? That is kind of disturbing, particularly for a judge on the DC Court of Appeals, which has more to do with Government than any other court in the land, with the exception of the Supreme Court. Please, you can find conservatives, you can find people who are against affirmative action who don't express these views; but these views are circa 1850, and even then would not be supported by most Americans. We are supposed to support a judge like that? Do you know what. I would guess if you asked my 51 colleagues on the other side of the aisle to nominate someone for the DC Court of Appeals and the record of Justice Brown were brought before them, they never would have nominated her.

Why is she here today? That is the question we ask. Is this to be deliberately provocative? Is it that the President doesn't believe he should nominate African Americans who are within the mainstream? I don't think so. He has nominated a few. I don't get it. The views of Justice Brown go so beyond what there is in a consensus in America, liberals and conservatives, that it is appalling to me she would be nominated for the DC Court of Appeals. There is only one reason: The extremists on the hard right are demanding something of the President. He is doing a prescription drug bill. He is talking

to the United Nations. He is not demanding Roe v. Wade be repealed at this very moment. By nominating somebody like Justice Brown, maybe he appeases them, even though he may know she will not be approved. I don't know. That is just a theory.

But I will tell you this. If Justice Brown were White, or Asian, or Hispanic, a man, or if she were Protestant, Catholic, or Jewish, or Muslim, or Hindu, I would oppose her nomination. If Justice Brown got 100 percent of the vote in California, I would oppose Justice Brown. Justice Brown does not belong on the DC Court of Appeals where over decades, over centuries, beliefs among Democrats, Republicans, liberals, conservatives, 99 percent of Americans about what Government should and could do would be totally rejected. Justice Brown will be defeated tomorrow, I hope and I believe. It will not be because of outside groups and it will not be because of any of the women not standing up for women. It will simply be because her views are so ideologically out of the mainstream that she does not belong on the DC Court of Appeals. It is that simple.

When we knock out Justice Brown, I believe the Founding Fathers will be smiling upon us. One of them might say to the other: That is why we gave the Senate some power to block the President's nominees. This is the kind of nominee who should be knocked out. This is the kind of role the Senate, as the cooling saucer, should play, and whether it be by filibuster or by not bringing her up for a vote, or by defeating her in committee, which are the various ways the Senate has to be the cooling saucer, none of them—51–49, none of them simple majority, the Senate will be fulfilling its hallowed, ancient, and continuing role as a check on abuse of power of the President.

The PRESIDING OFFICER. The Senator from New Jersey is recognized.

Mr. CORZINE. Mr. President, I thank the senior Senator from New York for making sure the fundamental issue is understood by the American public. The fact is, 172 nominations have come to the floor; 168 have been approved. Four have not been sustained under the rules of cloture. And 98 percent—you can talk about it any way you want. The numbers fit the commonsense judgment of the American people that something positive is going on here with regard to how we are dealing with the confirmation of judges. I go back to the practical reality that 95 percent of the judicial positions in the Federal courts, district and circuit and Supreme Court, are filled; 95 percent of them are filled. In 2000, at the end of the Clinton administration, only 75 percent of those positions were filled.

This is the lowest vacancy rate in 13 years. The reason is very simple—168 to 4. It is not a complicated issue. It is not a complicated issue. Then you have to look at the four. The Senator from New York read this statement about the judge we will be looking at tomorrow, talking about ''when government advances, freedom is imperiled.'' I don't think that is what the American people would think—those people who believe in Social Security, those people who might think we ought to have a prescription drug benefit for all Americans, people who believe we ought to pull together an army to protect the American people from terrorism, the folks who think we ought to build highways, bridges, schools, and other things, which are generally done by the public. When the government advances—what is this? I want to say this right. ''When the government advances, freedom is imperiled.'' There is one out of the four. One wonders whether that is the mainstream of American thought.

A couple of judges in this four have serious issues some people think approach or have gone over the line of ethical violations. I have heard almost everybody say at some level they believe integrity is an issue. There are serious concerns about actions of several of the people who are involved—aside from their views. I will not even mention the judge. One judge said, in talking about the role of Congress:

Congress, for example, should not be in the business of public education, nor in the control of street crime.

That may be a view that is mainstream for some in this body, but I have a hard time understanding where many of us believe the role of Congress would prohibit us from being involved in the business of public education or the control of street crime. It doesn't sound to me like a mainstream thought. That is one of the judges.

Then another judge we will be considering tomorrow talked about privacy rights, threw out a case where someone was performing an operation on a patient, and it happened to be a female. The doctor had a male drug salesman attend without asking for that right of the individual. Then the judge said that wasn't a violation of privacy rights. That kind of thing—I am not a lawyer and I don't know all the details of this precedent, but it is kind of like 168 to 4. You would think if somebody is undergoing surgery and somebody asks you a question about who the person was who was observing you going through surgery, if you had a drug salesman overseeing that, you might think that was an invasion of privacy. That is sort of common sense to me.

I think there are reasons to debate these four and maybe the two, if we are going to get people who are not necessarily following precedent, settled law—I hear a lot of arguments about activism on the court. It sounds to me like there is an active view that is different than settled law with regard to privacy. There is a view that is outside settled law and precedent with regard to the role of Government, with regard to schools and crime in our streets.

I think there is a reason to question some of these four. Therefore, it is not inappropriate, when you think people are going to be out of the mainstream and may have ethical issues that are legitimate questions that people raise, that somebody ought to exercise that judgment here on the floor of the Senate when we are asked to vote on it. From my perspective, that is what guides my vote and one of the reasons I have helped make this 168 to 4 happen.

By the way, I am proud of the 168 and while we now have the highest percentage of occupancy of judicial positions in the last 13 years—that looks to me like a pretty good track record. In most walks of life, it would be a pretty reasonable statement of cooperation and effort to make things happen. That is certainly, again, the perspective I want to start with, 168 to 4, filling up the judiciary.

Then we heard the argument raised that somehow we are trying to change the subject. This is changing the subject. We are talking about four folks, while we have 9 million people unemployed, 2.5 million manufacturing jobs lost in America, and we have the rampaging trade deficit, budget deficit, a rise in the poverty rate, declining insured and health insurance coverage in America, no prescription drug benefit for seniors, no passage of the Transportation bill, no consideration of a minimum wage increase for 7 years. We cannot get it to the floor.

We don't want to talk about four judges when we have a war going on and all these economic issues before the country. They say we are changing the subject? I think we ought to change the subject. I would imagine the people watching this debate are changing the channel because they want to know what the heck is going on in the fundamental parts of their lives, their jobs, what their kids are doing in Iraq, what is going on with regard to jobs that are going to be created for the rest of their families. They want to know what is happening to their health insurance. They would like to know whether school class size is going to be 18 or 26. Those are things that matter, and we are debating four judges who, as I read some of the most extreme comments here—again, we are debating whether it is appropriate to have a filibuster about somebody who says ''where government advances''—it says ''advances relentlessly''—''freedom is imperiled.''

We are debating that, as opposed to worrying about whether 9 million people can get extended unemployment benefits, whether we can get a jobs bill to build highways and bridges and other things in this country, whether we can have an honest debate over intelligence operations in this country. It strikes me we have our priorities out of place. It just makes no sense in the world we are living in that we are debating 4 judges out of 172 and they have views like ''where government advances, freedom is imperiled.'' I don't think the American people—anyone you sat down around the kitchen table

with and you talked about this issue, with this language, and this perspective on judicial philosophy—would say I would rather you be focusing your time on the floor of the Senate at 5 minutes to 12, 29 hours and 55 minutes into a debate, saying it is more important that we are talking about that judge than we are talking about what is happening with our men and women in Iraq, or whether we have appropriate investment in our intelligence operations that protect them, or the 9 million people are getting the proper attention on their unemployment benefits. I don't get it. There is no comparison of the importance. It is not changing the subject. It is getting to the subject the American people want us to do. At least that is the way it is in New Jersey. I have not had one single person ask me about a judge, until today when we got a call-athon calling in—the first time we got a call with regard to whether the filibuster was holding up these rights. I had my people read back this: ''When government advances, freedom is imperiled.'' About half of the people said I don't know whether that is somebody I want to stand with because I don't know that that is a position that really fits with the American Constitution, in my view, of what the American democracy is about. It is very hard for me to understand where we have our priorities.

Lastly, I want to bring up a point that filibusters weren't only used to stand in the way of civil rights acts by Democrats back in the 1930s or 1940s. On February 3, 1991, a filibuster was executed on this floor on the Family and Medical Leave Act. There were no Democrats who voted for that cloture. Let's see. Handgun violence prevention on November 19, 1993. I think that is the Brady bill. Let's see. Goals 2000, to educate America on March 24. I have a list of about—something that approaches about 50—maybe a little more than that—60 filibusters that were executed, including a couple with regard to judges, where judges withdrew their nominations that were executed by the other side of the aisle.

Filibusters have been used. No one was calling them unconstitutional when you were trying to deal with family and medical leave, or nobody was calling them unconstitutional when we were talking about the Hatch Act. Funny how that comes up. No one was calling them unconstitutional when we were dealing with judges at an earlier time when they withdrew their names. I want to make sure we keep the right perspective here because we are making all kinds of statements. Frankly, I think all of it is irrelevant. It makes no sense when we should be talking about the 9 million Americans who don't have jobs and we are talking about the 2 million people who have lost health insurance in the last 2½ years, when we are talking about the 1.7 million people who slipped into poverty in the last 2½ years, when we have gone from a $250 billion budget surplus to a $375 billion budget deficit, a $550 billion negative cashflow swing in this country because we are not handling our finances right, and we have a war going on and the generals are saying we are having unrealistic views about it back here.

I don't know, maybe we should not change the subject. We should just talk about these four judges. I wonder if the Senator thinks that is the right prioritization. It strikes me it is out of touch with America, and we are now 29 hours and 59 minutes talking about 4 judges.

The Senator from New York is right; 168 to 4 actually expresses what the debate about judges is all about. But one could think we ought to be talking about the 9 million Americans or, by the way, the 130,000 troops we have on the ground who are in harm's way. It strikes me, the discussion we have had for these 30 hours is missing a very major point to the American people.

I yield the floor.

The PRESIDING OFFICER (Mr. BROWNBACK). Is there further debate? The Senator from South Carolina.

Mr. GRAHAM of South Carolina. Mr. President, we got to the bewitching hour. It is midnight. I am going to enjoy the evening the best I can because I have a chance to engage with two of my colleagues. I don't know how long it will last, but I really enjoy the give and take of dealing with Senator SCHUMER. It may come to surprise people, we actually have been working on a couple of things. We had some successes in the past and we will have some in the future. I believe with a great deal of certainty, if the shoe were on the other foot, if my party were engaged in filibustering nominees of a Democratic President, that Senator SCHUMER would be right out here fighting for his cause. Senator CORZINE and I are getting to know each other. We will have all night to get to know each other. I have enjoyed working with him, also.

This is unusual for the Senate. I don't know if this has ever been done before. I hope it is not necessary to do again. But here we are. We are here at midnight. We are talking about whether or not there is a filibuster. Has there ever been one in the past? Who shot John? Who has been the meanest and the baddest in the past?

I guess what I am trying to focus on for the next few minutes is, What about the future? I guess that is my biggest concern. We have had all kinds of charts about how nominees were treated in the past. I have been here a year. Since I have been here, it has been like pulling teeth to get certain people on the floor for a vote. But that is OK. The process is what it is. The Constitution says what it says and we will all have our chance to express what we think is right versus what we think is wrong.

This is a big deal. It is a big deal for the Senate. There are a lot of other issues that need to be talked about. Sure, Iraq is certainly one of them, people out there in harm's way. We have 9 million people unemployed. I am the first to admit there are a lot of issues in this country that need to be talked about and addressed.

But this is one of them. One of the reasons Senator CORZINE has not had too many calls is Americans are able to walk around with a pretty secure feeling that the system works. I think it is a blessing we are not nervous every day about whether or not you can go to court because we expect, if we have a problem, a legal problem, there will be a place to go to get it resolved. That is just part of our mindset. We don't worry a whole lot about that and I think that is great.

But, really, that is a luxury. There are a lot of countries in this world where there is no venue to go to settle disputes. You have to go by force or violence, or you have nobody to help you out when you are down.

We have a pretty good legal system. God knows it needs to be fixed in some respects, but the idea of a rule of law nation caring about how you appoint judges is a big deal. Imagine if you had a system where it would be almost impossible to confirm somebody who had an actual belief or opinion. What you would find is there would be a lot of vacancies and there would be a backlog of cases. The things we assumed were always there for us would no longer be there. So this really is a big deal.

If you believe in a system where the weak can hold the strong accountable, then you ought to be listening to this debate because only in a rule of law nation, a courtroom, is that possible, because in a political environment the strong always win over the weak. In a confrontation of resources, the strong always win over the weak.

But America is a little bit different. You can hold anybody accountable. You can have your day in court. Even the President of the United States can be sued by an average, everyday person, if the President of the United States is claimed to have violated their rights.

That is a big deal. That is something worth fighting for. Some people believe that is worth dying for.

Now, that is very much at risk. The way we do business with our legal system is very much at risk. Because you can put up all the charts you want to put up and you can play all the number games you want to play, but the truth is, and I challenge someone to prove me wrong, that this is the first time in the history of our Nation that nominees have come out of the Judiciary Committee with a majority vote and have been blocked by a filibuster from being voted up or down. This is unprecedented. This is dangerous. We find ourselves in political and constitutional quicksand.

Of all the conflicts we have had in this Nation, of all the fights between the Republican and Democratic Parties, of all the likes and dislikes that

have happened politically, no one before has chosen to go down this road. The road our friends on the other side have chosen to go down really is the road to oblivion, in terms of trying to get good men and women to be willing to serve their country as a judge.

My friend and colleague, Senator COLEMAN from Minnesota, is new to the Senate like myself. The strength of this Nation is people with accents have a chance to get ahead in life. I am the first person in my family to go to college. My dad was a World War II veteran and came out of the war and started his own business and married my mom and neither one of them finished high school. But they impressed upon me and my sister the value of an education. Because of the good, sound, strong public school system of which we partook, I was able to do things I never dreamed of doing. Now I find myself in the Senate.

I am a lawyer. If you can't take a joke, you should not be a lawyer, because there is a lot of lawyer jokes out there. But I have always enjoyed the role of being an attorney because I like representing people and I like representing causes. The law to me was not just a job; it was a passion.

The ultimate ascendancy for somebody in the law is to become a judge. You will make less money but you will get authority and respect, and you will have a chance to mold the law. To many people that is much more important than money.

To me it is a shame, if you are willing to apply for the job, that you have to be treated so poorly as these four people we are talking about have been treated. But make no mistake about it, they are not four people; there are going to be at least a dozen in the next couple of weeks. They are being treated differently than anybody in the history of the Nation. They are having some very hard things said about them and all they want to do, and all they are willing to do, is to serve their country in the Federal judiciary.

Our friends on the other side have pulled out a chart, 168 to 4, with an illustration: 168 apples represented those people who were allowed to go forward. The Senator who had the chart said, I like apples, so I picked apples to represent the 168. And the four, well they were called lemons. I thought that was pretty cute at the time. But the more I thought about it, that is really not fair. If you don't like these people, if you disagree with their philosophy, if you disagree with their view of the world, you have a chance to express it. You have a chance to vote them up or vote them down. But I don't think it helps anybody to label them as lemons. We are going to have a long talk about the people they have labeled as lemons. Between now and 9 o'clock in the morning, we are going to have a long talk, eventually, about the individual nominees.

You can decide whether or not you will vote for them. You can kind of be a Senator for a day, if you would like. That would be an exercise that would be interesting for those who want to watch. If you don't like them, you can vote against them in the Senate. But I think you have an obligation to vote them up or down.

As I talk about these individuals I will tell you why I am willing to vote yes. I don't expect anyone on the other side, or my side, to vote because of my reasoning. I do expect the people at home, in South Carolina, to be able to judge me and hold me accountable for my reasoning. I will tell you, with a deep sense of pride, that I think the four people who have been called lemons are very fine Americans and deserve more respect than they have gotten.

The thing I like most about serving with my colleague, Senator COLEMAN from Minnesota, is that his race was one of the most watched and unusual races in the Nation. It was full of triumph and tragedy. His opponent, Senator Wellstone, who I knew fairly well and certainly respected for his strong beliefs, tragically died right before the election. Senator COLEMAN ran against former Vice President Mondale.

The thing that impressed me most about his race, as I watched the debate, was the sincerity he had when it came time to present the reason he wanted to be a Senator for the people of Minnesota, along the lines of: I would like to go to Washington and do something. I watch you from afar and you seem to be fussing and fighting about everything. People are hurting out here and I would like to be a Senator who could go to Washington and work across the aisle and actually do something.

Tonight, at almost quarter after midnight, I would argue to the people who may be listening in Minnesota that your Senator is doing something. It is not what he envisioned. It is not what he hoped for. It is not what I hoped for. I hoped to be home right now. And we passed some legislation long overdue. But I argue the Senator from Minnesota is doing something that needs to be done; that is, standing up for his beliefs and his view of the Constitution.

I am confident that over time this exercise will be judged well in history. When there is an accounting in this period of the Senate, it will be one of the darker periods of the Senate and my hope is it will be a period that will not have lasted long. Because the future is why I am here. The future is why I and Senator COLEMAN ran. We have a lot of problems with Social Security and Medicare and a budget and a war to fight and many obstacles facing this country. We are dying to get on with it. We really do want to help win this war on terrorism and make the economy better and stronger and fix the retirement problem the Nation faces.

We didn't ask for this. But it came our way. It happened on our watch. I think this may be one of the most important things we will ever do as Senators.

With that, I will yield to my good friend, Senator COLEMAN from Minnesota, and let him know in my opinion that he is doing something that is very important to the country by participating in this debate.

The PRESIDING OFFICER. The Senator from Minnesota is recognized.

Mr. COLEMAN. Mr. President, first, I thank my friend and colleague, the Senator from South Carolina. We came in in the same class. He served in the Congress. He is more experienced and understands the ways of Washington. But he understands the ways of South Carolina. He is about as real as he can be. People think of Washington as a phony town. I look at my colleague, my friend from South Carolina, and he is very real. That is a good thing.

In the discussion we have had tonight—now past 30 hours—I appreciate his effort to humanize the four individuals whose lives have been, in some ways, put on hold, their future put on hold, certainly by the actions of this body. No, they are not lemons and they are not simply numbers. They are people. They are moms, dads, fathers, daughters, sons. They are folks who have the capacity to have an incredible influence on our lives.

I was a former prosecutor. The Senator from South Carolina had that experience of doing some prosecution in his time. I can tell you, courts have an impact on your lives, on your family's lives in many ways. So I appreciate it, if as we move now into the morning hours, there will be votes coming up this morning—not tomorrow morning, this morning—to put a human touch on what this is about.

I think there was a mood or a feeling in the country at the time that we got elected that really did focus on getting something done. I was running for office and disaster assistance bills were being debated in the Congress. The House was passing bills but the Senate was not. I can tell you my constituents were unhappy. They were concerned.

Last year there was a debate over a prescription drug benefit. I was running for office. There were still seniors forced to make the choice between prescription drugs and food. That is a bad thing. That is not a good thing. Hopefully, this year we are close and before we get out of here, assuming folks come together, we can get something done.

I think that was the tone. That was the message. By the way, I hope, certainly the message I heard—it should not be a partisan thing. There are a lot of things I heard in the debate tonight from my colleagues on the other side. I don't disagree with all of it. My colleague from Louisiana made a comment that we can't be divisive. She is right. I can tell you we are not trying to be divisive. Being divisive is when you do something that is unprecedented, and that is really what we are talking about today.

The fact is, one of the things we did kind of settle tonight is the filibuster.

There was a discussion all along about whether they are really filibustering nominees, a lot of discussion about filibusters.

First, I say again I was disappointed what I heard tonight. If anything, it was the comment of my colleague from Louisiana saying filibuster was the successfulness of the truth. No. With filibusters we have stopped some very good legislation. We have used the filibuster in a very terrible way in this body in its history. We have filibustered to try to prevent antilynching laws coming into effect. We have filibustered civil rights legislation. We have filibustered against the poll tax. We filibustered about a lot of things and not often good. A filibuster is often to be ashamed of and this one is to be ashamed of.

My colleague asked what is the difference between filibustering legislation and judges? The difference is this little book. It is called the Constitution. That is the difference. The Constitution laid out very clearly when the President has certain powers. The President, by the way, doesn't get elected unanimously. He gets elected following the laws. Not everyone votes for him but he then becomes the President. Once you become the President, you have certain powers and the Senate has certain powers and responsibilities. So it is a matter of seeing there is a difference between what one can do legislatively, using filibusters, and what the Constitution provides.

There is a reason why, in the history of this country of 214 years, up until this Congress, this body has never used a filibuster to stop circuit court nominees once they got through committee. That is the reality.

You can put all the charts up and all the statistics; that is the reality. If folks are listening, they have to be thinking there has to be some reason in over 214 years why folks have not done what is being done today. In part, it is because of the consequences. If we do that, what we do is we let a minority—that is what we have here because in each of these cases the judge is being filibustered, a majority of the Senators, Democrats joining with Republicans—yes, they are going to vote for them. We know that. That is why the minority is filibustering, stopping the vote.

So what you have here is a situation where the minority stands up and says: We don't support a person. Maybe it is because of a particular issue. Maybe the issue of abortion comes up again and again, which, by the way—and we will have plenty of time to talk about this—what is so interesting if you look at the record, the nominees who have been criticized or attacked because of their position on abortion, to a person have said that they would follow the law, that they would put personal beliefs aside.

You choose a judge and what you ask of them over here is can you put your personal beliefs aside and make a judgment. That is what these folks have all said. Because they have those beliefs, the minority comes together and blocks them. What is the outcome?

This, I know, frustrates my friend from South Carolina and it frustrates me. We all look into the future. I campaigned and I wanted to be a charter member of the ''Let's Get It Done Coalition.'' Let us figure out a way to solve problems.

The Senator from New Jersey is right. We have to get an energy bill through. I hope we get it through. We have to do something about prescription drugs. We have to do something about jobs, and something about medical malpractice. We should do something about class action. Those efforts are not going to be allowed to come to a vote. Those are the jobs bills. Let us get it done. Let us put the bickering and partisan stuff aside and figure out a way to get it done.

The problem we have as we look to the future is who is going to get confirmed. If anybody with deeply held views is going to be filibustered by one side, now the Democrats are in the minority, there may come a point in my time where my friend from South Carolina is sitting in the minority and a Democrat President may propose a judge, and I will say to the body that I intend to use the same standard with a Democrat President. Are judges qualified? Will they commit to uphold the Constitution? I will not support folks who will use the Constitution to create laws of their own beliefs. But if they agree to follow the Constitution and are qualified, then you support them. The President has that authority.

If you look at the history of the judiciary, it is kind of a balance. There have been Democrat Presidents and Republican Presidents going back over the last 12 years—8 years of Bill Clinton, 8 years of Reagan, 4 years of Bush, Jimmy Carter. There are about almost equal numbers of Democrats and the Republicans on the judiciary. It is balanced. What is happening here today is we are changing that balance. When we allow minorities to take hold, we change that balance. That is what happens.

In the future, you are going to get folks with strongly held beliefs and there may be a Ruth Bader Ginsburg, a liberal who went to my high school, James Madison in Brooklyn, NY. I disagree with some of her reasoning on decisions. She is a good judge. She is bright. She exercises her judgment. I don't think in this environment if the Democrats are in charge that Ruth Bader Ginsburg would be confirmed. That would be sad for America. The same would be true with Scalia and a number of members of the Court.

What are you going to get? The best and the brightest are going to be cast aside because they may have a strongly held belief, which is what you see in some of the nominees here because a minority says we don't want them to come forward. A minority then filibusters in a way again in contradiction to article II of the Constitution. That is why we are raising this. That is what we are talking about and doing something that has not been done in history.

It is interesting. In terms of the Constitution, it is very clear. The President has certain powers—unlike, by the way, in European countries and in contrast to monarchs who would simply make treaties. Leaders in Europe could make treaties. Our folks said, no. The President's power of making treaties is going to be contingent upon two-thirds of the Senate present and concurring. That is in the Constitution. We wanted to limit the powers of the President. When it came to appointment of judges, it is not two-thirds. Two-thirds is only for treaties. Very clearly there is a delineation.

For some reason to date, 214 years into our country's existence, the standard has been changing. That is an important thing. Jobs are important. As a former mayor, I have said 1,000 times the best welfare program is a job; the best housing program is a job; the best health care comes with jobs. Jobs are important. I understand that. What is interesting is my colleagues on the other side of the aisle are crying economic—by the way, never once mentioning 9/11. If you talk about what has happened to this economy, you have to talk about the impact of 9/11. You have got to talk about the recession that occurred before the President came into office. You have to talk about the impact of WorldCom and the impact of Enron.

The reality is now because of the policies, many of which this Congress passed, policies which cut taxes, which put money in the pockets of moms and dads which give businesses the incentives to invest, the economy is starting to move forward. The last numbers report 7.2 percent gross domestic product growth, and over 200,000 more jobs in the last couple of months. The number is revised upward. Business investment is moving forward, in part in large measure because of the tax cuts. Yet the other side of the aisle says we want to talk about jobs. I am looking forward to that debate. But it is all important. The judiciary is important. What we do with judges is important. In order for businesses to operate and for families to operate, you have to have a judiciary that works.

What is fascinating here—and I love that chart of 168 to 4. I love seeing that chart. When the other side puts up a chart showing 168 to 4, that is their argument. They keep coming back with the underlying supposition of, It is false. Their argument doesn't carry weight. Let us talk about 168 to 4. The real discussion here and what is going on here is the President of the United States has the power to appoint district court judges.

A little lesson, for those listening, a first impression in the Federal system: What happens when the district court

judge issues an opinion, there is a review process. It is reviewed by the circuit courts. The courts of appeal level, by the way, is right below the Supreme Court, which is one of the things I think comes into play here.

When you pick judges who may be on the circuit court, what happens is they then became a candidate for the Supreme Court. That is the real deal. They are all the real deal. Being a judge on the court of appeals is an incredible honor. It is a higher court than the district court. What is happening is the President has had 29 circuit court judges confirmed. We as of tomorrow will have six who have been filibustered. There are more in the hopper. That is very clear from my colleagues on the other side of the aisle. They will be filibustered. Out of the circuit court, the other side is saying 168 to 4, and some judge like wearing pink shoes and green shoes—no. The difference between circuit and district court judges is not the color of their shoes. The difference between circuit court and district court judges is these judges are on a higher court. These are the judges who are right below the Supreme Court.

District court judges sit in a particular district. Circuit courts sit in a multistate area. They have a broader range and geographic jurisdiction. It is the higher court.

What has happened here is it is not 98 percent. Even 98 percent of the time, adherence to the Constitution is wrong. When we took our oath, when the distinguished Senator from Kansas took his oath, and the Senator from South Carolina took his oath on that floor, we swore to uphold the Constitution of the United States 100 percent. It wasn't qualifying.

I find it absolutely startling that folks take pride in upholding the Constitution 98 percent of the time. The first amendment, freedom of the press: If there are 172 newspapers in the country and 168 of them are going to have freedom of the press and not the other 4, they wouldn't be very happy and very American.

The reality here is we have 29 circuit court judges who have been approved and we have 12 who are being filibustered. I think we are talking around 30 percent, 25 or 30 percent. That is a big number. I believe that is the largest number certainly since World War II. I have to go back in the history books. That is wrong. That is the number here.

The other side keeps coming back saying 168 to 4; therefore, no problem. The problem is you can put up all the numbers you want, but the difference is not the difference, whether it is green shoes or pink shoes; these are courts of highest jurisdiction.

What has happened here and what is happening is unprecedented in 214 years of the history of this country. This hasn't happened.

All we are asking is for these 12 judges to simply have a vote. We are talking about a vote. A cloture vote tomorrow is not a vote on the judges. We are simply saying give—Miguel Estrada, by the way, withdrew.

My time may be coming to an end. I want to get back to talking about him—an immigrant, incredible record, education record, incredible performance record, a brilliant man, and withdraws.

Priscilla Owen, give her a vote. William Pryor and Pickering, give them a vote. If you do not support them, you vote them down. Your voice is heard. It is not about a rubberstamp. I am not asking my colleague, the Senator from New York, to vote for these folks. Vote them down. If you do not like Judge Brown, vote her down; Judge Kuhl, vote her down. Vote these folks down. But give them a vote. That is what the Constitution requires.

Thank you, Mr. President.

The PRESIDING OFFICER. The Senator from Searchlight, NV.

Mr. REID. Thank you, Mr. President.

First of all, I want to extend my appreciation—and I speak for the Senate, both Democrats and Republicans—to the staff which has been supporting us the last few days. People are working very long hours. The Capitol Police are working a 16-hour shift. Their shifts are very important. There are some people from all over the world who target the Capitol of the United States where we now stand. These men and women who guard us, protect us, make us secure, have to be vigilant. They are among the best trained police officers in the entire world. I extend appreciation from all Senators to them for the work they do, not only during the time in the past few days but all of the time—having been a Capitol policeman in the day when things were much more calm and deliberate than they are now.

I also extend the appreciation of all Senators to all the staff, Parliamentarians, clerks, the enrolling clerks, the court reporters—I don't think I have done that—and the pages. We have juniors in high school who are here tonight. I haven't mentioned everyone. But my compliments go to everyone who supports this great institution. I am sorry they have had to work another night, but that is the way it is.

The reason you have seen all the charts on the other side of the aisle change is because this number Mr. SCHUMER talked about bothers them a lot. Now they have come up with judges who haven't even come before the Senate. They know only four have been turned down. But now they have the other thing, that there is going to be 12. Well, we might wait and see what is going to happen. Why don't we wait?

I say this: The 30 hours we have spent so far has been totally wasted. There isn't going to be a single vote changed. Nothing is going to change. This has been an effort to toss meat to the rightwing extremists. Many Senators—and I say many—certainly at least a dozen Republican Senators approached me and made different excuses and apologies for what is going on on the other side. They know this is very nonsenatorial. But we are involved in this and we are going to proceed in the best and most dignified way we can.

There is something else I would like to spend some time talking about tonight, and that is jobs.

Let us talk about what is happening in the last 30 hours. What has happened? We can start at a number of different places. During the last 30 hours, 2,833 Americans—men women, teenagers, old people, married, unmarried, grandparents—have been laid off. They have lost their jobs.

In America today, things are so difficult dealing with jobs. For the 2,833 Americans who have lost their jobs during the last 30 hours, the average time for them to find a good job will be 5 months. Five months, 2,833 Americans will wait an average of 5 months to find another job.

It seems to me it would be good for us rather than spending 30 hours plus on 4 people and not a single vote has been changed—4 people who have jobs, good jobs—that we would spend some time talking about how to create more jobs, thirty hours of debate here in the Senate about programs.

For example, I think what we should have is an infrastructure development program where the Federal Government is involved in putting out money so the contracts can be let in the private sector so companies can build roads, they can build dams, they can build bridges, they can do water systems, sewer plants. We could spend some time here debating where it should go and how much we should spend. We know for every $1 billion spent, we would create 47,000 jobs as compared to 2,833 Americans who have lost jobs in the last 30 hours—47,000 high-paying jobs. Of course, the spinoff from these jobs would be significant and magnificent.

As I indicated, 2,833 people have lost their jobs in the last 30 hours. The four people who have been dwelled on by the majority have jobs—good jobs. Who are the people who have lost their jobs? I have already talked about parents, single parents, families. It is really sad to understand that 2,833 people are going to have to wait on average 5 months to find another job.

During the last 30 hours, 8,698 people have lost their health insurance.

A man flew in from Arizona to meet with me today. He graduated from Utah State University where I did. He was a star football player at Utah State University. He is a big man physically and a big man emotionally. He flew back here because he is now a physician. He is terribly concerned about the 8,698 people who have lost their health insurance. He understands what it means for people to come to him and have no health insurance. He talked to me and my staff about what we can do about it. He felt so strongly about it that he came back and talked to me.

How does a mother feel, how does a father feel, who have children or no children, how do they feel going to bed at night recognizing if something happens to them or their family, they have no health insurance. What do they do? They do not get the treatment and care they need. They only go when something desperate has happened to them. An automobile accident, they go to the emergency room. Preventive care, forget about it. During the last 30 hours, 8,698 people have lost their health insurance. I think we should talk about that. We need to do something about that. There are 44 million Americans who have no health insurance.

In addition to 44 million people who have no health insurance, there are millions of people who are underinsured, meaning they have insurance but it isn't very good. That is what I talked about today among other things with my friend from Utah State University, a wonderful man, who is a young physician who cares about his community and his country.

We have 44 million Americans with no health insurance, and we are here, and we have been here for the last many hours talking about four people who not only have jobs but they have health insurance. Every one of the four have health insurance. And they have jobs.

What does it mean not to have a job? Does it take away someone's dignity? Does it cause divorce, dissension? Does it cause kids not to be able to go to school, to college? Of course it does. Does it cause crime? Of course it does. Does it cause our welfare rolls to go up? Of course it does.

But the 4, the 168 to 4, those 4 have jobs. They have health insurance. Why are we not here talking for 30 hours of constructive debate about doing something in this Nation about health insurance so people when they get sick can go to a doctor, people when they need preventive care can get it. In the long run it would save the country lots of money.

In the last 30 hours, the trade deficit of this country has gone up $300 million. In 30 hours, the trade deficit has gone up $300 million. What does that mean? It means we have bought more into this country and sold less outside our country to the tune of $300 million. That is not good.

I have heard my friend from North Dakota, Senator BYRON DORGAN, give lectures in this Senate about the need to do something about our trade policies because the trade deficit continues to rise, causing this country lots of problems. We are doing nothing about it. We have a trade deficit with China. They jiggle their money, and it is continuing. We are afraid to take that issue up here.

My friend, the distinguished Senator from New York, Mr. SCHUMER, has attempted on several occasions to bring forth an amendment to stop the Chinese from playing with the numbers so that the trade deficit continues. But we have been unable to do that. Why? Because we are talking about four people who have jobs, who have health insurance, and could care less about the trade deficit.

In the last 30 hours, focusing away from some problems that to some may not seem important—the trade deficit—we could talk about something that is real important. During the last 30 hours when we have been here talking about four people who have jobs, who have health insurance, and who have nothing to do directly with the trade deficit but are keeping us from talking about it, during that 30 hours the food stamp rolls in this country have gone up by 6,237. During the last 30 hours, 6,237 desperate people have signed up for food stamps saying, in effect: We are hungry. Government, will you help us buy food for our families? We have never done it before. But these are new people signing up for food stamps.

I could say without any qualms or reservations, the four people I have talked about here tonight and the majority has talked about here for a long time, they have not lost their jobs. They have not lost health insurance. They don't even have to consider food stamps. But wouldn't it be good for us as a nation to spend some time talking about food stamps?

I can remember when I was a new Senator, the great Senator Pat Moynihan—his chair was right back there. There was a vote going on about the homeless. Senator Moynihan said to me: We have helped create the homeless by Federal policies where we have, in effect, emptied out our mental institutions, but we have done nothing to have community health centers. A lot of the people who are homeless are people who need medical attention.

Well, food stamps, we need to do something about that.

About poor people, in America today, as sad as it seems, the rich are getting richer. The rich are doing fine. The wealthy are doing fine. The elite of America are doing great. The poor are doing real bad. The middle class is narrowing all the time. We need as a nation to figure something out to do something about that. We don't want to live in America like many countries where you have the rich and the poor and no middle class. Why don't we spend 30 hours doing that? Not spending 30 hours talking about four people who are well educated, have jobs, have health insurance, are not on food stamps.

During the last 30 hours, when we have been here in the Senate talking about these four people, we have had in America 36 mass layoffs. Employers have had 36 experiences where they said: We have to lay off more than 50 people. A mass layoff, by Department of Labor standards, is more than 50 people. During the last 30 hours, we have had 36 of those.

Why are we having so much trouble in America today keeping people working? Why is it taking so long for people who lose a job to find a job? I would think this Nation would be better served talking about jobs, not about four people who have jobs, who have health insurance, who are not on food stamps, who have not been part of a mass layoff in the last 30 hours.

On this Senate floor, during these last 30 hours, there have been seven attempts by the minority to extend unemployment benefits for people whose unemployment benefits have run out. Is that important? During the last 30 hours, while we have been here talking about four people who have jobs, who have health insurance, who are not on food stamps, who have not been part of mass layoffs, 13,194 people have had their unemployment benefits run out. The people who have lost unemployment benefits are real. These are not statistics that somebody made up.

Let me read to you a letter I received from a woman in Las Vegas, NV. We will just call her Margo. I won't give her full name. She writes, October 10, 2003:

> Dear Senator Reid:
>
> On July 2, 2003 I became a displaced airline worker after 38 years as a TWA (now American Airlines) Flight Attendant. As a result of union concessions given to American Airlines, I received no severance pay.
>
> My Unemployment Benefits will expire on January 2, 2004.
>
> Congress has passed new legislation which made December 28, 2003 the cut-off day for Temporary Extended Unemployment Compensation. After that date, there will be no more extensions. I will miss the deadline for Extended Unemployment Benefits by 5 days.
>
> I am a single woman and a sole supporter. I have no skills applicable to this difficult job market and my age makes an already bad job market even more limited. It will take time to learn skills and find a suitable job. Extended Unemployment Benefits will be needed for my very survival.
>
> I ask you—

She has it in bold type—

> to please support S1708—

The one we have tried to move seven times to the floor in the last 2 days, objected to by the majority—

> which will extend the TEUC [benefits] and provide additional Unemployment Benefits to those who cannot find jobs.

This is a real person. This is not someone who is made up. This is descriptive of the 13,194 people who, during the last 30 hours, have lost their unemployment benefits. That is sad.

I have another letter here from another woman. I will read the last paragraph:

> I am not writing this letter to get a hand out or sympathy. For every job that is open, 50 people apply. I have faith in God that he has a perfect job for me and that he will provide for us.

I ask unanimous consent that these two letters be printed in the RECORD, and with the permission of the Chair, I would ask the clerk to block off the names because I have not spoken to them for permission to make their names public.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

JULY 31, 2003.

To: President George W. Bush, Congressman John Gibbons, Senator Harry Reid.

Re unemployment benefits.

GENTLEMEN: I really don't expect that any of you will actually read this letter. It will probably go to an aide and if I am lucky I may get a response. So why I am writing this letter? Because there are many other people in this country who are unemployed and have run out of unemployment benefits. Man people like me, feel that writing a letter like this is a waste of time. Many have no hope, but I believe that one person's voice can make a difference.

I live in a small community in Northern Nevada. There are at least 50 people applying for every job opening. We have thought about moving to other cities, but the job market is tight every where. My husband is disabled and receives a small social security check each month. It pays all but $15 of our first mortgage on our house. I have to supply the money to pay a second mortgage and all of our living expenses. Three years ago we had to file for bankruptcy. With a job and a new start we have been rebuilding our credit, but have not been able to refinance our home.

In December of 2001 I had to quit my job. I quit for cause. My doctor wrote a letter and I was eligible for unemployment benefits. Less than 6 months after I left that company, the position that I had held for 6 years was eliminated company wide. Some people moved up into management, but many were laid off. It took me five and a half months to find a job. My training and experience has mostly been in the accounting field. I took a job as an outside sales rep. for an office supply company, because that was what was available. The job lasted 8 months. Then the company that I was working for updated their computer system to make it easier to purchase items off an internet web site. As a result they laid off some sales people including me.

Here in lies the problem. Because I was on unemployment from January to June 2002 it affected my base period for benefits. When I got laid off on March 2003 I was only eligible for 13 weeks of unemployment benefits not the full 26 weeks. My lack of employment in the base period was not by choice. I was on unemployment, but because I was on unemployment and had no job earnings it shortened the amount of weeks that I was eligible for benefits. When I applied for the federal extension the same thing happened. I was eligible for 7 weeks not 13 weeks. I have sent out hundreds of resumes with little response.

I am not writing this letter to get a hand out or sympathy. I have faith in God that He has the perfect job for me and that He will provide for us. There are many thousands of people who do not have this hope. They have been laid off multiple times, and were eligible for little or no benefits. I have friends that were laid off over a year ago and are still trying to find work. Unemployment should not be a free ride. There has to be a limit on benefits or it would turn into another welfare situation. People would get on it and have no incentive to better themselves and get off it. But the way the current system is setup, it paralyzes people who have been laid off multiple times over several years. All I am asking is that people, who are truly trying to find work, get a fair chance to provide for their families while they seek employment. I would work a part-time job or 2 part-time jobs in lieu of a full-time job if I could find them. So the solution is two fold. Get the economy going so that people like me can find a decent paying job or jobs. And revise the current system so as not to penalize people who have already gone through one or more layoffs in a short period of time.

Gentlemen, this is the greatest country in the world. The middle class needs a break. I don't want a free ride. I just want a job or jobs that will supply the basic needs for our family.

OCTOBER 10, 2003.

Hon. HARRY REID,

U.S. Senate, Hart Senate Office Building, Washington, DC.

DEAR SENATOR REID: On July 2, 2003 I became a displaced airline worker after 38 years as a TWA (now American Airlines) Flight Attendant. As a result of union concessions given to American Airlines prior to my furlough, I received no severance pay.

My Unemployment Benefits will expire on January 2, 2004.

Congress has passed new legislation which made December 28, 2003 the cut-off date for Temporary Extended Unemployment Compensation (TEUC). After that date, there will be no more TEUC extensions. I will miss the deadline for Extended Unemployment Benefits by 5 days.

I am a single woman and sole supporter. I have no skills applicable to this difficult job market and my age makes an already bad job market even more limited. It will take time to learn skills and find a suitable job. Extended Unemployment Benefits will be needed for my very survival.

I ASK YOU TO PLEASE SUPPORT SENATE BILL S. 1708 which will extend the TEUC bill and provide additional Unemployment Benefits to those of us who cannot find jobs.

Thank you for your consideration in this matter.

Respectfully submitted.

Mr. REID. I would also say that this woman says she would take two jobs at minimum wage just to make things work. She has a husband who is disabled. That is what this is all about.

We know that during the last 30 hours people in America have had some problems. Two thousand eight hundred thirty-three people have lost their jobs; 8,698 have lost health insurance; food stamps increased by 6,237; the trade deficit has gone up $300 million; 36 mass layoffs, 13,194 people lost their unemployment.

During the last 30 hours, we have 65,357 people who applied for unemployment benefits for the first time. We have had, during this 30 hours, desperate people; 5,137 people have filed for bankruptcy.

I did general practice. I have had interviews with people who told me they had no choice but to file bankruptcy. Usually it is some problem with medical expenses, but these people are desperate. We don't have a bunch of deadbeats out there. We don't have 5,137 deadbeats. We have 5,137 desperate people.

What are we talking about here? Not doing something about the bankruptcy law when we came that close to passing it. There was one provision in it that because of the ideology of certain people it didn't pass. We came so close to reforming the bankruptcy law which would have helped a lot of these people. We should spend some time on bankruptcy.

I have talked to the distinguished senior Senator from Iowa on many occasions about the need to do something about this. And by the way, he is a Republican. We need to do something about it. But what are we doing? Spending 30 hours talking about people who have jobs. They have not lost their health insurance. They are not drawing food stamps. They have not been part of mass layoffs. They have certainly not lost their unemployment. They have not had to file for unemployment benefits for the first time, and they have not had to file for bankruptcy.

During the last 30 hours, to get real personal about this, 80 people have committed suicide. While we have been here talking about these 4 people, 80 people in America have killed themselves. These are real people. The distinguished junior Senator from Oregon lost a 22-year-old son about 2 months ago as a result of suicide. In this Senate Chamber, there are lots of people who have suffered as a result of suicide. My father killed himself.

We need to learn more about suicide. More than 31,000 people in America a year kill themselves. We don't know why. It is one of the leading causes of death for teenagers. Why are we spending time on these four people? Why couldn't we spend 30 hours trying to find out why people kill themselves? We don't know. And we, as a Congress, have trouble even having a hearing on it. The first hearing on this was held less than 10 years ago. We have done a little since then but not very much. There are desperate people out there trying to decide are they going to kill themselves today.

I met up here in my office today with a prominent person, a prominent name in Washington, DC. She proceeded to tell me when she was 17 years old she tried to kill herself. She took a lot of pills. She described to me how she believed she went to the other side and came back. This isn't some nut. This is a good friend, someone who a lot of people know, a wonderful person. We need to learn more about suicide. But we are not going to do it talking about these four people, these four people who have jobs, who have health insurance, who are not on food stamps, who have not been part of mass layoffs, who have not filed for unemployment benefits or bankruptcy.

During the last 30 hours—and this is very difficult to comprehend—during the last 30 hours, 10,000 people have died in Africa because of AIDS; 10,000 people in 30 hours have died in one continent because of AIDS; 70,000 people in a week. There are no vacations. Christmastime, Thanksgiving, Easter, it doesn't matter, they keep dying. What about a debate for 30 hours recognizing what we can do to approach the needs of this worldwide problem which has an affect on America?

During the last 30 hours, Nasiriyah, Iraq, a suicide bomber, 31 killed; during the last 30 hours in Baghdad, Iraq, 2 of the 1st Armored Division killed; during the last 30 hours in Iraq, 37 attacks by terrorists, many of our troops not dead but injured; during the last 30 hours,

seven funerals of American servicemen killed in a helicopter downing in Iraq, seven funerals.

I understand how strongly people feel about these four people. I know how strongly people feel about this. But as I said yesterday, I don't in any way suggest we are wrong. I believe as strongly as I can that we have done the best thing for America in turning down these people who would be bad for the judiciary.

I have been to juries lots of times. I have tried over 100 cases with juries. I have the greatest respect for our justice system. I have tremendous respect for judges who try cases themselves. But I also have some idea in my own mind, having been a trial lawyer, how important it is to have good people on the bench, especially the Federal bench. These are appointments for life. I think no matter how strongly people feel about this issue, and assuming for purposes of this discussion that we are wrong, which I disagree, but let's assume for purposes of discussion, don't you think we have carried this thing a little too far? Don't you think the same points could be made?

I have tremendous respect for my friend from South Carolina. I sat right here, just like this, scared to death 5 years ago. It was the first time I had ever sat this close, first time I ever had the job as the assistant leader of the Democrats. I was afraid to be here. The first big thing was the impeachment trial of the President of the United States. The Senator from South Carolina was one of the managers. He is a fine lawyer. I have great respect for him. He is a man of courage. He breaks from his party on occasion. I admire him for that.

But I say to my friend, I think we have made our points. I mean, you make a good case. But for Heaven's sake, everything has been said by your side, and everybody has said it. On our side, I think everything has been said, and everybody has said it.

Enough is enough. I think during the last 30 hours we could have been discussing issues that are more important, such as jobs, not the four people who have jobs, who have health insurance, who have not had to go on food stamps, who have not been part of mass layoffs. They have not lost unemployment benefits. They haven't had to file bankruptcy. There are just so many problems we need to deal with that we have not done because of these 30 hours.

I say to my friends, we have had an equal discussion. I think that is good, that the two leaders worked that out, because it could have been a real nasty situation here without allocating the time in a balanced fashion. Maybe history books will look at this as something that has been important to the country. I hope so. But I have my doubts.

I think the more important issues are not those dealing with these four people. The more important issues are those dealing with the personal lives of other than those four people.

I would ask that we recognize that. I know the content of the character of the Senator from South Carolina who is leading the debate on the other side. I know he will lead a civil debate. I appreciate that. But I just say: Why don't we all just wrap it up and go home. Come back and vote at 8:30. That is what the schedule is anyway. I think that would be better for the whole body.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. REID. Whatever time we have remaining, I yield to the majority.

The PRESIDING OFFICER. Time is yielded back from the minority side. The Senator from Minnesota.

Mr. COLEMAN. Mr. President, I have great respect for the Senator from Nevada and the deep concerns he has for a range of problems and concerns that he talked about. They are real. We are talking about more than just four people. We have to recognize that. It is not just about four people. For people who were confirmed and should be confirmed as court of appeals judges, we will have a tremendous impact on the lives of the folks about whom the Senator from Nevada was talking. That is what the courts do. It is not a personal thing. This is not a measure of whether these nominees have jobs, don't have jobs. It doesn't take away from anyone else. This is about the third leg of the stool of Government: legislative branch, we are part of that; executive branch; and judicial. Those are the three legs of the stool that uphold the system we have.

It is not about four people. The Senator is right. There are so many important issues to talk about, such as AIDS. I came back from a trip to Africa with the majority leader and a group of my colleagues. We saw the devastation and destruction. We were in South Africa where 5 million people are HIV positive, and 20,000 of them on treatment. We looked into the eyes of people who were dying and into the eyes of the doctors treating them. We are doing stuff about that; we are acting. We passed in this body a bill that provides over $2 billion—$2.4 billion, and you add in our commitment to the global fund. The President made a commitment of $15 billion, which is unprecedented, and overwhelmingly we are acting on it.

It is not enough to simply lay out a litany of problems. Maybe I am more of an optimist and a realist. My favorite quote is from the first Prime Minister to serve Israel, who said that anybody who doesn't believe in miracles is a realist. Goodness gracious, the world is not falling apart. There is a lot of hope and optimism. It is not just enough to talk about problems, as my colleagues on the other side of the aisle do. We can talk about the economy and jobs. What are you doing about it? That is the question. What is the plan? Their plan has been to roll back the President's tax cut. That is what their nominees for President are talking about—rolling back the tax breaks we are giving to moms and dads, that we are giving to small business, accelerating depreciation, increasing the opportunity to expense capital investment to generate more investment. The latest survey shows that business investment is up by 15 percent. So it is not simply to lay out a litany of woes, how terrible the world is. What are you going to do about it?

That is what my colleague from South Carolina and I talked about in our campaigns. We want to do something about it. It is not enough to lay out just how the sky is falling and how the world is falling apart. We are trying to do things here.

We will have time to debate the economy. We have debated it, and we passed the third largest tax cut in the history of this country. And what do you see? The GDP is estimated at 7.2 percent, down in the third quarter of 2003. Employment increased by 126,000 in October, while the number of jobs added in September was revised to 125,000 from the previous estimate of 57,000. The unemployment rate decreased from 6.1 percent in September to 6 percent. It is still too high but it is decreasing. There is a downward trend in jobless claims. The stock market, on November 3, jumped to a new 17-month high. We have trillions of dollars of new investment in this economy.

The tax cuts we passed here, which were opposed by our friends across the aisle, are responsible for the accelerated growth in opportunity. Spending by businesses grew at an annual rate of 11.1 percent in the third quarter, following an impressive 7.3-percent gain in the second quarter. Again, these are things we have done that have encouraged investment and, in the end, generated opportunity and are generating jobs. That is what it is all about. We have a ways to go, absolutely. But it is not enough just to lay out the litany of how terrible things are. What are you going to do about it? One of the things we do about it is why this debate is important—it is to make sure we have a strong Government, that we have a strong judiciary. That is what this is about.

The fact is, when the President of the United States has 30 percent of his circuit court judges and court of appeals judges filibustered, it is unprecedented in 214 years of the history of this country, and it is wrong. The fact is, we should talk about upholding the Constitution.

I am a former solicitor general in Minnesota. I had the opportunity to argue before the highest court of my State many times. I have great love and appreciation for its constitution and history, and it is important. To the person who is unemployed and is getting a job, that is important.

I say to that person that I am committed to doing everything I can, with every breath that I have, to make sure

you have opportunity. I am going to do that. At the same time, we have the ability to do more than one thing at a time in this body. I can tell you, we are debating at 1 in the morning, but to those listening, I hope this is an educational experience.

Let's talk about the Constitution now. By the way, to my friends across the aisle, I noted his conversation with the doctor from Utah State, that he was concerned about health insurance, as he should be. One of the keys to getting health insurance is jobs, small business. The things that we have done to generate new investment and grow jobs, that helps people get health insurance. I ask my colleague, the distinguished minority leader, assistant minority leader, whether the doctor talked to him about medical malpractice, whether he talked to him about the impact that medical malpractice has on his ability to practice and to provide quality health care. The cost of that, by the way, on businesses makes it more difficult for them to grow jobs. That is another issue that was filibustered by our friends across the aisle.

I think we came within a vote or two on class actions—within a vote of changing that. The fact is, it is not enough just to talk about it. So it is important to talk about the Constitution. That is what we are going to do.

The fact is that all of us, when we got sworn in, raised our hands and swore to uphold it. The Congressional Oath of Office is: I solemnly swear that I will support and defend the Constitution of the United State against all enemies, foreign or domestic, that I will bear true faith and allegiance to the same, that I take this obligation freely, without any mental reservation or purpose of evasion and that I will well and faithfully discharge the duties of the office upon which I am about to enter, so help me God.

That is a pretty strong commitment. It is not a partial commitment. It is not a 98-percent commitment, and it sure as heck isn't a 70-percent commitment. That is what we are dealing with today. My colleagues seem proud of that. You are even using the 98-percent figure.

Again, the reality is we are dealing with circuit court judges, and close to 30 percent have not been confirmed and have been filibustered. The fact is that right now it is four but tomorrow it will be six. We know the other six are there. Unless my friends from across the aisle would say we are not going to filibuster another six, I will run the names by them. We will change the chart and say something different. We all know the reality. Let's lay it out here at 1:10 in the morning.

Twenty-nine nominees were confirmed and 12 were not. Just think, if we took the approach that it is not important, you know, 98 percent—as I said before on the floor, if the airline that got me to St. Paul told me that I had a 98-percent chance of getting there and a 2-percent chance I would crash, I would not be flying.

The Constitution is wonderful. The first amendment says:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacably assemble, and to petition the Government for a redress of grievance.

I want those listening to think why is it that in the 214 years of the history of this great Republic, this great country, the Senate has not done what we are doing now. We are changing the system. It is very dangerous.

The second amendment says:

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

Minnesotans are pretty strong about the second amendment. We like to hunt and we like our firearms. That is OK. Imagine if I went to a group of 172 using my colleagues' chart and said 168 of you are going to have the second amendment, or if I went to 41 and said we are going to give these rights to 29 of you. There would be a revolution.

The third amendment says:

> No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Can you imagine if I went to 41 Minnesotans and said 29 of you are going to have a third amendment right, but 12 may be forced to quarter without your consent. I don't think they would do it. They would say, where is America? There is a reason why we have fidelity to the Constitution.

The fourth amendment says:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.

Can you imagine going to 41 Minnesotans and saying 29 of you will have the right not to be subjected to unreasonable search and seizure but 12 of you don't have that right? There would be a revolution. On and on.

The fifth amendment talks about the right against self-incrimination.

The sixth amendment says:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Can you imagine if out of 41 defendants, 29 were told you would have a right to speedy trial? Even if you told 168 they would have that right, but not the other 4, there would be a revolution.

We are not just talking about four individuals here. We are talking about one of the foundations and the underpinnings of this Government.

I tell the young people listening in the Chamber, this is your future. The greatness of this country is built on its fidelity to the constitutional principles. It has allowed us to kind of grow into the greatest nation in the world with the freedoms we enjoy, and those freedoms we have enjoyed have triggered great entrepreneurial opportunity—growing jobs. It is tied together and it is about growing jobs.

You grow jobs when you have a constitution that is adhered to and you have stability. I am chairman of a subcommitte of the Foreign Relations Committee on which we both serve. I can tell you that the concerns I have about some of the countries in Latin America have to do with whether they have rule of law. The reality is, if there is no rule of law, we see there is no investment, you don't grow jobs. So they are related. They are related.

In the end, I want to get away from just talking about the principles, these sorts of abstract constitutional principles. They are important and that is why we are here, because we must have fidelity there. We have to get things back in sync. We have to get away from this process, this unprecedented filibuster. By the way, those are not my words. Those are the words, as I understand it, of JOHN CORZINE, the chairman of the Democratic Senatorial Campaign Committee. In an e-mail he had—we have a chart here—it says:

> Senate Democrats have launched an unprecedented effort by mounting filibusters against the Bush administration's most radical nominees. Senate Democrats have led the effort to save our courts.

Unprecedented filibuster, that is what this is about. There has to be a better way. This is about being divisive. We have to get away from divisiveness, from everything being a battle. We have to get back to a fidelity to the principles that founded this great country. They are pretty clear. You don't need a Ph.D. or a law degree to understand the Constitution. It is pretty clear, pretty easy reading.

So that is what this is about today. In the end, it is not simply about four people; it is not about whether they have a job. It is whether, in fact, we uphold the obligation that we have, that we do our duty, that we do our job. In the end, we should simply give people a vote. If you think that they are good nominees, vote for them. If you think they are bad nominees, vote against them. But you give them a vote. That is what we have done for over 200 years. To fail to do that will have terrible consequences.

One last story before I turn the floor over to my colleague from South Carolina. It is about this building and a little bit of history from a number of years ago. There is an old Senate Chamber down the hall. When you walk out of here, it is maybe about 50 yards away. When we get sworn in in here in the official ceremony, we then have a ceremonial picture taking with the Vice President. It is a very special moment for all of us, especially for kids from humble roots. I am one of 8 kids,

and to have my mom and dad there was very special.

In that old Senate Chamber, in the old days the Supreme Court actually operated on the floor above the Senate. At one time, they were planning on remodeling the Supreme Court chambers. Some enterprising young architect decided that one of the pillars that was kind of holding it up didn't need to be there. So they said don't worry about that. What happened was that the Supreme Court crashed into the Senate, disrupting its work.

There is a moral to that story. If you displace or undermine one of the pillars of Government, which is what we are doing here, beware of the consequences. We cannot let that happen. These nominees—100 percent of them—deserve what we have done for 214 years: give them a vote, vote them up, vote them down, but give them a vote.

With that, I yield the floor to my colleague from South Carolina.

Mr. GRAHAM. I thank the Senator. The Senator did an excellent job of trying to put into perspective what we are trying to do. Senator REID from Nevada has left. If anybody deserves a break, he does. A couple of days ago, he spent about 8 hours-plus on the floor trying to prevent some legislation from coming forward that he thought was inappropriate. He was committed to making sure that the activity of the Senate did not go forward. He used his right as a Senator to speak. I applaud him for that. I don't agree with him, but the worst thing I think I can say about Senator REID is that sometimes I disagree with him. He is a very nice man. I have enjoyed getting to know him over the years and serving with him. I appreciate the nice things he said about me.

The point is that we disagree on this, and I don't question his motivation. I just question the judgment of what we are doing here. He described the United States problems in very graphic terms. God knows we have problems in this country, but I think it was used to try to illustrate or trivialize what we are doing tonight. If we have all these problems, why are we talking about this? I don't think it is healthy to trivialize the constitutional process of nominating judges. Whatever problems we have in this country—and there are a lot of them—none are going to be made better by hijacking the Constitution. If you expect us to just lay down and forget about it, then you have mistaken who we are. If you feel strong enough to stand up for 8 hours to stop something from happening, God bless you; if you think other people are not going to do the same, you have made a huge mistake. We are going to talk until 9 o'clock and do other things.

I announced today that if this doesn't change, I am going to ask the Supreme Court to decide whether or not the tactics of the minority have violated the Constitution, because I believe they have. If you are into numbers, I can tell you this. In the past 11 Presidents, on their judicial nominees confirmed versus those filibustered, we have had 2,372 people confirmed. We have not had one person filibustered. Now we have 4, and in just a couple weeks we are going to have a dozen. Some things were said. If nothing changes, nothing will change.

I can stand here, talk until I am blue in the face, and I have no illusions about my ability to change anybody's vote on the other side. I feel a real need to let history know, and my constituents back in South Carolina know, I think this is a lousy thing that is going on. I think this is a change for the worse, that you are taking the country down a road no other group has ever taken it in the Senate. You are doing it for political reasons you believe are just, but I think history is going to judge you poorly. I think it is going to be one of the darkest chapters in the history of the Senate. You have started something you can't stop, and most likely we will answer in kind down the road and you have taken 200 years of history and thrown it in a ditch. That is a big deal.

There are a lot of problems in this country, but you are about to create one that is very bad. You are adding to that list of problems the fact the Constitution has been changed in a way I think is illegal. Certainly it violates the traditions of the Senate. And we have to deal with it and we are going to deal with it. We are going to talk about it and we are going to try to get you to vote and we are not going to let this go.

I am going to ask the Supreme Court to look at this case that is going on before the Senate and see if the filibuster, requiring 60 votes, violates the terms of the Constitution because the Constitution requires a simple majority vote to confirm a judge sent over by the President.

Since we are going to have about 8 hours, I will save some of the time to talk about the history of the constitutional debate that went into that clause, why they picked a majority versus a two-thirds requirement that you have for ratifying treaties and impeaching the President. There is absolutely a rhyme and a reason for everything in this document.

There is no rhyme or reason for what is going on now, other than politics of the moment.

If you listen to Senator REID, you would want to leave the country. I mean it is an assessment of the problems of the country, given to try to trivialize our objection to the Constitution being changed in an improper way. But it also is a distortion of who we are as Americans, because Americans, given all of our problems, are still the most hopeful people in the world. After listening to this rendition you would just wonder why everybody is not moving to Canada or Mexico.

We are not leaving the country. Other people are trying to get into our country. One of the biggest problems we have that he did not talk about is illegal immigration. People are literally risking their lives to get to be part of the American dream.

I would rather focus on some of the positive aspects of our country, one of them being a courtroom available to everybody and anybody, regardless of your status in life, where you can go have your day in court, and that requires a judge. Judges are picked by the President and confirmed by the Senate. The advice and consent clause for the Senate has never meant a minority telling the President what to do. It has always meant a vote on the nominee with a majority being required to put you on the bench, until now.

Let's talk a little bit about some of these people, the four names. But there are many more affected by this than just four. This is the America I like to talk about, and relish.

Justice Brown: Janice Rogers Brown is one of the four who is being filibustered. She sits on the California Supreme Court. Senator SCHUMER said she is out of the mainstream. She is not of the temperament and the thought process, in his opinion, that makes her a mainstream person, so she would do harm to the country if she served as a judge.

President Bush disagrees with Senator SCHUMER because he chose her to go on the court of appeals. Senator SCHUMER has an obligation under the Constitution to give his advice and give his consent and eventually vote. He doesn't have the right, in my opinion, to band together with 39 other Senators and bring us to a screeching halt. No one has ever done that before. It is called a filibuster. The number of filibusters in the last 11 Presidencies is zero up until now.

Let me tell you a little bit about Justice Brown. No. 1, she lives in California and she got 76 percent of the vote. In California you get to vote on a judge. You get to decide. You, as a citizen, get to vote to retain a judge once they become a judge. You actually get to express yourself. I am going to go out on a limb here and say no rightwing nut is going to get 76 percent of the vote in California. I am going to stand firmly behind that statement. I don't believe 76 percent of the electorate in California would vote for somebody described as Senator SCHUMER has described this lady. I believe 76 percent of the people in California see Judge Brown like the President sees Judge Brown. This whole argument that she is somehow out of the mainstream just does not pass the smell test because the people of California get to vote on Justice Brown.

We finally got a Republican Governor of California. Arnold is an interesting figure, Governor Schwartzenegger is a larger-than-life figure—literally. But I don't think anybody would ever accuse him of being a rightwing nut. California's political makeup is such that the person described by Senator SCHUMER

would never, ever make it. This is just one example of the cut-and-paste job on all four of these judges, with more to follow.

Let's talk about the America she came from. Only in this country can you do what Senator COLEMAN and myself have done. I grew up in a pool hall restaurant—beer joint is probably a more accurate term—and made it to the Senate. I am very proud of my parents. They worked hard. They are small business people. I feel I am the luckiest person in the world.

She is the daughter of a sharecropper. She was not born in California; she was born in Greenville, AL in 1949. She attended segregated schools. I attended segregated schools up until I was in the sixth grade. I was born in 1955.

I can remember, I think it was the sixth grade—about 1967, somewhere along that period of time—showing up and for the first time in my life having African-American students attend my class. It all worked well back home where I lived. In other parts of the State it was more dramatic. In Alabama it was more dramatic. This is the State where George Wallace stood in front of the door of the University of Alabama and said, No, you are not coming here if you are an African American. It took the Alabama National Guard, federalized by President Kennedy, to open that door.

That is where she grew up. She talked about listening to her grandmother's stories about the NAACP lawyer Fred Gray, who defended Dr. Martin Luther King, Jr., and Rosa Parks, and her experiences as a child of the South, and that motivated her to become a lawyer.

Senator SCHUMER said she is not very good on affirmative action. Maybe her view of affirmative action is not what Senator SCHUMER's view is, but I would argue if she was somehow in the right ditch on affirmative action, 76 percent of the people in California wouldn't have voted for her and somebody would have informed them otherwise.

This lady's story is compelling. She moved to Sacramento when she was a teenager. She got a BA in economics from California State in Sacramento in 1974, her J.D. from the UCLA School of Law in 1977. She received an honorary doctor of law degree from Pepperdine University Law School, Catholic University of America School of Law, and Southwestern University School of law.

Prior to more than 8 years as judge in the State courts, she served from 1991 to 1994 as the legal affairs secretary to California Governor Pete Wilson, another known rightwing crazy person, where she provided legal advice on litigation, legislation, and policy matters. From 1987 to 1990 she served as deputy secretary and general counsel for the California Business, Transportation and Housing Agency, where she supervised the State banking, real estate, corporations, thrift, and insurance departments.

She was deputy attorney general in the Office of the California Attorney General. She began her career as a legislative counsel of the California legislature and more will come about Justice Brown.

The PRESIDING OFFICER. The time of the majority has expired. Who yields time? The Senator from Minnesota.

Mr. DAYTON. Mr. President, I was on the floor the second time yesterday, 4 or 5 in the afternoon. I observed, then, the time we devoted to this had already become excessive as indicated by the fact the statements being mailed were becoming increasingly repetitive and redundant. Now I see the added problem is, as we go even further, they become less and less factually correct and reliable, which is bad enough under normal circumstances. But the accusations that are being made are the most serious accusations that can be directed toward another Senator.

One point of factual agreement is we all do take an oath of office when we are sworn in here in this Chamber by the Vice President of the United States and we do swear to uphold the Constitution of the United States. When I took that oath 3 years ago, that was the most solemn oath I have taken in my lifetime. There is nothing I ever committed to that I take more seriously, and I do my best, as I can possibly see to do so, to uphold that. I have never had occasion in my almost 3 years here to question or certainly not to cast aspersions on any other Member for failing to uphold that solemn oath as he or she believes it is best performed.

We have information available to us through the Library of Congress and the Congressional Research Service that has been in existence since just about the time the country began. We use it as a learned and nonpartisan and, as much as possible, nonbiased source of information about the 216-year history of this body. It is not hard to get this information. You just pick up the phone and call and ask to get it. So I did the other day.

They list the chronological history of efforts to limit debate in the Senate. It goes back to the Journals of the Constitutional Congress in 1778. It references the very first session of the Senate in 1789, which started adopting these rules of various sorts. You can read, and over and over in the summaries, I am sure you can go back to the Journals and read in greater detail, how this has been discussed, considered, debated, argued, voted upon, modified, turned down by Members of this body for 216 years.

When people are accusing us of acting outside the rules and the procedures of this body in doing what has been done here and debated about here for all that time, they either are woefully ignorant of the facts or they know the facts and they are being, I think, extremely irresponsible to the American people, if they have the misfortune to be watching this at this hour, to lead them to believe we are doing something here which is anything other than our right, well established in 216 years.

If the Members on the other side want to disagree with what we are doing, or why we are doing it, or who we are doing it for or against, they are perfectly within their rights to do so. But to say we are violating the rules of this body is not true. To say we are violating the Constitution of the United States is a heinous fault and I will go with the Senator from South Carolina, I will join with him going to the courts of this country, right up to the Supreme Court and let's get the ruling he wants. Because I guarantee what it will be. Courts have ruled for the last 216 years the House and the Senate have the right under the Constitution to establish their own rules. That is what we have done. That is what this book is about.

This book is 1,524 pages, called ''Senate Procedure.'' These are all the precedents and changes in the rules and modifications and the like. It only goes up to about 1992 because over the last 11 years the chief Parliamentarian, who is the editor of this book, hasn't had the time to add to it. There are probably another 500 pages or whatever that have not been added to this that are all the different precedents, all the different changes. Any time any one of us thinks anybody else here is acting in violation of those, we have somebody right there. Every minute we are in session we have somebody we can ask and get a factual answer, an impartial and nonpartisan answer, and that is the Parliamentarian.

I ask the Parliamentarian if anything in these books for 216 years precludes our right to do what we are doing and if it is not within the rules of this body. I think it is shameful that anybody states otherwise.

One important rule, in 1902, was adopted. Rule XIX was amended by inserting at the beginning of clause No. 2 the following:

> No Senator in debate shall, directly or indirectly, by any form of words impute to another Senator or to other Senators any conduct or motive unworthy or unbecoming a Senator.

I can't think of any imputing of any conduct or motive more unworthy to a United States Senator than the violation of the U.S. Constitution, violation of the Constitution that we each took the oath of office to uphold. To do so without basis in fact is just beyond the pale.

The Senator from Mississippi, the chairman from Mississippi, earlier today said he had his disagreements, he thought we should review these matters in the Rules Committee. I laud him for saying so. He doesn't have to agree with what we are doing. He has every right to disagree and he has every right as the chairman of the committee to go through that process and I welcome the opportunity for him to bring in constitutional scholars, the

Congressional Research Service, the Library of Congress authorities, and go through all this and consider other questions about whether the minority should be able to hold up the nominations of some 60 nominees of a President of the other party when they are in the majority; as the Senator from Florida suggested, whether these should be lifetime appointments. By the time he passed away, Thomas Jefferson was opining that they should not be, to the Federal judiciary.

Let's get the facts. Let's ask the Library of Congress, the Congressional Research Service, to tell us if this is wrong. It's on their stationery that up until 1917, when the Senate first adopted a cloture rule, until 1949, I read directly:

> . . . cloture could be moved only on legislative measures and nominations could not be subjected to cloture attempts.

But then the Senate rule was changed, by the Senate. Following the rules and procedures of Senate they changed it so these steps could be taken with regard to nominations.

I am on page 3, reading again exactly:

> Even after Senate rules began to permit cloture on nominations, cloture was sought not until 1968 on a motion to proceed to consider the nomination of Justice Abe Fortas which was debated at length.

Moving ahead:

> Cloture was sought on no other nomination until 1980. Subsequent to 1980, of the 12 nominations on which cloture occurred during the 103d Congress, ten were for executive branch positions except in that Congress most nominations on which cloture had been sought have been to judicial positions.

They have a table which says between 1967 and 2002 on judicial nominations cloture was invoked by the Senate 11 times; cloture was not invoked 6 times. Executive branch nominations, cloture was invoked 10 times, not 8 times.

It is pretty easy to get this information. If somebody thinks they are just making it up, they are wrong. They should make that case. But otherwise people are making up misrepresentations and misinformation. It is outright false. They are doing a great disservice to this body and to the credibility we all strive to maintain.

One of our predecessors from Minnesota, a man I worked for back in 1975 as a legislative aide, Walter Mondale, former attorney general of Minnesota, served for 11 years as a Senator. He said one of his proudest accomplishments was modifying the procedures under rule XX from two-thirds to three-fifths of Senators. On behalf of the change, Senator Mondale said at the time as sponsor of this resolution the proposal was a reasonable accommodation of the right to debate and the right to decide. We believe this might be harmonized in such a way as to protect action.

Anybody in this body has a perfect right to disagree with that statement by Senator Mondale with the actions of the majority of his colleagues in that session to make this modification and to leave this rule as it essentially is today. But to just imply it is a violation of the rules in what we are doing—implying we disrespect the body and the purpose of the established procedures and upholding the best interests of this country for 216 years—by people who have been here less than a year themselves I think is an abomination. Then to go beyond that and say we are in violation of our oath to uphold the Constitution of the United States is I think a disgrace.

I yield to my colleague from New Jersey the balance of our time.

The PRESIDING OFFICER. The Senator from New Jersey.

Mr. LAUTENBERG. Mr. President, I thank the Senator from Minnesota. It is obvious he is outraged at the triviality that is being thrown out here about how we are violating our oath and violating our standards.

Think about this. We are now in the 32nd hour of this talkathon on judicial nominations, brought to you by the Republican Party. I guess the first 30 hours were so successful they decided to extend the hours. But instead of helping anyone promoting a good cause, Republicans are using this staged event to push for job applicants who are unfit to take the job. They are unfit, they are unqualified, they have shown they are likely to abuse their authority as circuit court judges who advance an extreme rightwing agenda and not in the best interests of America.

The Republicans so desperately wanted this talkathon to be a made-for-television movie they attempted to coordinate their efforts with FOX News, the providers of fair and balanced Republican television. It comes from the distinguished majority leader's office, one of his staff people. It says: ''It is important to double your efforts to get your boss to S. 230 on time. FOX News channel is really excited about this marathon. Brit Hume at 6 would love to open with all of our 51 Senators walking onto the floor. The producer wants to know we will walk in exactly at 6:02 when the show starts so they can get it live to open Brit Hume's show. If not, can we give them an exact time for the walk in start?''

That hardly sounds like a sincere effort to me to get something done.

I hear the outrage about how we are playing politics on this side. What is this? If that is not raw production, I have never seen it. Line up. I wonder if the suit colors and ties were described at the same time. It is good to see a bunch of penguins walking down here 51 deep.

FOX News presents—it says 30 hours. They made a mistake. They didn't know how enjoyable this was, that we were going to go on with this.

The passions are so high there are things said that are just not accurate.

I point to this hallowed document, Senate Manual, which talks about the Constitution of the United States. It is part of the book. It talks about the powers of the President. He ''shall have power by and with the advice and consent of the Senate to make treaties et cetera and with the advice and consent of the Senate shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court and all other officers of United States.''

Advise and consent—it doesn't say consent and advise. It doesn't say just approve them and we will talk about it later. We are maintaining our responsibility to the Constitution to a ''t''. It is our friends who want to ride roughshod over it and perhaps maybe find another way to curtail the appropriate dissent of the minority as has been evidenced so many times in the past.

I think about what is going on here after a visit I made yesterday along with others to Walter Reed Hospital, and I met a young man there. I knew he was in a ward in an area—a single room but in an area where the amputees are cared for. I didn't want to really inspect him with my eyes. I reached out my hand to shake his hand, and I wound up feeling a cloth and nothing in the cloth. His hand was missing. On the other side his arm was missing. He is about 23 years old, full of life. My guess is 23. I know he is young. He was positive and said, I am going to get on with this. We had the good fortune to have former Senator Max Cleland from Georgia who lost three limbs in Vietnam and was made out to be unpatriotic in the last election. Figure that one out. But he had the good judgment to ride in there in his wheelchair and look at this young fellow who had been, by the way, 3 weeks in Iraq, and about 4 months in the Reserve; no hand on either side, and no arm on one side. He told this young man, Have courage. There is life for you. And then he gets visited by Danny Inouye, Congressional Medal of Honor winner, missing an arm. He comes in to say to this young fellow, There is life out there. You can accomplish something.

And here we stand on this nonsense. Why aren't we talking about what the problems are in Iraq and how we solve them?

Let me read to my friends on the Republican side what a very distinguished Republican Senator said, John McCain. Few had his experience in military matters in a war. He said:

> The Pentagon's proposed withdrawal of U.S. troops in Iraq would be an irrational move. ''If anything,'' said McCain, a senior member of the Senate Armed Services Committee and an outspoken critic of the administration's postwar policies in Iraq, ''the United States needs to increase its troop presence in Iraq, specifically special forces and Arabic-speaking intelligence officers. The attacks are up. The wounded Americans are up. Killed Americans are up, and the Pentagon announced a withdrawal or decrease in the number of American troops. It is not reasonable or rationale,'' says John McCain.

I agree with him. Why aren't we discussing that? Why aren't we having a marathon, 30-hour marathon, and talking about the war, talking about what

is going on and talking about what we do to make it easier on those to make them safer, and send the 10,000 or 20,000 additional troops John McCain says are necessary and I believe are necessary? I am no military expert. I spent 3 years in the Army. I was a corporal during World War II. But I know we need more there. We have to help our troops.

Do not talk about whether we are violating the Constitution. Where is your oath? Is it in your heart? It is the process we are talking about. Go to the Supreme Court and have a great trip. We will escort you there. Take and read the Constitution—just like you can, just like I can. Forgive me—just like the Senator from South Carolina can.

That is what we ought to be talking about and not talking in front of the American people about the process and about how fair we have to be with judges we think are unfit and we are going to talk about it. Just as we were threatened by the debate that went on, we are not going to go away, as I heard the Senator from South Carolina say. We are going to stay here. We are going to do this, and I am going to the Supreme Court. Have a good visit. The fact of the matter is it is very clear what our responsibilities are.

I talked about my trip yesterday to Walter Reed. On Monday, I made a trip to the Sacred Heart Cathedral in Newark and watched a young man who was on a Chinook helicopter. By the way, the fellow I saw in Walter Reed was not the American amputee. The other fellow, burned, broken bones all over his body, he was in the Chinook helicopter also. It wasn't many days ago this fate befell them, and they were already in the hospital here.

But Sergeant Joe Parez—25 years old, wife, little baby girl, mother, father, brothers—was buried at the Cathedral in Newark. He was one of the 16 who perished when the Chinook helicopter went down.

We had a brief moment of conversation. I said we would try to be of help to the widow and the family. She is a very young woman totally overcome by the loss of her husband.

This was a week for me that brought home reality. I saw it when I served in Europe during World War II, and I saw it here, and I saw it when I went to the hospital that took care of Vietnam veterans.

There is a price, a terrible price people are being asked to pay. They are there. They are worried about their families. They are worried about their jobs. They are worried about this country. They are worried about how they are going to adjust back into society after being away too long. We are stretching this rubberband so tight. We have reservists who signed up for duty that included weekends and a couple of weeks a year out in field exercises. Their job primarily was to be there in the case of emergency, floods, natural disasters, riots, those kinds of things that happen. But we do not talk about those. As a matter of fact, what has happened here I find quite shocking is there is a deliberate attempt by this administration to conceal the fact that these dead guys are coming home in caskets, and they deserve the honor of being acknowledged and not hidden off in some obscure air terminal and shipped quietly in trucks to get them out of the way. Stand up, Mr. President, and stand up, my friends on the Republican side, and demand we have an inquiry about this instead of fooling around with 30 hours here to prove nothing.

The Constitution tells you how it goes. Read it. Read it and tell the truth to the American public. Stop talking about politics because that is exactly what you are doing. You think the TV perhaps is going to get your brave message out to the rest of the country. Yes. Our heroes stood up and they stood up for a process. The rate, I think, is something like $80,000 an hour it costs to put on this not very good circus, I would say.

I say to the critics on the other side, stand up, talk about things that affect people, tell us how we are going to get out of Iraq without losing more of our young people. We are over 400,000. There are far more casualties than we had in gulf war 1.

I managed to be the first legislator to be there in 1990. We had 540,000 people on the ground and we lost far fewer than we have lost in Iraq II. Why? Maybe we were better prepared. Why? Maybe we had enough people to make sure they couldn't maraud our troops and our units there and decimate them, and not only break their lives but break the hearts of the Americans across the country because they do not understand what is happening.

This is a colossal waste of time. Face up to it. The minority disagrees with the selection. You have seen the statistics—168 to 4. I think the number is a very small percentage of those who have been challenged. More judges have been confirmed in this Senate than we saw in the entire years of the Clinton administration. We have done our job, and we have done it well. Tempers fly high. I think they ought to. I don't like losing my temper. But I dislike losing my mind.

That is what is happening here. This is a loss of purpose. This is raw politics. To call it anything else is unfair and false. The Constitution says advise and consent. It doesn't say consent and advise. It says nothing in the Constitution, no matter how many attributions, that we have to lay down and simply accept what the President sends down. There are checks and balances, just as a reminder, in case one doesn't understand that. This is a perfect example of what it is about.

No, we will not accept people who we think are unfit. This has not been an unreasonable Senate. We have done what we have to. We have watched appropriations bills language all over the place. We have seen there is hardly a serious long day of work to get the job done. But this falsely heroic effort to make a difference in the way our society functions is I think see-through politics. I think it is obvious what we are watching—someone called it theater. I call it a circus. It is not fair to the people we serve.

I hope we will be able to get on with the business of the people soon. We have our votes tomorrow morning. I would like to see us turn to the war in Iraq and have a serious debate about it and hear from the high-posted officials, the Secretary of Defense, the National Security Adviser.

I was at a briefing today. I don't know whether any of the other Senators here were in the room. It was a relatively junior staff presentation. The news didn't particularly have much insight attached to it. But we went to try to find out.

We ought to make a pledge right now that we will do another 30 hours, maybe start tomorrow night and talk about the Iraq war, talk about our people, talk about how we are going to get them home and talk about how we are going to end it; talk about how we are going to justify to the American people why we are spending $20 billion for the reconstruction of Iraq but we can't rebuild schoolhouses filled with asbestos or otherwise.

The PRESIDING OFFICER. The minority's time is expired.

Mr. LAUTENBERG. I yield the floor.

Mr. GRAHAM of South Carolina. Mr. President, I thank Senator LAUTENBERG for his services to this country. Serving in World War II is a big deal no matter your rank. My dad was a corporal, too. If you think it is a waste of time, have your say. This is a huge deal. The Democratic leadership and the members of the Democratic Party have set in motion something I don't know how to stop. I had a chart that says in the last 11 Presidencies we had 2,372 people confirmed and not one person filibustered. You decided to do something different. It bothers me as much as our response bothers you. The people being filibustered are very qualified people, in my opinion, and you certainly have your right to disagree.

I don't believe the Constitution gives the minority of the Senate the right to advise and consent. We have 214 years of history where the advice and consent clause has been the Senate speaking as a majority. What hurts the most about the filibusters, which are unprecedented and are harmful to the country, is every nominee that is being filibustered by our friends on the other side has enough votes to become a judge. Literally a minority of Senators have taken it upon themselves for the first time in the history of the country to make sure a majority of the Senate cannot vote to confirm a judge by using a rule of the Senate.

I would like the Supreme Court to hear that case because I don't know of any other way to make this go forward.

Chances are the Supreme Court may very well say this is not something we decide because you are the Senate. We are the Court. These rules are your rules. They may well say that, but I feel a need to push this as far as you can to get an answer and try to move on and have a better future.

The future of the Senate when it comes to judges is going to be lousy. We have four filibusters going on with another seven or eight to come. But if we behave with each other like this, we will have hundreds before long. As time marches on, we will have a lot of people caught in this vise.

Senator COLEMAN from Minnesota made a great point, I thought. Justice Ginsburg would not have a prayer because she has a liberal view of the law and a lot of people on this side voted against her. But they voted and she won the day. Justice Scalia is vilified by the left. He would never have a shot. A lot of people on the Democrat side voted against him. But he won the day and he is sitting on the Court. That is the strength of the Nation. When you have someone like Ginsburg and Scalia in a room having to talk to each other trying to find a way to move forward in terms of judges, it is going to be very disappointing because good people are not going to put themselves through this.

Justice Brown will be filibustered just as sure as I am standing here. She is an African American who sits on the Supreme Court of California. She has authored more majority opinions in California than any other justice. I gave a rundown a while ago about her story coming from a sharecropper family in Greenville, AL, going all the way to the Supreme Court in California, getting 76 percent of the vote in her last election. And you have to vote on judges in California. My argument is that no one would get 76 percent of the vote in California if they were the rightwing ideologue that the other side is describing.

I am not here to convince Members that I am right. I am here to set the record straight in terms of why I believe President Bush picked a good person. If you disagree, vote against her. Don't allow the Constitution to be changed in the way you are doing because you are putting the country in constitutional and political quicksand. Members will regret it down the road. I know the country will regret it.

Now, there is politics going on here. I will put a human face on this. Justice Brown has had a pretty rough time of it in committee. She has been very successful with her career in California. She has been successful in every endeavor she has engaged in, serving in a variety of capacities to the point that people want to promote her and the three-fourths of the citizens of her State think she has done a great job. But she comes to the Senate and she runs into a buzz saw because she is conservative. Apparently that is a crime.

This is a cartoon by the Black Commentator, a paper. The first amendment allows people to talk about public figures. This is just a little bit of what it is like to be in the environment our friends on the other side have created. This cartoon has ''Welcome to the Federal Bench, Ms. Clarence, I mean, Ms. Rogers Brown. You'll fit right in.''

And it is a caricature of President Bush and a racial stereotype, an offensive drawing, of Miss Brown. The people in the choir are clapping, as Justice Clarence Thomas—a very distorted picture which is offensive, I think—Colin Powell, African American, Secretary of State, a great general and somebody I admire, and Condoleezza Rice, our national security adviser, another African American who I think will help us do a good job in Iraq. This has been a miserable experience for this lady. I am very sorry she has had to go through this.

Over 50 percent of the Senate will vote for her when the cloture vote comes. Pickering, Owens, Pryor, all have received over 50 votes but we cannot get to passage because the filibuster rule requires us to get 60 votes. Therein is my problem. The Constitution does not require 60 votes to confirm a judge. There are several places where two-thirds are required. The Constitution says you will advise and consent by majority vote in the Senate.

They are using a procedural device, the Democratic Party is in this case, to block a vote on what I think are well-qualified people. No one else in the history of the country has done this before, Republican or Democrat. This is the first time someone has come out of the Judiciary Committee with a majority vote who cannot receive an up-or-down vote. There are four of them with a bunch more to come.

I give no apology for wanting to try to do something about this because, as sure as we are all here tonight, there will be a Democratic President come later on and that person will make a recommendation to this body, a nomination to this body, and if we do not change the way this trend is going, it will be a miserable experience. We will get bogged down and we will never be able to move forward as the Constitution has envisioned. This has worked well for 214 years. This is not time to change it.

Senator LAUTENBERG was right, there is a political dynamic going on here. I am sure Republicans have been abusive in the past in terms of the way the judges have been treated. I have heard a lot about that. Like Senator COLEMAN, I am new to the Senate. I would rather not perpetuate that problem. I would like to be someone who solved that problem.

We have some quotes from the past that I will read quickly. Senator LEAHY, the ranking member of the Judiciary Committee, said in 1998: I stated over and over again on this floor that I would refuse to put an anonymous hold on any judge—that is a way of keeping a judge coming through the committee—that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported, that I felt the Senate should do its duty. If we don't like somebody the President nominates, vote him or her down.

Very wise advice. We are not doing that at all. I don't know why we changed but we have.

Senator LEAHY, 1998: I cannot recall a judicial nomination being successfully filibustered. I do recall earlier this year when the Republican chairman of the Judiciary Committee and I noted how improper it would be to filibuster a judicial nomination.

I will read before the night is over many statements in the past where our Democratic colleagues were absolutely against the idea of doing anything other than giving a person an up-or-down vote. That has changed in an unhealthy way.

E-mails were talked about before. Let me read an e-mail that I think says a lot. This came from Senator CORZINE, the chairman of the Democratic Senatorial Campaign Committee, November 3, 2003, not very long ago, and it was sent out to raise money. I am sure we have sent e-mails and letters saying: Help us. The Democrats are destroying all of President Bush's nominations. That is the political environment we have gotten ourselves into. Like Senator COLEMAN, I would rather not perpetuate this. I would like to end it and move on and get it right.

Based on the prior statements of Senator LEAHY and others that we will read later on, they have changed for some reason. Now they are going into the past and saying, we are doing this because you did that. Where does this end? The truth is, no one has done what they are doing now. That is just a fact.

From the e-mail:

> Senate Democrats have launched an unprecedented effort.

I will stop right there. I think that is a true statement. I don't believe Senator CORZINE is misleading the donor population. I think he is trying to tell them, folks, we are doing something nobody else has done before. This is unprecedented. You need to pay attention. You need to look at your Democratic Senators, pay attention to what we are doing, because we are taking a step no one has ever taken before. What is that step?

> By mounting filibusters against the Bush Administration's most radical nominees, Senate Democrats have led the effort to save our courts.

This e-mail is designed, quite simply, to let people in the Democratic Party know that the Senate Democrats have done something different, something unprecedented, and they are filibustering the President's nominees because they are radical. You cannot send this e-mail out to collect money and spend 32 hours denying you are filibustering anybody. You are filibustering judges in an unprecedented way.

And they are the Bush administration's nominees. The question is whether or not they are radical.

If you think they are radical, vote against them. I don't believe Justice Brown is radical. I don't think 76 percent of the people in California who have voted would have voted for her if she was radical. I think the attacks against her have been radical. But that is just my opinion.

This e-mail clearly establishes the fact that the Democratic Party has made a calculated effort in the Senate wing of the Democratic Party to do something different, to stand up against President Bush. They are blinded by the political moment. If we continue down this road, there will be more e-mails such as this on both sides of the aisle and it will be a disaster for the Constitution.

There are men and women serving in Iraq. There are people putting their lives at stake for this country. God bless them. We all did take an oath. They have their opinion and I have my opinion about what the oath means. But it will not withstand the filibustering of these nominees. It would be irresponsible on my part, given what I believe my oath is, to just let this go and make like it is no big deal because I think this is a huge deal.

I yield to the Senator from Minnesota.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. COLEMAN. Mr. President, following up on the comments of my friend and colleague from South Carolina, you have to ask yourself, 214 years and the Senate has not done this, has not stopped a judicial circuit court nominee by filibuster. That is a fact. My colleagues on the other side can argue with charts but that is the reality.

You have to ask yourself, for 214 years was the Senate a rubberstamp for the President? I don't think so. I don't think anyone could make that argument. What you have is the reality that the Senate was exercising its constitutional responsibility. And doing it in a constitutionally responsible way.

That is what is important, doing it with respect for the Constitution, respect for the authority of the President to set forth the nominee, respect for the obligations upon the Senate to advise and consent, by a majority vote. Again, the Constitution, article II, says treaties need a supermajority, not a simple majority vote. What we have here is the minority saying we are not living by majority votes when it comes to judicial nominees regardless of what is in the Constitution. That is unfortunate. It is more than unfortunate. It undermines the principles upon which this democracy is based.

My colleague from Minnesota, the senior Senator from Minnesota, talked about this not being unprecedented. We have done it before.

Here are the facts. This is a listing of judicial nominations subject to cloture attempts from 1968 to 2003. I will go through every one of them. The first one is Abe Fortas, Chief Justice. Cloture was rejected. I will come back to whether that was even a filibuster. That was not a partisan filibuster. In fact, it was a bipartisan effort because of ethic complaints about Fortas but it was not a partisan filibuster.

A letter was sent to JOHN CORNYN, chairman of the Subcommittee on the Constitution from the former Senator from Michigan, a predecessor of my colleague, Mr. LEVIN, who is sitting there, talking about the Fortas nomination and basically saying that it was not a filibuster.

What happened, in a letter he says, while a few Senators might have contemplated use of the filibuster, there was no Republican Party position that it should be employed. Indeed, the Republican leader of the Senate, Everett Dirksen, publicly expressed his support for the Fortas nomination shortly after the President announced his choice. Our position in 1968 to the Fortas nomination was not partisan. Some Republicans supported Fortas; some Democrats opposed him.

Go through every listing on this chart. Outcome of cloture attempt, may have been rejected, may have been invoked, may have been withdrawn, but every nominee got a vote. That is what this is about. Vote them up or vote them down but give a vote.

We have a minority for the first time in the history of this body basically saying, regardless of what is in the Constitution, regardless of the language of the Constitution that makes it clear that the advice and consent is based on majority, they are changing the rules of the game. The argument is that these candidates, these nominees are outside the mainstream.

What is the mainstream? Who is the mainstream? Priscilla Owen received 84 percent of the vote in the last election for the Texas Supreme Court.

I have to tell you, I would love to see an 84 percent in any election. Just about anybody in this body would love to see 84 percent. They would tell you that is mainstream. That is mainstream. That is the ''wholestream.'' What is left is extreme. And that is what you have.

Bill Pryor, 59 percent in his last election for Alabama Attorney General—59 percent.

Janice Rogers Brown received 76 percent in her last election to the California Supreme Court.

I would note one of the Senators from California, Mrs. BOXER, received 53 percent. Who represents the mainstream in California? Seventy-six percent of the vote. The other Senator from California, Mrs. FEINSTEIN, by the way, former mayor of San Francisco—I am a former mayor. I have great respect and appreciation for mayors. It is a tough job. She is a great Senator. I do not always agree with her, but she is a great Senator. She got 56 percent of the vote. Janice Rogers Brown, who supposedly is the extreme, got 76 percent in her last election for the California Supreme Court. That is mainstream, not extreme.

Charles Pickering was confirmed to the Federal district court in 1990 by this body by unanimous consent. What that means is no one objected; everybody agreed. And today he is described as extreme?

If I could go through some of the candidates, Priscilla Owen—a whole bunch of these nominees are out of the mainstream? I am not sure what they are talking about. She has served in the State of Texas on the highest court. She has been given the support of 15 past presidents of the State Bar of Texas, a bipartisan group. We are talking about the folks who know them best.

Justice Owen was unanimously rated as well qualified by the American Bar Association. Apparently, this unanimous rating of the American Bar Association is out of the mainstream as well. I would submit, by the way, the American Bar Association is not a conservative interest group. I do not know who the members are, but I have to guess it is a bipartisan group. I have to guess there are some Democrats in that group.

It is clear the so-called mainstream being portrayed by some in this body is not only an incorrect reflection of the average American but a single-issue extreme which flows only in the direction of special interest groups. That is really what this is about.

You have to go through the records of these folks. I went to law school. Senator GRAHAM went to law school. I went to the University of Iowa, did fairly well, and served 17 years in the attorney general's office, and solicitor general, chief prosecutor of the State of Minnesota. But you would love to have the qualifications and credentials of the folks here, the folks the President has nominated. These are quality, quality, quality folks.

Then you read the statements of some of their supporters. Mary Sean O'Reilly, lifetime member of the NAACP and a Democrat:

> I met Justice Owen in January, 1995, while working with her on the Supreme Court of Texas Gender Neutral Task Force. . . . I worked with Justice Owen on Family Law 2000, an important state-wide effort, initiated in great part by Justice Owen. . . . In the almost eight years I have known Justice Owen, she has always been refined, approachable, even tempered and intellectually honest.

That is what you want from a judge. That is what you want from a judge. You do not want fidelity on a single issue. What you want is the judge to be tempered, to be intellectually honest, to apply their best judgment, to interpret the Constitution.

Raul Gonzalez, former Democratic justice on the Supreme Court of Texas. In Texas they elect their justices. In the elections, Democrats run, Republicans run. Senator CORNYN, one of our colleagues, also elected with us, is a

former member of the Texas Supreme Court, former attorney general.

Raul Gonzalez, former Democratic justice on the Supreme Court of Texas:

I found her to be apolitical, extremely bright, diligent in her work, and of the highest integrity. I recommend her for confirmation without reservation.

John L. Hill, former Democratic chief justice on the Supreme Court of Texas:

After years of closely observing Justice Owen's work, I can assert with confidence that her approach to judicial decision-making is restrained, that her opinions are fair and well reasoned, and that her integrity is beyond reproach.

That is what it is about: integrity beyond approach, opinions that are fair, well reasoned. That is what you look for in judges. You cannot allow a minority of folks in this body to toss about the label mainstream, fueled by folks with special interests. They are kind of pounding the drum, and people follow that drum.

But you have to ask, who is in the mainstream? Folks who get overwhelmingly elected by the people of their State, who receive bipartisan support.

Another former Democratic justice on the Supreme Court of Texas, Jack Hightower:

I am a Democrat and my political philosophy is Democratic, but I have tried very hard not to let preconceived philosophy influence my decision on matters before the court. I believe that Justice Owen has done the same.

That is what you want. The reality is, judges are people. They have heart and soul like everyone else. If you are a defendant in front of them, you may worry about that. But they are people. They bring a life experience. They bring a perspective. They bring a philosophy. You cannot divorce that. You do not divorce that. Some may have been active in politics. There is no question about that. They bring positions on issues. They are not issue neutral. They have not been lobotomized. They bring a life experience and perspective.

What we ask of them is to do what these folks—their colleagues, by the way, are from a different political perspective—say they do. We look to their ability to be well reasoned. We look to their ability to have integrity. We look at their ability to put aside the preconceived notions and simply say they will examine each case on the facts, and apply the law, the law that is done by—yes, that is what we do. That is what legislators do. That is what you are looking for.

Former law clerk of Justice Owen, Lori Plager:

During my time with her, I developed a deep and abiding respect for her abilities, her work ethic, and, most importantly, her character. Justice Owen is a woman of integrity who has a profound respect for the rule of law and our legal system.

That is what it is about: respect for the law and the legal system. To be described as extreme, when you have this body of opinion of folks who know you, who have worked with you, who have been your colleagues, who sit side by side, who have watched you process and reason, and then to render judgments, when they are willing to put aside their political predisposition—and what we are asking for is our colleagues to put aside the politicization of this process, put aside what we have done. Do not go back on a history of 200 years. We have not allowed this to happen on the floor of this Senate. We have not rejected judges on the floor of this Senate by virtue of filibuster for 214 years.

Hector De Leon, past president of Legal Aid:

As the immediate past president of Legal Aid of Central Texas, it is of particular significance to me that Justice Owen has served as the liaison from the Texas Supreme Court to statewide committees regarding legal services to the poor and pro bono legal services. Undoubtedly, Justice Owen has an understanding of and a commitment to the availability of legal services to those who are disadvantaged and unable to pay for such legal services. It is that type of insight and empathy that Justice Owen will bring to the Fifth Circuit.

That is what you are looking for. You cannot do any better than that. Do not allow folks to wave a flag and say ''extreme'' when you have folks who in their own community, overwhelmingly—overwhelmingly—voted, reelected her to the Supreme Court of Texas in overwhelming numbers, and her colleagues coming forth and saying: Hey, this is a woman who is right. This is a woman who is talented. This is a woman who will not put the life experience she brings, perhaps preconceptions about issues—you have folks saying she will do what judges need to do. That is what it is about.

Before the night is over, we will talk about others. We will talk about Bill Pryor. We will talk about Judge Kuhl. We will talk about Miguel Estrada, who has withdrawn. We will talk about Judge Pickering.

But the common denominator in all of these, what the President has done is he has exercised his authority under the Constitution to nominate people who have integrity, who have the qualifications, who have the support of those with whom they have worked, and who, in many cases, when they have had to go before the people of their State, have been overwhelmingly endorsed as being part of the mainstream, not the extreme.

The PRESIDING OFFICER. The Senate majority's time has expired.

The Senator from Michigan.

Mr. LEVIN. Mr. President, how I wish we could take a week's worth of time to debate the issues which are of some critical importance to the people of my State; namely, the loss of manufacturing jobs and the problems we have in Iraq. These issues, the economy in general, job loss in particular, and loss of our troops abroad dominate the minds and the hearts of my constituents.

But the majority has the power to take the Senate on a fruitless cruise. That is what we are about: rehashing the merits and demerits of 4 of the 172 candidates who we have voted on in this Senate. I know these numbers are numbers which are very troubling to the majority. I can tell that by the fact they have attempted to come back with a whole bunch of other numbers.

When this debate is over, when the dust is settled, what I think most people will remember, at least in terms of the calls to my office, is, Is this Senate being tied up, night after night, with complaints that 4 of 172 judges have not been confirmed.

Mr. President, 168 is a number now which is impressed on the minds of people who have watched this debate and heard this debate. The number four is a number which people now understand. Maybe the 98 percent confirmation rate is not quite at the same level as these 2 numbers, but those numbers—168 of President Bush's nominees confirmed by this Senate, 4 have not been confirmed by this Senate—those 2 numbers are very much emblazoned in the minds of people across this country.

In rejecting these four, the Senate has exercised its advise and consent function according to our rules. It has carried out the checks and balances role according to the Constitution that gives us a check and a balance, according to the rules of the Senate.

I want to go back a little bit in history. We have heard quite a bit tonight that this is the first time a filibuster has been used against a judge on the floor of the Senate. I will get into this in a little more detail. I hope to have a little time to talk about the economy and manufacturing job loss, and other things which are very much on the minds of my constituents.

But since the majority has decided to set aside this time, mainly to debate the fact that only 98 percent of the judges who have come before us have been confirmed, and have now suggested, over and over and over again, that filibusters have never been used relative to judges, this is the New York Times headline of September 25, 1968 relative to Abe Fortas: ''Critics Of Fortas Begin Filibuster. . . .'' This is what the Senate Web site says about that filibuster. This is not a Democratic Web site. This is the Senate Web site for the date October 1, 1968: ''Filibuster Derails Supreme Court Appointment.'' That is a Senate Web site.

Folks on the other side, our colleagues on the other side, are saying: Well, what about circuit court nominees? We sometimes hear those words put in there when the statement is made that filibusters have not been used to derail judicial nominees. Sometimes the words ''circuit court nominees'' are put in there instead of ''judicial nominees,'' sometimes the words ''circuit court'' are left out, sometimes they are included.

If circuit court nominees have not been derailed by filibuster, it is not for

a lack of trying. The complaint of our colleagues on the Republican side, it seems to me, more accurately would be: Well, we have tried filibusters many times, but we have not succeeded. You folks are succeeding.

That is the complaint when you strip away the rhetoric and look at the reality. If filibusters have not succeeded in derailing circuit court nominees of Democratic Presidents by Republican Senators, it is not for lack of trying. Because the effort was made over and over and over again with Clinton circuit court nominees. The difference is, the filibuster effort did not succeed because the supermajority, which was required during those filibusters, was achieved for those circuit court nominees. That is the difference.

This is not at all unprecedented. This use of extended debate requiring a cloture vote on judicial nominees has been used repeatedly. It has not succeeded repeatedly, but it has been used repeatedly.

One of our Republican colleagues, during a debate on a nominee—this is not a judicial nominee, but this is a nominee which is subject to this exact same language of the Constitution about advise and consent as our judicial nominees are—when a Clinton nominee to be Ambassador was before us, and there was a filibuster underway and that nomination was blocked, this is what one of our colleagues said. Now this was in 1994, and the Senate was controlled by Democrats. The White House was controlled by Democrats. The House of Representatives was still controlled by Democrats. Our Republican colleague here in the Senate was pointing out the only power that was left to Republicans was the use of a filibuster and forcing a cloture vote. And I emphasize, this is on a nominee who had exactly the same rights or lack thereof to an up-or-down vote as a judicial nominee because the nomination is governed by the same advise and consent clause of the Constitution as our judicial nominees. Here is what our colleague said:

> In considering the nomination of Mr. Samuel Brown to be Ambassador . . . I have reflected on the latitude which ought to be accorded the President in making this decision for the Ambassadorship, reflecting as well on the constitutional responsibility of the Senate for advice and consent as a check. I am troubled by a situation where the only pressure point Republicans have in the U.S. Government is on cloture. Once cloture is obtained, there are more than enough votes on the other side of the aisle to cover the day. While the House is not involved in this matter, the House is overwhelmingly Democratic. There is a Democrat in the White House. The only place that Republicans can assert any effective, decisive action is by stopping somebody from coming up. We have 44 votes and we have more than enough, if there is unity among the Republicans, to do that. I think Mr. Brown's nomination and the responsibilities of the Conference on Security and Cooperation in Europe are sufficiently important to preclude his nomination.

That is what our Republican colleague said in 1994:

> The only place that Republicans can assert any effective, decisive action is by stopping somebody from coming up. We have 44 votes.

That has been the case not just with ambassadorial nominations but with other nominations subject to the advice and consent clause. The only difference with the circuit court nominees of President Clinton, for instance, who were filibustered is that there was not a supermajority to stop the confirmation of the judges. That is not a distinction which I would think the Republicans in this debate would want to emphasize, but it is a distinction in fact.

Mr. President, 168 of this President's nominees have passed the test; 4 have not. When the filibuster has been used relative to those four, the rules of the Senate which provide for that to occur, and there was not a supermajority, then those nominees have not been confirmed.

What is at stake here is the functioning of the Senate as a check and a balance on executive power. Our Republican colleague who spoke that way in 1994 was exactly right. He was using the rules of the Senate in a totally appropriate way and saying that the only way we can stop this, the only way the minority has a voice, if we feel so deeply that there are 41 or more of us who wish to stop this nominee from being confirmed, we must use the filibuster, and we must force a cloture vote. Checks and balances are what are at stake here. The historic role of the Senate is what is at stake here.

Then-Senator Lyndon Johnson, in March of 1949, said the following relative to these checks and balances:

> A man elevated to the Office of the President has virtually unlimited powers of influence over his country. His own personality is a force of great impact upon all the people of the Nation and, in fact, upon the people of the world. Add to those powers directly all those less conspicuous powers of his aides, his administrative agencies and the multitude of channels which feel his influence, and you have a force no other representative government has even trusted for long to one man.
>
> If on occasion you grant to this titular head of government the further intoxicant of an overwhelming majority of loyal supporters in the legislative branch, then you have a force well nigh irresistible. The distinctions between legislative and executive are difficult to preserve under such circumstances. Mere memorandums become laws and laws become mere memorandums. In such a situation, which happily is more hypothetical than historical, the entire theory of our Government system of checks and balances dissolves and evaporates. The right to check and balance was not granted to the majority because a majority rarely seeks control over itself. Those rights were conceived and installed in the Constitution solely as safeguards for the minority.

He said:

> I am no historian, but as I have studied the history of governments gone before us, I have been impressed by the fact that the freedom of unlimited debate in legislative chambers has been given up many times by members themselves who are irritated or frustrated by a minority. But so far as I have found, once that freedom was yielded, it has never been returned. If we now give up this freedom in the Senate, I, for one, do not expect to live to see its return.

Much has been stated here about filibusters on the floor of the Senate. Too little has been said about stealth filibusters which occur in committee. Political scientist Sheldon Goldman of the University of Massachusetts, who is a neutral observer of the process, said the following in a Los Angeles Times article on November 6:

> The Bush administration has been spectacularly successful in getting the overwhelming proportion of its judicial nominations confirmed. There are only a relative handful being filibustered and held up, and this contrasts with the dozens of Clinton nominees who were held up by the Republicans in the last 6 years of the Clinton administration.

Professor Goldman expressed it this way:

> The Republicans obstructed quietly in the committee. If they didn't want to approve you, you just didn't get a hearing.

Here is one example. Kent Markus was nominated by President Clinton for a seat on the Sixth Circuit. He testified to the Senate Judiciary Committee on May 9, 2002, as follows. To their credit, Republican Senators told him two things.

> There will be no more confirmations to the Sixth Circuit for the Clinton administration.

Two:

> This has nothing to do with you. Don't take it personally. It doesn't matter who the nominee is, what credentials they may have, or what support they may have.

Mr. Markus went on to testify that one Republican Senator told him the following:

> This is bigger than you, and this is bigger than me.

Senator KOHL, who kindly championed his nomination in the Judiciary Committee, encountered a brick wall. The fact was a decision had been made to hold the vacancies and see who won the Presidential election. With a Bush win, all those seats could go to Bush, rather than Clinton nominees.

That is what happened. That is exactly what happened to Kent Markus and his nomination. A hearing was denied to him. A vote was denied to him. And if there is some constitutional right which is being created here on the floor, I assume Kent Markus was denied his constitutional right to a vote, as were the dozens of other nominees of President Clinton who never got a hearing, much less a vote.

I can't believe for one minute that any court, even if it reaches the merits of this case that is going to be brought, would say there is a constitutional right to have your nomination voted on when there are so many ways of blocking a nomination from getting a vote, starting with not having a hearing, starting with not having a markup, starting with not reporting a nomination to the floor, starting on the floor not reaching a vote up or down.

When the Republican Senate denied committee hearings and votes for 63 judicial nominees and more than 200 executive branch nominees, they blocked

a vote on those nominations. That was their right. They may have done the wrong thing in doing so, but they had a right to do so. I wish they hadn't. I wish they had allowed those to come to hearings. At least have a cloture vote, if nothing else, on the floor, but that was not to be.

There are a lot of ways you can have a vote on this floor. One of them is a cloture vote and one of them is a vote up or down. But these 63 judicial nominees never even got to a cloture vote, never even got to see if there could be a supermajority put together for them under our rules on the Senate floor.

It is remarkable to me that our colleagues on the other side of the aisle make the claim that blocking nominees from having an up-or-down vote on the Senate floor is unprecedented, given the actions during the last administration.

Republicans filibustered several Clinton nominees on the floor of the Senate, including Richard Paez, Marsha Berzon, Rosemary Barkett, and H. Lee Sarokin. Cloture votes requiring supermajorities were required to be produced for each of them.

Our colleagues say these nominees were not blocked by a filibuster, which is an artful way of saying that the effort at the filibuster failed. That is very different from saying that the filibuster was not tried. It was. Cloture votes were required but supermajorities were obtained. That is the difference between those Clinton nominees and these four nominees. Here supermajorities have not been obtained. Therein lies the difference. Same cloture votes, same type of cloture votes required, but cloture was invoked for Berzon, Barkett, Paez, and Sarokin. Supermajorities supported those nominations, and the opposition had a right to force those votes. That required a supermajority. They had a right to filibuster, and, in fact, did so.

Two of President Clinton's nominees, not judicial but nominees, still governed by that same advice and consent clause in the Constitution, were defeated by filibusters. One was Henry Foster nominated to be Surgeon General, and the other one was Sam Brown nominated to be ambassador. The argument relative to that nomination was quoted by me at some length a few moments ago where a Republican colleague within his rights using the rules said: We have only to put together 41 Republican Senators and we can block this nomination. It is the only way to block a nomination with which we fervently disagree.

Given the fact that the Democrats didn't control the White House, the Democrats controlled the Senate, our Republican colleague pointed out accurately that the only way to block that nominee was by use of the filibuster. Were his constitutional rights violated? I don't think so. I think he was given consideration by the Senate in the way that the Senate decides to consider nominees, and it can consider nominees in many ways.

It can decide never even to give a nominee a hearing should it choose. I don't think that is a wise course, in most cases, but should the Senate choose not to give a nominee of the President a hearing, that is the Senate's decision. Or after a hearing, if it decides not to have a markup to vote that nominee either out of committee or to defeat that nominee, that is the Senate's decision. Should a chairman, acting alone, decide not to put a name on a markup, that may be that chairman's power.

So the suggestion that requiring a supermajority vote by filibuster is new to the Senate is just simply wrong. We can argue—legitimately argue—and disagree over whether or not the Senate should give up this important check and balance on Presidential power, but we cannot argue, it seems to me, that it is unprecedented in its exercise.

Here are the words of one more of our colleagues during a filibuster of a Clinton nominee on March 3, 2000. During the filibuster of the nomination of Judge Richard Paez to the Ninth Circuit, this is what our colleague said:

> I say to the American people who may be listening right now, judges impact our lives big time in the decisions they make. Citizens complain about violence and the criminals getting out. There are bad judges making bad decisions that cost Americans their liberties, cost them their lives sometimes. That is wrong. We have an obligation in the Senate to take a good hard look at a lifetime appointment to the circuit. The members are there forever, even when they get real old. It is pretty hard to get rid of them. This is a lifetime appointment. We have a responsibility to make darn sure these judges are going to represent the views of a majority of the American people in terms of the law. I intend to do that as long as I can stand here to do it.

He didn't have 39 others or 40 others to stand with him. As a result of that, there was a supermajority for that judge, but it was despite the filibuster. It wasn't that there was no filibuster. It was despite the filibuster which the Republicans had a right to stage and did stage. But most Republicans decided, or at least enough Republicans decided not to continue that filibuster but, rather, to invoke cloture.

To suggest the filibuster has never been used flies right in the face of history and recent history, as well as the history of Abe Fortas.

Historian Robert Caro wrote the Rules Committee of this Senate as follows:

> In short, two centuries of history rebut any suggestion that either the language or the intent of the Constitution prohibits or counsels against the use of extended debate to resist Presidential authority. To the contrary, the Nation's Founders depended on the Senate's members to stand up to a popular and powerful President. In the case of judicial appointments, the Founders specifically mandated the Senate to play an active role, providing both advice and consent to the President. That shared authority was basic to the balance of powers among the branches.

He continued:

> Surrendering such authority is not something which should be done just because of a Senator's point of view on the particular issue of the moment—because much more than the particular issue is involved. What if a Senator—let us say a Senator from a small population state without any other means of defense votes to support a new limitation on debate today. What will he [or she] do in some future year when he is trying to stop a bill or a nomination that a bare majority of the Senate supports, but that he and 40 colleagues believe would be terribly detrimental to their states or to the nation. . . . What will he feel when he suddenly realizes that his right to hold the Senate floor against that action has been so greatly reduced that the bare majority can silence him before he is finished making his case? What will he do when he realizes that, without the right of extended debate his cause is ultimately helpless?

Finally, I ask unanimous consent that the letter from Senator CORZINE, which has been referred to, apparently a fundraising letter, be printed in the RECORD in full because I think the words which were quoted by my friend on the other side had some very critical dots in there, and I think the dots should not have been there. The two sentences should not have been pushed together as though they were one. The document of Senator CORZINE says the following:

> Senate Democrats have launched an unprecedented effort to protect the rights of all Americans by keeping our courts fair and impartial.

That is the unprecedented effort. The next sentence is:

> By mounting filibusters against the Bush Administration's most radical nominees, Senate Democrats have led the effort to save our courts.

The suggestion that the words read ''an unprecedented effort to mount filibusters'' is not an accurate reflection of that letter. The dots which were in the chart, it seems to me, take the place of some very critical words making two sentences look as though it is one sentence.

I ask unanimous consent, just so we can have full disclosure of this letter, that this letter be printed in the RECORD.

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

> Despite the administration's desire to ignore the Constitution's rule of ADVICE and CONSENT, Senate Democrats are holding Republicans accountable.
>
> Why must the Democrats continue their fight against Charles Pickering?
>
> While in law school, Mr. Pickering wrote an article suggesting ways the state of Mississippi could better enforce its ban on interracial marriage.
>
> As a state senator in the 1970's, Mr. Pickering worked to repeal important provisions of the Voter Rights Act.
>
> In 1994, he went out of his way to seek a more lenient sentence for a convicted cross-burner.
>
> Once defeated when Democrats had a majority in the Senate, President Bush nominated Charles Pickering for a second time after the 2002 elections and now two successful filibusters launched by Senate Democrats have kept him off the bench!

The Bush Administration is devoted to using the courts to its political advantage. Time and again, this administration has nominated ultra-conservative candidates who are zealously devoted to advancing corporate interests, taking away reproductive freedom, smashing the wall of separation between church and state, and dismantling equal opportunity.

But the Administration has got a big problem: Senate Democrats. Senate Democrats have launched an unprecedented effort to protect the rights of all Americans by keeping our courts fair and impartial. By mounting filibusters against the Bush Administration's most radical nominees, Senate Democrats have led the effort to save our courts.

Help the Senate Democrats keep fighting. Support the DSCC efforts to help elect more Democrats to the Senate—and keep the proven leaders we have. Help the DSCC send a message to the Bush Administration—Senate Democrats will NOT rubber stamp extremist judicial candidates. Help us fight to maintain judicial integrity by sending more Democrats to the United States Senate in 2004.

Contribute Now!

Sincerely,

Senator JON CORZINE.

Mr. LEVIN. Mr. President, how much time do I have remaining?

The PRESIDING OFFICER (Mr. ALLARD). Forty seconds.

Mr. LEVIN. I thank the Chair and thank my colleagues. I am happy to share with them the feeling that somehow or another hopefully we can find a way some day to get over the place we are at, not just on judges but on all of these nominees.

I look forward to that Supreme Court case which my friends are going to file. I think it would be just fine to have the Supreme Court rule on this issue to clear the air on it. I have great confidence that they will support the right of the Senate.

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

Mr. LEVIN. I yield the floor.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. COLEMAN. Mr. President, I have the greatest respect for my colleague, the Senator from Michigan. He serves as the ranking member on the Subcommittee on Investigations, which I chair, and serves this body as ranking member of Armed Services. He is a credit to this institution.

I disagree with him, however, in his interpretation of the reality of the history of this body. It is very clear that this body has not successfully filibustered a circuit court nominee in its history. The one case that is mentioned again is Abe Fortas.

As I indicated earlier, this was a bipartisan effort. It was not a partisan filibuster. So what we have here on the floor today is the first partisan filibuster, and the purpose is clear. My colleague has said this is the only tool that the minority thinks they have to stop the President from exercising his authority, but I think that he is right when he says the historic role of the Senate is what is at stake here.

I say that because we have to reflect upon how our colleagues who preceded us—by the way, some of them are still here in some of the cases he talked about—what was going through their minds when they were faced with the same circumstances we are faced with today; that is, a group of folks in the majority in many cases who objected to a particular nominee.

We can use the Clinton years as an example. There was a Republican majority for 6 years of President Clinton's term. No judicial nominee, not one judicial nominee, was ever deprived of a vote on the floor of the Senate. That is what we are talking about, a vote on the floor—not one.

My colleague and friend from Michigan made reference to the cases of Marsha Berzon and Richard Paez in the year 2000, Ninth Circuit. Although most Republicans opposed their confirmation—and we heard some of my colleagues earlier tonight. Senator SESSIONS talked about that case. Senator LOTT talked about that case. He was majority leader at the time. They also opposed any effort to prevent the full Senate from voting on their nominations. They did so and they told you it was because of their reverence and respect for the historic role of the Senate. That is what is at stake. That is the principle that has guided us for 214 years before today, before this 108th Congress.

Colleagues had the opportunity to invoke cloture only if the Republican majority said we were to go along, and it was not because, as my colleague from Michigan somehow inferred, that they could not kind of put together the necessary votes to block it. No. What happened is that they were not willing to ignore the history and the tradition, and I think most importantly what the Constitution says, and that is that supermajorities are not required to confirm nominees for circuit courts.

Debate on each of these nominations, Berzon and Paez, lasted only 1 day and a majority of Republicans joined all Democrats in supporting cloture motions for debate on each nomination, including over 20 Republicans who would eventually vote against confirmation and a majority of the Republican members of the Judiciary Committee. Senator HATCH talked about that.

So our colleagues at that time faced two candidates in the Ninth Circuit. By the way, that is the same circuit that ruled the phrase ''under God'' unconstitutional. That is the same circuit that initially was going to prevent the California recall from taking place until finally en banc the entire circuit had to come together and change that.

In neither case did Republicans mount a party-line filibuster effort to prevent voting on a nominee. In fact, Majority Leader LOTT filed the cloture motions for the above debates. So what we have is not what my friend and colleague from Michigan would infer, that somehow before there was simply an ability—yes, there were cloture motions and either they were invoked or they were rejected, and that somehow they were invoked and that is why you were able to vote on it. No. Here you had the Republican majority leader file the cloture motions for Berzon, for Paez. My colleague, Senator SESSIONS, said: I opposed them. I voted to support cloture. I voted against the nomination, and that is what we are asking for.

Follow the history. That is what is at stake, as Senator LEVIN said, the historical role of the Senate. If it has changed it, it has changed it at great risk.

The situation was similar in 1994 when some Republicans voiced objections to President Clinton's nomination of H. Sarokin to the United States Court of Appeals of the Third Circuit. A majority of Republicans supported a cloture motion after a relatively brief period of debate and cloture was invoked by a vote of 85 to 12. Judge Sarokin was then confirmed by a vote of only 65 to 35. Twenty-three then of my colleagues supported cloture. The majority supported cloture. Yet at the same time they voted against the candidate. That is the history of this body. That is what the Constitution requires.

I am told that the only judge nominated by President Clinton who faced a partisan filibuster was that of Brian Theodore Stewart, a nominee to the Federal district court in Utah. However, it was Senate Democrats who filibustered the nominee in protest over purported delays in bringing other judicial nominees to the floor. A cloture motion was voted upon on September 21, 1999, and failed, falling short of the 60 votes by a vote of 55 to 44, with all Democrats except Senator Moynihan opposing cloture.

Once again, Democrats' objection was not to Judge Stewart himself and on October 5, 1999, the Senate confirmed him by a vote of 93 to 5. So for all the handwringing that we heard about the treatment of President Clinton's nominees, one is very clear: Every single one of them got a vote.

The fact is that what happened here is that my colleagues followed the history and tradition of this body and said they would make sure they got a vote because that is what the Senate is called upon to do, advise and consent. There is a principle of majority rule, a principle, again, espoused in this document, in this Constitution, of the United States.

My colleague also implied that it is just fine to prevent an up-or-down vote on at least 4 of these nominees because we blocked 60 of President Clinton's nominees. I have two observations about that, and I know this is what frustrates me and my colleague Senator GRAHAM. The fact is that there is and has been a tradition in this body, shortly before the end of the President's term. What happens is that folks kind of say, well, let's see who the new guy is, see what happens, and they slow it up.

The numbers are even more stark, by the way, if we compare the number of

nominees left hanging at the end of the first Bush administration by Senate Democrats with the number of Clinton nominees awaiting confirmation at the end of the Clinton administration. The Democrat-controlled Senate left 54 of the first President Bush nominees unconfirmed at the end of 1992. In contrast, at the end of the Clinton administration, 41 nominees remained unconfirmed.

Let's stop that practice, unless a game is being played, unless these are clearly unqualified nominees, unless there is some reason to suspect we are not having qualified folks coming before us and we are playing politics.

On the other hand, well, they did it to us and we are going to do it to them. It is like the Hatfields and McCoys, like Montague and Capulet. It is like a family feud. It is futile and it needs to stop. It needs to change.

I appreciate the comments of my friend Senator LEVIN at the end saying maybe we can get beyond this. I hope we can get beyond this. I hope we can do what Senator GRAHAM talked about when we started this conversation a little over 3 hours ago and he said let's look to the future.

The future is only going to be a bright future if we, one, follow the dictates of the Constitution, understand that there is this concept of majority rule, that the Constitution dictates that these nominations be dealt with on a majority basis, and that this body respect the history and tradition. That is what we have.

Then, of course, it is the responsibility of the President to bring forth qualified nominees and get past the rhetoric of extreme. I dealt with Priscilla Owen. Let me talk about Bill Pryor, for example. Alabama Attorney General Bill Pryor, nominee to the Eleventh Circuit, has earned a reputation as one of America's most experienced and esteemed State attorneys general. His nomination has received overwhelming support from across the ideological and political spectrum. Mr. Pryor was appointed attorney general of Alabama in 1997 and was overwhelmingly reelected; outstanding credentials. He was a law clerk for civil rights legend, the late Judge John Minor Wisdom.

Senator LAMAR ALEXANDER, also one of our newer brethren, fraternity of those who just got elected this year, had an opportunity to work with Judge Wisdom, who is, by the way, one of the great civil rights legends. Attorney General Pryor worked for him. Pryor graduated magna cum laude in 1987 from Tulane University School of Law and was then chief of the Law Review. What is interesting is that Attorney General Pryor is being attacked as being extreme. He is a man, by the way, who does have very strong beliefs. He is human. He has strong beliefs. That is not a bad thing. That is a good thing.

He is a person who has shown that he is willing to put his beliefs to the side to look at the law and to interpret the law, and that is what we expect a judge to do.

My friend Senator GRAHAM and I have talked about this. We talked about Bill Pryor. There is the chief judge in Alabama, who was involved with the case about the Ten Commandments in court. The courts have said that is unconstitutional.

Now, I suspect General Pryor believes that is probably a good thing, but General Pryor then leads the effort to challenge—in effect, to prosecute—the chief justice saying the law has to be enforced. That is what it is about.

Bill Pryor has also been a moderate voice in the partial-birth abortion debate. By the way, that is a mainstream position, but a court decision came down and challenged the Alabama law. General Pryor, in accordance with his duty to defend the statute, that is what he did. He then exercised that authority putting aside what I am sure are personal opinions to enforce the law. That is not extreme. That is mainstream. That is what we want on a court.

Yes, we have people of character, principle, and strong beliefs. What the other side has done is they take folks who have these strong beliefs, who then espouse them. Along the way they may give a speech, they may give a writing, and then they wave that around to see how extreme they are, but we have to judge people by their actions. We have an attorney general who puts aside his personal beliefs to say he will enforce the law. That is what you do.

My distinguished colleague who will take the floor after me, Senator PRYOR, was a former attorney general. I know he operated in the same way. That is what he would expect of his colleagues, put aside personal beliefs to enforce the law. That is what makes a good judge. Vote them up, vote them down. Give them a vote.

I yield the floor to my colleague, Senator GRAHAM.

Mr. GRAHAM of South Carolina. I thank the Senator for yielding. I think he did a very good job of trying to explain the best we can that this has never been done before, that this is truly a new era for the Senate. We are filibustering judges who have been reported out of the Judiciary Committee for the first time in the history of the country. That fact will never go away. It has never happened before. Abe Fortas was not a partisan filibuster. Republicans and Democrats thought the man was not qualified to be chief judge because of some ethics complaints, and the President withdrew it. But you had Republicans and Democrats banding together trying to send a message to the President that they did not think this person was promotable. They had 4 days of debate. It was not a filibuster. It wound up being a bipartisan effort to come together to send a message to the President.

There is nothing bipartisan about this other than the fact that every nominee who is being filibustered has Republican and Democratic support to sit on the bench in a majority fashion. That is the problem here, that if all of these people who are being filibustered had their day on the floor, an up-or-down vote, they would be judges and they would have Democratic votes. One of them has 55, we believe, because 55 people have voted to allow a vote on the floor. That is important.

These people would be judges, just like the two Senator LOTT intervened on. The two Democrats who were being opposed by some Members of the Republican Party, Senator LOTT stepped in and stopped it. He filed a cloture motion and it passed overwhelmingly to end debate, and they are sitting on the bench today. Good for him. I am glad he did it.

I want to be fair, too, to Senator CORZINE. There is nothing wrong with people talking about issues before the Senate in trying to get money sent to the parties. Both parties do that. I have never suggested that Senator CORZINE has done anything wrong. I am just trying to put in perspective what this debate truly is all about, because when you are out there talking to your base about what you are doing that can be a pretty good evidence of what is in your heart and what you mean to do.

Now I have the whole document. This chart is an excerpt from a November 3 fundraising e-mail sent out by Senator CORZINE, the head of the Democratic Senatorial Campaign Committee. It says:

> Senate Democrats have launched an unprecedented effort . . . By mounting filibusters against the Bush administration's most radical nominees, Senate Democrats have led the effort to save our courts.

I have been saying for days now that this e-mail indicates that they view this to be an unprecedented effort by Democratic colleagues and the unprecedented effort is mounting filibusters. But this dot, dot, dot, now I have the whole e-mail and I do want to be fair. I do not think it has changed a thing. Having looked at the e-mail, I think it reinforces my point.

This is what the actual paragraph says in full:

> Senate Democrats have launched an unprecedented effort to protect the rights of all Americans by keeping our courts fair and impartial. By mounting filibusters . . .

I think a fair reading, a fair interpretation of the English language, is that the unprecedented effort refers to the filibusters. They are throwing in some nice language about being fair in there. Nothing has changed.

This was an e-mail sent out to try to tell Democrats that we are up here fighting Bush in an unprecedented way by filibustering his judges because we think they are radical. This e-mail is about a particular judge, and I am going to read the whole thing. This is the way it is entitled:

> Senate Democrats protect our courts again. Dear Erin, Senate Democrats have stopped another judicial extremist who

wants nothing more than to turn back the clock on fifty years of progress on civil liberties. Reproductive freedom, equal opportunity, and corporate accountability again.

What a lousy person that is—that is me stating.

After being defeated under a Democratic controlled Senate, controversial judicial nominee Charles Pickering was defeated again on Thursday by Democrats in the Senate.

For the first time in history, a President of the United States re-nominated a judicial nominee that the committee had already voted down but the Senate Democrats stopped the Bush Administration in its tracks.

That is true. When the Democrats had control of the Senate, Judge Pickering was voted down on a party-line vote. The President has a right to resubmit the nominee. I am very glad he did because this time he came out of committee on a party-line vote.

We just have a different view of whether or not this man is a racist, because there is no other way to interpret what this e-mail is saying about this man.

Continuing:

Despite the administration's desire to ignore the Constitution's rule of advice and consent, Senate Democrats are holding Republicans accountable.

Why must the Democrats continue their fight against Charles Pickering?

While in law school, Mr. Pickering wrote an article suggesting ways the State of Mississippi could better enforce its ban on interracial marriage.

As a State senator in the 1970's, Mr. Pickering worked to repeal important provisions of the Voter Rights Act.

In 1994, he went out of his way to seek a more lenient sentence for a convicted cross-burner.

They have described somebody who is not what you would want to have on the bench. There is no other way to say it other than this e-mail is directly and indirectly suggesting Charles Pickering is racially motivated. What a horrible thing to say about somebody if it is not true.

Once defeated when Democrats had a majority in the Senate, President Bush nominated Charles Pickering for a second time after the 2002 elections and now two successful filibusters launched by Senate Democrats have kept him off the bench!

The Bush Administration is devoted to using the courts to its political advantage. Time and again, this administration has nominated ultra-conservative candidates who are zealously devoted to advancing corporate interests, taking away reproductive freedom, smashing the wall of separation between church and state, and dismantling equal opportunity.

But the Administration has got a big problem: Senate Democrats. Senate Democrats have launched an unprecedented effort to protect the rights of all Americans by keeping our courts fair and impartial. By mounting filibusters against the Bush Administration's most radical nominees, Senate Democrats have led the effort to save our courts.

Help the Senate Democrats keep fighting. Support the DSCC efforts to help elect more Democrats to the Senate—and keep the proven leaders we have. Help the DSCC send a message to the Bush Administration—Senate Democrats will NOT rubber stamp extremist judicial candidates. Help us fight to maintain judicial integrity by sending more Democrats to the United States Senate in 2004.

That is the e-mail in its entirety. Now the accusations in that e-mail are strong, they are direct, and I think vicious. Judge Pickering, according to this e-mail, is someone who wanted to keep the interracial marriage statute alive when he was in law school by writing law school papers in support of this. He went out of his way in 1994 to make a sentence more lenient for a convicted cross burner.

The only thing a rational person would receive from that litany is Judge Pickering is friendly to a cross burner. If that is true, he should never have been a judge for 30 seconds. If the other things are true, it was a huge mistake to ever advance this man forward.

But here is the problem I have with believing what is in this e-mail. Number one, I have met the man. I have talked to him. I served in the House with his son, Chip, who is one of the nicest, brightest young men I have ever met. This e-mail describes him as a very intolerant, racially insensitive person. But I can tell you without a doubt from personal experience he did a great job as a father because his son is anything but racially intolerant. His son is a wonderful young man.

If that e-mail is true, then you explain to me how the American Bar Association could give him the highest rating possible, well qualified. Did they miss this racial past? Or do they condone it? How about this, maybe this is a cut-and-paste job and they didn't buy it. He graduated first in his class; 99.5 percent of the cases were affirmed or not appealed. His reversal rate is below the national average, two times lower than the average district judge in the Fifth Circuit Court of Appeals. He has never had a voting rights case appealed or reversed. He has never had a formal discrimination case reversed in 170 cases and is endorsed by the current president and 17 past presidents of the Mississippi State bar. Maybe they are all racist, too. He is endorsed by all major newspapers in Mississippi. He is endorsed by all statewide elected Democrats and the chairman of the Mississippi legislative black caucus. He was endorsed by former Democratic Governor William Winter, Bill Waller, former Democratic lieutenant governor, and the list goes on and on and on.

Other people object, but I assure my colleagues this e-mail is a distortion of this man. Here is the Judge Pickering I have come to know. In 1967 when Mississippi was red hot and racial tensions were very high in the South, particularly in Mississippi, he served as an elected county prosecutor. He was asked to testify against the Imperial Wizard of the Ku Klux Klan of Mississippi. He took the stand against the Imperial Wizard successfully but lost his job. He was not in the mainstream; he was swimming upstream.

In 1967, when schools were integrated in Mississippi—and I have told the story about integration in South Carolina—he chose to keep his children in public schools at a time when White flight was the dominant way of dealing with the problem in that part of Mississippi. You will see class photos in that era of a lot of African-American children and a smattering of White kids. Among those White families, White kids, were Judge Pickering's kids.

He chose at a time, when others did not in large numbers, to try to make Mississippi better. He has been head of the Mississippi Baptist Association. He has been on the Federal bench for a dozen years, rated well qualified by the American Bar Association.

Of all the events that have occurred in the Senate since I have been here, this one bothers me the most because southern White males are very open to the accusation that we are racially insensitive, due mostly to the way the South has conducted itself.

When I grew up, my family had a restaurant and African Americans came to get their food and to buy a beer and they had to leave because there was no mixing of the races until I was in high school. That is not something to be proud of. Judge Pickering was part of the solution.

What they are trying to cast this man as being is unfair to him; it is unfair to his family. If you believe it to be so, you can vote against him. But he is the best example of how sick the Senate has become.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. COLEMAN. I ask unanimous consent we use 5 more minutes of the majority's time and we subtract it from the next hour.

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

Mr. COLEMAN. Mr. President, I will continue the Pickering story because I think it is important.

My colleague, Senator GRAHAM, has done a tremendous job of laying it out. I don't know Judge Pickering's son as well as Senator GRAHAM does, but I have met him. I have to go beyond that.

Senator GRAHAM mentioned when he was in law school that he wrote an article on interracial marriage. That was in 1959. He was assigned to write an article. It was required, not voluntary. It was an academic exercise. The article evaluated various State laws on interracial marriage. He took no position on the moral nature of these laws nor did he advocate or condone the ban on interracial marriage. He was given an assignment and required to do it.

In the case of the cross burning—and I am a former prosecutor and I have seen this happen—he simply sought precaution in sentencing. There was a bad investigation done by the Clinton Justice Department. They recommended a plea bargain to the guy in the cross burning who was the ring

leader. So he gets off. There is a trial then for the other guy. Judge Pickering is there and he sees it is simply not proportioned. He told the guy he tried, who was not the ring leader—but the other got was off the hook. He said what he had done was heinous and dastardly and would not be tolerated and someone would have to spend time in the penitentiary for his act and ruled according to the sentencing guidelines. On and on.

This is an individual who, again, sent his kids to interracial schools in the 1970s. This is a guy who testified against the KKK. This was a death sentence.

In 1985, he was president of the Mississippi Baptist Association, and he presided over the first convention addressed by an African-American pastor.

I could go on and on and on. Again, what we have here is mainstream, not extreme. This is a person who was supported by the folks who know him best. Many African-American judges have written in support of Judge Pickering, including Justice David Keith, the first African-American Federal judge in Mississippi, Henry Wingate, the first African-American Supreme Court judge in Mississippi, Rubin Anderson, and Mississippi court judge Johnny Williams.

What we have is a case where the people who know him best see this is a decent man. This is a man without prejudice. We have special interest groups with their own agenda from outside looking to shoot him down. In doing so, what we have is this Senate undermining the Constitution and our obligation. They are doing something that has not been done before, without legitimate base. Vote them up, vote them down, give them a vote.

I yield the floor.

The PRESIDING OFFICER. The Senator from Arkansas.

Mr. PRYOR. As I understand what just transpired, his additional 5 minutes or so will be applied to the next hour so I still have 30 minutes.

The PRESIDING OFFICER. That is correct.

Mr. PRYOR. Mr. President, I thank my colleagues on both sides of the aisle for their zealousness on the issues that are present here with regard to these judicial nominations. I know my colleagues on the Republican side have very strongly held opinions and viewpoints they are very sincere about holding. I may differ with them on some of the particulars and some of the conclusions, but I respect their opinions and I respect their zealousness and their commitment to their cause.

Likewise, on the Democratic side, I have a number of colleagues over here who have done a very good job of poignantly discussing these issues and trying to present the other side of the story. I think they are equally passionate.

In some of the finest traditions of the Senate, this august body, this Chamber, is like an arena where maybe two great competitors come in, hash it out and fight it out. That is how the Senate is designed. It is almost like in the Bible, the Book of Proverbs, as iron sharpens iron, one man sharpens another. I just hope that is the process we are going through, that we are sharpening the other, that we are making this engine better and we are progressing as a people and as a nation.

I appreciate the Presiding Officer being here. It is the second night in a row the Senator has had the graveyard shift. Someone with your seniority, I am surprised to see down here two nights in a row. I know you are doing your duty for your colleagues and for your Nation. Certainly there are untold numbers of staff people who work for the various Senators, who work for the Senate itself, the Capitol Police, the C–SPAN team. I have been watching some of this at home or in my office and C–SPAN has done a great job. Periodically when a term will come up that may be unfamiliar to the viewers around the country, they will flash up a definition of that term, such as what a filibuster is, what a hold is, whatever the case may be. They have been taking this opportunity to use this as an instructional time for viewers back home to help understand their Government and help understand their Congress.

I thank the cloakroom staff on both sides. I could go down the long list. The stenographers are doing double duty. There are so many people who should be thanked for allowing this marathon to go on. It has put strains on people. I am very sensitive to the fact they have families they need to get home to and they have lives outside of what goes on here on Capitol Hill. I express a deep and sincere debt of gratitude to those people.

Let me talk about the judicial nomination process. Both my colleagues across the Chamber know I signed on to a letter with them this spring about trying to make this process work better. One thing I was concerned about in signing that letter is we might come to this point today where we would lock horns and have some gridlock on a few nominees. I hope we do not get to the point of gridlock overall in this process.

As to the numbers, since we have been here this Congress, I believe we have confirmed 68 of President Bush's nominees and 4 have been blocked. Last Congress, there were an additional 100, so I believe the grand total is 168.

We have seen a lot of charts with numbers and percentages, but I hope the whole process does not bog down. So the people around the country understand, we are talking only about a select few of the nominations, not the overall nomination process.

One thing I was concerned about and one reason we wrote that letter several months ago was because we wanted to try to make the nomination process better.

We want to try to make it more constructive and more productive. To me, a lot of that responsibility rests with the White House. We talked about that very briefly in that letter. I feel strongly that since the President, under the terms of the Constitution, is the one who begins the process of nominating, he and the White House staff need to try to get the Democratic and Republican leaders involved and sit down to try to work through some of these controversial nominations and try to figure out how we can do this better as we move forward.

One thing I am concerned about is we, around here in the Congress, particularly in the Senate, probably more than the House, are so focused on tradition and history and how things have been done in the past that it is human nature, I guess, that we oftentimes cannot put aside the things that happened in the past. Sometimes those things are perceived to have been ill-willed or for whatever reason perceived to have been unfair, unjust, whatever the case may be. Of course, I have said many times that I have a concern that in this judicial nomination process there is sort of partisanship and gamesmanship, and it is just counterproductive for the people.

So, again, I hope we can move forward. I want to try to continue to work with President Bush on his nominations. I believe I voted for 66 of his nominations of judges. In fact, I was talking to my staff the other day, and I said: Well, the people who are calling in about some of these controversial judgeships, what are they saying to you? They say they want Senator PRYOR to vote for candidate X, whoever that may be. The staffer will say: We appreciate your call. But we also want you to know he voted for 66 or 67 of President Bush's nominees. Invariably, the person on the other end of the line says: No, he hasn't. Because they are not hearing the other side of the story, that, again, we are only talking about a small percentage of the nominees who are not getting through.

If you look at the numbers and the percentages that President Bush has accomplished since he has been President, they are historically high numbers.

So I want to continue to work with the President and find that common ground. I believe we all have the constitutional responsibility to advise and consent on judicial nominations. Mostly what I am hearing on the other side—mostly—people believe the Senate should not be a rubberstamp. I think the vast majority of Senators believe the Senate should not be a rubberstamp and an automatic approval process for the President.

I think we have a responsibility to the Nation to look at these—again, the concept of iron sharpens iron, the President and the Senate sharpening each other, because he knows we will review and look very carefully at the nominations he puts forward. He puts

forward a higher quality nomination than if it was just a rubberstamp. That accountability is a positive thing for the people and for the Government. I take this responsibility seriously. I know all Members of the Senate do take their responsibility very seriously.

Another thing I wish to say is that when I look at judges I kind of have a criteria. I have kind of broken it down into four parts. We try to be consistent in our office when we look at these four factors.

One is just a starting point: Is the nominee qualified? Most of the people who make it through the committee are qualified. I think, again, there is a weeding out process there, but I start with the presumption that if they get to this stage in the process they are qualified.

The second thing I ask myself is, can they be fair and impartial? I think that is an extremely important criteria. Admittedly, it is somewhat subjective. Reasonable minds can differ about if someone can be fair and impartial, and reasonable minds do differ.

Again, that is one thing we get back to in the Senate. Someone like either of my two colleagues, who have spoken here in the last few minutes, who are so articulate and so good, they look at some of those nominees and there is no doubt in their minds, they are going to be fair and impartial. I look at them and I have some doubts. Again, that is how the process works. I am proud that their two States have sent them to the Senate. They are here to do their duty as God gives them the right to do it. I feel like I am here to do the same.

So reasonable minds can differ about being fair and impartial. But regardless of how you come out on the conclusion, that is one of the criteria I use. I think it is extremely important for a judge.

There is another, a third, element I look at; that is, has the nominee demonstrated an ability to exercise and to show the proper judicial temperament? For all the lawyers out there, and all the parties out there, if you have been in court before, you understand how important the judicial temperament can be in cases. Literally these judges oftentimes hold life or death in their hands for a criminal defendant. Or they may hold a business's solvency or whatever the case may be. It is very important. Their temperament oftentimes is determinative in how the case will come out. So again it is subjective, but I try to look at their judicial temperament.

Then the fourth criteria is sort of the elastic clause. The Constitution has an elastic clause, so part of my criteria is kind of an elastic standard—and I don't say standard but elastic consideration—and that is, are there other factors or other circumstances, when you look at these nominees, that should be considered? And, boy, that is just open-ended.

But I think, as Senators, we should consider the totality of the circumstances. We should look at these nominees in a historical context; it may be a social context; it may be something unique to that region or that State or that person. I think it is incumbent on us to look at those carefully.

Here again, it is subjective. Is that something you can really write down as criteria of how it is going to work in every single case? No. Maybe it should not be. Maybe it should be left elastic so it can be changed and be looked at from different perspectives with each particular nominee.

But regardless of that, I do take my role and my duties as a Senator very seriously. One of those roles that I believe very strongly about is the people of Arkansas sent me here to work with everybody else who is up here. If the people of this country want to elect George Bush as President, I am here to work with President Bush. Mississippi sends their set of Senators and Texas sends their set of Senators, and Massachusetts and California, and I believe my responsibility, as a Senator for Arkansas, is to work with who is here. That is what I have tried to do, and I will continue to try to do that.

One thing also we need to keep in mind is that these judicial nominations we are talking about today and that we always have under consideration here in the Senate are lifetime appointments. Only under extreme circumstances will these people be removed from office. It is very rare that happens in American history, but it can happen. But these are lifetime appointments.

I think it is critical that our judiciary is independent. I think that is the way our Founding Fathers set it up. We better get these nominees right on the front end because these people will serve for life.

Like I say, they hold justice in their hands. Their application of the law will be determinative for so many things during the course of their careers.

I think, simply put, people are entitled to know what nominees think. I think people are entitled to know about the qualifications. They need to have the assurance that these nominees under consideration by the Senate—the people need to have an assurance that if these people do put on the robe, do serve on the bench, that the integrity of the system will be there and that these people will do justice, as their responsibility requires.

I personally believe the people of America want a moderate and balanced approach. Personally, I think most Americans do not want to see the courts packed with judges with a conservative agenda or judges with a liberal agenda. I think most Americans want to see moderate, fairminded people on the bench. Because people understand that if you go into this with an agenda, then the courts will not be balanced and that judge and the court will have one dominant point of view. That is not good for our justice system.

I do think there has been a lot of discussion about some of these judges' records. Again, I think those are subject to interpretation. I am not going to try to get into all the particulars of those. We do not have time tonight, plus my colleagues, for the last several hours, the last 30-plus hours, have tried to do that. Many of them have done a very good job.

What I would like to do, if I can, is talk about one thing that does bother me, and that is the fact we are getting toward the end of our calendar year in the Senate and this is crunch time for the Congress to get its work done. In fact, right now our colleagues in the House, down the hall, basically are only meeting about 1 day a week, maybe 2, for votes because they have taken care of a lot of their legislative business—not all. They still have some things pending. But they have gotten theirs down to the point where they do not have to be in very many legislative days. In fact, a lot of what they are doing is waiting on us to accomplish and to finish our business.

Well, here we are spending 30-plus hours in a talkathon about these four judicial nominations that have been blocked. I think we need to keep it in perspective. Some of the Democrats have talked about 3 million jobs that have been lost in the last 3 years and what we are arguing about here are four judicial jobs. Well, that may be fair; that may not be. But I think there is some merit to that.

To keep it in perspective, 98 percent of President Bush's nominees have been confirmed. That is a pretty good percentage. You try to find another percentage like that in history, I am not sure you will find it. Also, when you look at Government and we look at anything involving human events, 98 percent is a pretty high percentage.

So again, I would encourage all of us to try to keep this in perspective. I heard one of my colleagues last night talk about 98 percent of this and 98 percent of that. In fact, it was Senator CHAMBLISS of Georgia. He had a very humorous monologue about that. But the truth is, 98 percent in politics and in Government is a pretty doggone good success rate. In fact, I would go so far as to say I am not sure anybody in Washington ever gets 100 percent of what they want. Most people are happy to get 50 percent of what they want, if they can just get that done.

But regardless of that, I think most people I talk to back home understand that judges are important, and they understand that it is important that we have an independent judiciary, but they also perceive that these four nominations are not urgent to the welfare of our Nation. So that causes me to question why we are doing this right now. If this is a big issue, can't we put it off until another time? But regardless, we find ourselves here. That is just where we are right now.

I want to talk about one other thing that is a concern to people all over the

Nation; that is, losing jobs in the manufacturing sector of our economy. It was announced the other day that one of the great companies in the world, I guess—Michigan-based Whirlpool—plans to move some of its refrigerator production, which is made in Fort Smith, AR—they plan to move those jobs from Fort Smith down to Mexico. Very sad news.

Jim Pickens, who was, until very recently, Arkansas' economic development director, said that it is clear that some of the 4,500 Whirlpool jobs in Fort Smith will go.

The problem with this is it is not an isolated incident. It is a trend. It is something to which we in the Senate should be devoting our time. It is something that folks back home are very concerned about, losing these manufacturing jobs.

One thing that is of particular concern in the Whirlpool case is it was just a few months ago—about a year ago—when Whirlpool made an announcement they were going to actually add 700 jobs in Fort Smith. Of course, there was a lot of excitement about that announcement. Now there is a lot of disappointment about what Whirlpool has decided to do. I am not saying this to be critical of Whirlpool, but I am saying to my colleagues instead of spending this much time on these four judicial positions, let's spend this much legislative time in trying to figure out how to save our manufacturing sector. Because I think long term when you look at what is good for technology and good for this Government, good for this country, saving those manufacturing jobs is probably more important than these four judgeships we are talking about.

Another thing that I must tell you I experienced today is I went to Walter Reed Hospital, the Army hospital here in the DC area, and talked to men and women who had come out of Iraq and Afghanistan. Very sobering, very serious. These are patriots of the first order. Some of them will have lifelong injuries due to their service to this country.

One thing that was emphasized with us over and over is that Iraq is a very dangerous place right now. There again, I hope, and I sincerely hope, the Senate will spend this much time in deliberation and in consideration of how we should move forward in Iraq and what that future looks like for Iraq.

Mr. President, it does not bother me to work late. This is the second night in a row that I have had a late night slot. But it does bother me a little bit that we may have lost some perspective in that we need to keep these other important issues in perspective. No question that our judiciary is important. That is our third branch of Government. But we also need to keep it in perspective.

Mr. President, may I inquire, how much time do I have remaining?

The PRESIDING OFFICER. Four and a half minutes.

Mr. PRYOR. How much time?

The PRESIDING OFFICER. Four and a half minutes.

Mr. PRYOR. Let me read part of a letter from Robert Caro. He is the man who wrote the Pulitzer Prize winning book, ''Master of the Senate.''

''Master of the Senate'' is the story of Lyndon Johnson when he was a Senator. In June of this year, Robert Caro wrote a letter, not to me, but to TRENT LOTT and CHRIS DODD, the two leaders of the Rules Committee.

Mr. President, I ask unanimous consent to print this letter in the RECORD.

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

ROBERT A. CARO,
June 3, 2003.

Hon. TRENT LOTT, Chairman,
Hon. CHRISTOPHER J. DODD, Ranking Member,
Senate Committee on Rules and Administration, Russell Senate Office Building, Washington, DC.

DEAR SENATORS LOTT AND DODD: Several members of the Senate have asked me whether my research on the history of the Senate sheds light on the current debate over the role of the Senate with respect to President Bush's judicial nominations.

Defining the right of extended debate is always tricky. If it is being used against you, it is a vicious weapon of obstruction, whose use in a democracy is unconscionable. If it is you who is using that weapon, it is a great one to have in your arsenal.

Many times in America's history, the right of extended debate has been used to defend causes with which I profoundly disagree. In Master of the Senate, I tried to show how it was a last-resort, but very effective, barrier thrown up in the most ignoble of causes: the continuation of racial segregation.

Nonetheless, great care should be taken in placing new restrictions on that right. Senators who are considering doing so should understand that they will be taking a step that has significant implications for the balance of powers created under the Constitution, and also for another very fundamental concern in a democracy: the balance between majority and minority rights.

The writings of the framers of the Constitution make clear that Senators, whether acting alone or in concert with like-minded colleagues, are entitled to use whatever means the Senate rules provide to vigorously contest a President's assertion of authority with which they strongly disagree. One could say, in fact, that under the fundamental concept of the Senate as envisioned by the founding fathers, it is not merely the right, but the duty of Senators to do that, no matter how popular the President or how strongly the public opinion polls of the moments support the President's stand on the issue involved.

I said in Chapter 1 of Master of the Senate that ''. . . in creating the new nation, its Founding Fathers, the Framers of its Constitution, gave its legislature . . . not only its own powers, specified and sweeping . . . but also powers designed to make the Congress independent of the President and to restrain and act as a check on his authority, [including] power to approve his appointments, even the appointments he made within his own Administration. . . . And the most potent of these restraining powers the Framers gave to the Senate. . . . The power to approve Presidential appointments was given to the Senate alone; a President could nominate and appoint ambassadors, Supreme Court Justices, and other officers of the United States, but only 'with the Advice and Consent of the Senate.'''

I also pointed out that ''the Framers wanted to check and restrain not only the people's rulers,'' but also the possibility that the majority will would be used, in Madison's words, ''to oppress the minority.'' The Framers, he said, established the Senate as the body ''first to protect the people against their rulers; secondly to protect the people against the transient impressions into which they themselves might be led. . . . The use of the Senate is to consist in its proceeding with more coolness, with more system, and with more wisdom, than the popular branch.'' The Constitutional Convention adopted the two-House Congress with almost no dissent.

To give the Senate strong protections from transient public passions or executive pressure, the Convention kept the Senate small so that it would have, again in Madison's words, less propensity ''to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions.'' To make the Senate more stable, to keep it ''firm,'' and ''to insure their independency'' [Edmund Randolph], the Framers gave Senators terms three times as long as House members and half again as long as the President's. As a final layer of armor, only one-third of the Senate would be elected every two years, so that the Senate would change only gradually over time.

As I wrote, since the power of the President and the power of the people would be very strong under the Constitution, ''to enable the Senate to stand against these powers—to stand against them for centuries to come—the Framers of the Constitution made the Senate very strong.''

I have pointed out that one of the first acts of the Senate was to write the 1789 statute setting up the federal judiciary system. Sixteen years later, the Senate was called upon to preserve and protect the independence of that system by standing up to Thomas Jefferson, a popular President with a majority in both Houses. Jefferson wanted the Senate to help him tilt the Supreme Court in his own direction, by convicting Justice Samuel Chase after the House had impeached him on a party-line vote. Jefferson had more than enough of his own party members in the Senate to convict Chase, but enough Senators from *both* parties voted against the President to sustain the independence of the Judiciary from the Executive. As your colleague Senator Byrd said some two centuries later, ''The Senate exercised in that fine moment of drama the kind of independence, impartiality, fairness and courage that, from time to time over the years, it has brought to bear on the great issues of the country.'' The independent Senate had vindicated the Framers' hope that it would stand against the tyranny of presidential power and the tides of public opinion.

The Founders, in their wisdom, also gave the Senate the power to establish for itself the rules governing exercise of its powers. Unlike the unwieldy House, which had to adopt rules that inhibited debate, the Senate became the true deliberative body that the Framers had envisioned by maintaining the ability of its members to debate as long as necessary to reach a just result. For more than a century, the Senate required unanimous agreement to close off debate. The adoption of Rule XXII in 1917 allowed a two-thirds cloture vote on ''measures,'' but nominations were not brought under the rule until 1949.

In short, two centuries of history rebut any suggestion that either the language or the intent of the Constitution prohibits or

counsels against the use of extended debate to resist Presidential authority. To the contrary, the nation's Founders depended on the Senate's members to stand up to a popular and powerful president. In the case of judicial appointments, the Founders specifically mandated the Senate to play an active role, providing both advice and consent to the President. That shared authority was basic to the balance of powers among the branches.

Surrendering such authority is not something which should be done just because of a Senator's point of view on the particular issue of the moment—because much more than the particular issue is involved. What is a Senator—let us say a senator from small-population state without any other means of defense—votes to support an new limitation on debate today? What will he do in some future year when he is trying to stop a bill or a nomination that a bare majority of the Senate supports, but that he and 40 colleagues believe will be terribly detrimental to their states or to the nation—an action that he feels a few members of the senate may change their view about if only he has enough time to explain the full consequences to them and to the public? What will he feel when he suddenly realizes that his right to hold the senate floor against that action has been so greatly reduced that the bare majority can silence him before he is finished making his case? What will he do when he realizes that, without the right of extended debate, his cause is ultimately helpless?

I am not attempting to say that the right of extended debate should not be modified. I am, however, attempting to say as strongly as I can, that in considering any modification Senators should realize that they are dealing not with the particular dispute of the moment, but with the fundamental character of the Senate of the United States, and with the deeper issue of the balance between majority and minority rights.

As I told a group of Senators last month, you need only look at what happened when the Senate gradually surrendered more and more its power over international affairs to learn the lesson that once you surrender power, you never get it back.

Respectfully,

ROBERT A. CARO.

Mr. PRYOR. Mr. President, basically what Robert Caro points out in this letter is:

Several members of the Senate have asked me whether my research on the history of the Senate sheds light on the current debate over the role of the Senate with respect to President Bush's judicial nominations.

Defining the right of extended debate is always tricky. If it is being used against you, it is a vicious weapon of obstruction whose use in a democracy is unconscionable. If it is you who is using that weapon, it is a great one to have in your arsenal.

I think right there we see the tension Mr. Caro captured so well in his book, but here again he has captured it and framed up the issue very well for us. The right of the filibuster or unlimited debate is something that is viewed very differently, depending which side of the filibuster you are on.

It has historically in this country been used time and time again for almost everything under the Sun—sometimes successfully, sometimes not successfully. One thing he talks about is:

Nonetheless, great care should be taken in placing new restrictions on that right. Senators who are considering doing so should understand that they will be taking a step that has significant implications for the balance of powers created under the Constitution, and also for another very fundamental concern in a democracy: the balance between majority and minority rights.

I have no doubt some of my colleagues on the Republican side genuinely feel the Democrats are out of line in using the filibuster in this context. Also, I have no doubt many of my colleagues on the Democratic side feel we are perfectly within our rights to use the filibuster. Here again, I encourage my colleagues to look at this letter from Robert Caro dated June 3, 2003, which brings a historical—not a political, not a partisan, but a historical—perspective to what we are talking about tonight and what we will be voting on in the morning.

Again, I thank all my colleagues for being here. It is late-night duty. It is not easy. The staff has just done a fantastic job. My legislative director, Walter Pryor, has been with me every step of the way. I know he would like to get some normalcy back in his life, as do so many of us.

Has my time expired, Mr. President?

The PRESIDING OFFICER. The Senator has 40 seconds.

Mr. PRYOR. Mr. President, again, I thank you and thank my colleagues on both sides of the aisle for all their hard work in bringing these issues to the forefront. I see my colleague from Rhode Island, Senator REED, walk in. We went to Walter Reed Hospital today. I know he has had a long day. I look forward to listening to his remarks.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM of South Carolina. Mr. President, I wish to acknowledge Senator PRYOR's commitment to moving this process forward. He did write a letter a while back trying to find a way to better handle the problems we are having with judges. I think he has a very good heart about this. I respect him as a person. He has truly become a friend.

With that kind of attitude, maybe we will find a way out of this down the road. Right now, unfortunately, we are stuck in the quicksand, not mud. The more we fight each other, the deeper into it we get. The atmosphere in the Senate right now about judges I think has taken a turn for the worse.

There are probably many things one can point to in the past on the Republican side. I am not here to defend the past. I am here to talk about the future, and we have to deal with the present. Here is what about the present bothers me the most.

There is an effort to filibuster judges in a way that has never occurred before in the history of the country. I think it is very unhealthy and constitutionally impermissible and will only be answered in kind. We are going to set the future course of the Senate down a road where it will be hard to get good men and women to apply. Let me tell you why I think they will not apply.

I read a fundraising e-mail that concerned Charles Pickering. As one can tell when I spoke, it bothered me greatly what they are trying to do to Judge Pickering because I come from the South. I know how easy it is to be associated with the sins of the past, to be, for lack of a better word, sometimes stereotyped. Here are the accusations in the e-mail:

Why must the Democrats continue their fight against Charles Pickering? While in law school, Mr. Pickering wrote an article suggesting ways Mississippi can better enforce its ban on interracial marriage.

That statement clearly tries to make the reader believe this is a person who has supported interracial marriage bans and is racially insensitive. I ask the country to look at it in these terms. He was unanimously confirmed by this body 12 years ago. Not one person objected. I can't believe the whole body was asleep at the switch and this law school article was not known. He didn't advocate the ban on interracial marriage. It was under attack, and he wrote a scholarly dissertation about it.

If you believe what the statement says, the entire Senate either didn't know about this or ignored it because the entire Senate unanimously approved Judge Pickering 12 years ago, long after he got out of law school, to sit on the Federal bench as a district court judge.

The second point:

As a State senator in the 1970s, Mr. Pickering worked to repeal important provisions of the Voter Rights Act.

The reader of this e-mail who is being asked to give money to help Democrats fight President Bush's nominees—what is the message you are trying to convey to the reader of this e-mail? That yet again in the 1970s this same person, while holding public office in Mississippi was working to undermine laws that protected African Americans in the State of Mississippi. There is no other fair interpretation of why that is in this e-mail and trying to cast him in that light.

Again, it is beyond my understanding and real belief, if that were true, if this man used his office in Mississippi in 1960 to undermine the Voting Rights Act, that this body 12 years ago would have unanimously approved him to be a district court judge.

I believe these two statements were designed to emotionally charge the reader and to unfairly label Judge Pickering in a way that is not deserved and flies in the face of the fact that the Senate confirmed him unanimously 12 years ago.

The last point:

In 1994, he went out of his way to seek a more lenient sentence for a convicted cross burner.

My colleague from Minnesota very eloquently spoke about that case. I am on the Judiciary Committee. When I heard that accusation, it really did pique my interest. I wondered what was going on because none of us want a judge who is going to be sympathetic to such a horrible crime.

Here is what actually happened. There were three defendants, not two—three defendants. The ringleader and the second oldest man, I believe, received a probationary sentence. The youngest of the three was charged with a crime of arson.

What this judge did is he looked at the way the prosecutor handled three defendants, and he said: That is not fair. You are letting two of the worst guys go and impounding the youngest guy.

That is what I want a judge to do. I want a judge to make sure the people who come before his court are treated in an apportioned manner.

The third person, the youngest one, was given a speech and a lecture by Judge Pickering about the act of cross burning that should make us all very proud. The youngest defendant went to jail, but his sentence was adjusted in light of what happened to the other two people who basically got away with it because the prosecutor did a deal I don't understand myself.

I do understand why Judge Pickering wanted to adjust the sentence, but if you listened to the words and read the transcript, he didn't go out of his way to do anything other than to make the sentences apportioned. He went out of his way to let the defendant know what a sleazy person he was by engaging in this activity, but he brought balance to the people before him.

The reason I keep talking about this situation and Justice Brown is I am trying to let the record reflect for future review that I believe very sincerely these judicial nominees are having a tremendous hatchet job done on their lives. They are trying to make up reasons to justify a filibuster, and there is no good reason to have a filibuster.

Senator PRYOR is a very fairminded person. If he disagrees with me about Judge Pickering or anybody else, that is just life; he is right. All I am asking him and other Senators to do is to follow the Constitution, and the advice and consent clause for the entire history of the country when it comes to judges has been interpreted in a manner that the majority of the Senate will advise and consent, not a minority.

What is happening to these four people—and we will talk more about the others—is very unhealthy for the country. The reason I say that is they are taking statements and articles, speeches, and letters to their church out of context, and liberal special interest groups are trying to oppose conservatives coming on the bench in an unfair way.

These four individuals' lives have been distorted. That is what bothers me the most. If you don't like their philosophy, vote them up, vote them down, just vote, is the saying. If we continue what we are doing today into the future, no reasonable person is going to feel good about wanting to go on to the Federal bench given what is happening to these people, and that will be a huge loss to the country.

The process we are engaged in today has no upside; it only has downsides, and the downsides I think are extremely dire for the country. Not only are you going to drive good people away because nobody is going to want to go through this—and I assure you it will be answered in kind, and that is sad because I know politics.

The other downside is special interest groups, liberal or conservative, are going to have more power than they deserve over individual lives because all they need to do is get 41 votes.

Special interest politics is part of our political landscape. The Constitution has checks and balances against each branch. One of the checks and balances I like the most about the way the judicial nominating process works is if a majority of us feel a person is qualified, they get to sit on the bench.

Please, let's not as a group empower special interest groups to the point that 41 of us can stop somebody from sitting on the bench because we will have rewritten the Constitution, not only in its letter but its spirit.

I end with this. Federalist Paper No. 66 has the following comment:

> It will be the Office of the President to nominate and, with the advice and consent of the Senate, to appoint. There will, of course, be no exertion of choice on the part of the Senate. They may defeat one choice of the executive and oblige him to make another, but they cannot themselves choose. They can only gratify or reject the choice of the President.

For the sake of the future of law in this country, for the sake of the future of the Senate, let's not let a small group make it impossible for good people to serve.

I yield the rest of the time to my good friend from Kansas, whom I have known since I have been in politics at the Federal level, Senator BROWNBACK.

The PRESIDING OFFICER. The Senator from Kansas.

Mr. BROWNBACK. Mr. President, I appreciate my colleague from South Carolina carrying the comments and the load for several hours in the early morning as we approach 4:15 in the morning. We are talking about something of great importance. He has real wisdom in his words, too, about the point that the process on which we are embarked has no upside to it. When you have good people, qualified people blocked from the Federal bench not by majority vote but by filibuster, you are headed down a bad path. This bad path doesn't have a good ending.

We will continue to have division in this body. I don't doubt we can be blocked on these for some time, but that is certainly going to carry over into the next election cycle, and this doesn't have an upside to it. Plus, we have good people waiting. We have people who are qualified and are not going to be serving on the Federal bench.

We have a lot of hurt feelings. We have a lot of accusations made without truth. We have harsh words, harsh comments, and that all leads to a downward cycle. There isn't an up cycle here.

I wish to take a few minutes to describe why I think we got to this point. We didn't used to be here. We have approved people of strong judicial opinions in recent times. They have generally been from the left, and those have been approved during the Clinton years.

Lord knows we are talking about circuit court nominees now. What if we got a Supreme Court nominee? Does the body get tied up for 2 years? We have actually had one Supreme Court Justice who has been filibustered in the past.

Why did we get to this point? It used to be if people had a litmus test on candidates, that was seen as a terrible thing and they were castigated. I don't know if the Presiding Officer or others remember when Ronald Reagan was accused of having a litmus test. That was just a horrible thing. His administration denied it. They didn't put forward people under a litmus test, and we were moving forward.

Now people are being subject to a litmus test. They are being blocked. They are qualified, and they are being stopped. How did we get to this point? I want to take a shot at that and develop it from the standpoint of a case that is currently before the Supreme Court. It is the case of Michael A. Newdow v. The U.S. Congress, United States of America, George W. Bush, President of the United States, State of California, Elk Grove Unified School District. That would be the operative group in the Newdow case, the flag suit case. It is the case most people are familiar with where the Ninth Circuit Court of Appeals determined it was unconstitutional for our children in school to say the Pledge of Allegiance. The reason it is unconstitutional is because of something Dwight Eisenhower signed into law when he was President of the United States in 1954, and that is where the Congress of the United States added the phrase: ''One Nation under God.''

That phrase was so offensive to Mr. Newdow or his child who was in the school that he said: I can't stand this any longer. He was joined by some other people and took this case to the Court.

The Ninth Circuit said you are right. You should not have to. This is not right for our children to say one nation under God. That evoked quite a comment across the country. It evoked quite a comment by this body. I believe this body voted 99 to 0 to say that the flag salute is right; we should say this; it should be allowed by our children.

There were a lot of protestations and the people commented that it was terrible that the Ninth Circuit would be so out of whack, so lacking of mainstream thought, so out of context and touch with the American public that they would rule against something that 98 percent of the American public is for, the flag salute.

The problem with the public outpouring on Newdow and the problem facing the Supreme Court now on this Newdow case is that they were following precedence being developed over a period of 40 years, that the Supreme Court, circuit courts, and others had been working for a period of 40 years to remove the recognition of a higher moral authority from the public square. They were saying this is something we do not want in the public square.

It started in 1962 that these series of cases is built upon. In 1962, Engel v. Vitale was the case that really started this whole string going. That was when our children were allowed to say a prayer at the beginning of the schoolday, and Engel v. Vitale said that was unconstitutional. It was followed by School District of Abington Township v. Schempp. There the Court held that the Bible readings in public school also violated the first amendment. It was followed, in 1992, by Lee v. Weisman, a case about prayer that was being held at a graduation exercise. The Court held that was unconstitutional. It was followed, in 2000, by Santa Fe Independent School District v. Doe where prayer was being removed from being said at a football game. That is followed by the Newdow case now before the Court. I predict it will be followed by a case that will call for this body to remove ''In God we trust'' off the mantle that is here. I predict it will be followed by a case that will call on us to remove off of our money any reference to a higher moral authority, ''In God we trust'' being taken off of the back of the one dollar bill. It will follow, follow, follow.

Well, people do not agree with that. Massive amounts of people in this country do not agree with that. People have mounted up now. Actually, some people do agree. Some people say, yes, we should remove the recognition of some higher moral authority, of God, from the public square. So we are engaged in this great ideological fight.

I contend that this battle, this fight, of blocking these justices started about 40 years ago. Some of us participating in this form of debate feel as if the last couple of days have been along that 40-year line. What we are seeing is the courts injecting itself here into a societal issue that many people feel deeply about and immersing itself in this. Then both sides get fired up and we get good people such as Charles Pickering and Priscilla Owen and others—particularly a guy like Charles Pickering. He is probably the most instructive of the cases here.

We have gone through ad nauseam his qualifications, but I want to make this point of him: First in his law school class, highest rating by Martindale Hubbell, unanimously approved by the Senate for a district court judge in 1990, affirmed on appeals 99.5 percent of the time, reversed only 26 times out of approximately 5,300 cases, received the ABA, the American Bar Association, highest rating, well qualified.

So what is the problem with this picture? Mr. Pickering was president of the Southern Baptist Convention for Mississippi, so he is a man of faith. As such, when we have these 40 years of cases coming up that say we have to remove God from the public square and run into a guy such as Charles Pickering who says, I will uphold the law—and he has upheld the law because, if he had not, he would have been overturned many more times—he says I will uphold the law but I really think this line of cases and some of these discovered rights the court has done in just these last 40 years, I think they are wrong personally. I disagree with these. I will uphold the cases. But they run into people who are saying we are trying to remove God from the public square and we are going to try to remove people who believe in God from serving in the public square.

You run into this clash, and you get this great clash in the civilization and you get this great clash in the culture. Now you have the courts injecting themselves in a great culture conflict that we are involved in in this country today. One of the key division issues in our country today is issues of culture. People ask what is that?

Culture, it is difficult to say what that is, but people are concerned about it. There is not a company in this country that is not deeply concerned about its corporate culture. There is not a family in this country who is not concerned about its family's culture. There is now in the country itself concern about what its culture is going to be.

The central issue is, are you going to recognize a higher moral authority or not? Is the motto ''in God we trust'' true or not? You get a guy qualified such as this who would say, yes, that motto is true. I believe it to be true. I will uphold the laws as ruled to date, but I do believe this motto is true. And it runs right smack into this series of cases and we are going to see it front and center again in Newdow. We will see it again and again.

That is the problem actually with this, because it divides us on something that should not. It divides us on something that should unite us. It divides us in a way that I do not think is healthy for the country. I do not think this is good at all. I think it divides us on something that as a policy matter is not good and that is why I think it is also bad politics when this happens. I think bad policy is bad politics. That is why we have this level of fighting today. That is why I am speaking on the floor of the Senate at about 4:30 in the morning.

We are going to continue to have this fight. Regardless of the vote that we take later this morning, how it takes place, probably really regardless of the dispensation of these four and future ones coming on, this is the cultural clash that we have. It is not healthy but it is going to continue.

Mr. SANTORUM. Would the Senator from Kansas yield for a question?

Mr. BROWNBACK. I would be happy to yield for a question.

Mr. SANTORUM. Mr. President, the Senator from Kansas points out that Judge Pickering, who is a sitting Federal court judge right now, was affirmed in 99.5 percent of his cases. What I have heard from the other side is that we do not want these judges out of the mainstream being nominated.

Now, would the Senator from Kansas say that someone who has been affirmed or not appealed in 99.5 percent of the cases since he has been on the Federal court is someone out of the mainstream?

Mr. BROWNBACK. Mr. President, the number speaks for itself. Absolutely, this is a mainstream judge. When you get approved on that percentage of your cases that you have ruled on—remember, this is at the district court level, so he is both finding fact and applying law. You have to be a really good judge, if you are going to be upheld by people reviewing you 99.5 percent of the time on both facts, that means there is wisdom there, and law, which means he is applying it correctly.

Mr. SANTORUM. I would ask the Senator from Kansas if he would look at maybe what the Senator from New York, Mr. SCHUMER, said yesterday he considers a mainstream judge. He referenced the Ninth Circuit and some of the judges that President Clinton nominated and were unanimously supported by Members on the other side of the aisle, a judge such as Richard Paez who was involved in the case the Senator just spoke of, the ''under God'' case in the pledge, who went in and tried to hold up the California election, ruled unconstitutional the California three strikes and you are out. This is a man that has been overturned—in fact the Ninth Circuit, with a majority of Democrat nominees, has been overturned more than any other circuit.

Is that group of judges mainstream in the Senator's opinion?

Mr. BROWNBACK. It is not mainstream.

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

The Senator from Rhode Island.

Mr. REED. Mr. President. Once again, we are engaged in the early hours of the morning in a discussion about judges and the role of the Senate, and our role is stark. We have the responsibility under the U.S. Constitution to give advice and consent to the nominations of the President of the United States, not advice and approval, not just advice, but advice and consent. That requires the Senate to take a very active role in reviewing the qualifications of nominees who come before us and making judgments about their ability to serve as members of the Federal judiciary.

We take that seriously. I think that responsibility implies that at times we have to disagree with the President. It

is not unusual that such disagreements take place. This whole debate, I believe, might begin and end with a very simple statement of fact, 168 to 4. One hundred sixty-eight of President Bush's nominees have been reviewed by this Senate and have been confirmed. Four have not. It suggests to me that the Senate is properly discharging its responsibilities to advise and consent with respect to the nominees of the President to the Federal judiciary.

In fact, of those 168 individuals, they represent, I would suspect, jurists who have a conservative outlook, probably a different outlook than I have, on certain issues. Yet they represent both in terms of their conduct personally, but just as importantly their judicial temperament and their judicial philosophy, individuals who uphold the tradition of the Federal judiciary at the level of the district and circuit court individuals who follow law, not try to make it, who do not impose their views on the case before them but, in fact, follow precedence, who follow the guidance of the Constitution and the Congress in establishing the law.

It is in those cases and the very few cases, 4 out of 168, where there seems to be a record of ideological commitment rather than legal scholarship, of political—with a small p—interest, rather than a judicial temperament that is fair and balanced, that the President's nominees have not passed the test.

An example of this is the comment I made in May of 2003 when I contrasted the nomination of Judge Edward Prado to the pending nomination of the Texas Justice Priscilla Owen. Judge Prado served 19 years on the United States district court. He is someone who has a record of fairness and evenhandedness. I would suspect, since he is a nominee of President Bush, that he has a conservative outlook in his approach to cases. But he is an appropriate judge. He follows precedence. He does not insert his particular philosophy, his particular ideology, into the cases before him. As a result, he was confirmed, an example of the 168 judges who have been confirmed by this Senate on behalf of President Bush.

The four who did not pass the test were those whose record suggested that they were not evenhanded, they were not balanced; that indeed they inserted political or ideological bias in the conduct of their decisions. In that case, I think it is not only appropriate but it is our responsibility, as the constitutional body entrusted with advice and consent, to register our consent and to register our protest. And we have.

This is not an unusual circumstance in the history of this Senate and of this country. There have been instances several times when Republicans have used the device of cloture votes and filibusters to express their concern about the qualifications or quality of a judicial nominee. It goes back many years, and it certainly continued into the administration of President Clinton. Abe Fortas, whose nomination as Chief Justice of the Supreme Court of the United States was subject to cloture votes, was subject to attempted filibusters by the Republicans. So were Rosemary Barkett and Stephen Breyer as a judicial nominee for the circuit court. Justice Breyer is now a member of the U.S. Supreme Court. In fact, I was here yesterday morning and listened to my colleague, the junior Senator from Missouri, talk about how Justice Breyer was at a conference he was attending and how he was articulate and appropriate, and might not be someone he philosophically agreed with but that he was a good judge—but Justice Breyer was the subject of cloture motions and a filibuster.

Mr. SANTORUM. Would the Senator from Rhode Island yield for a question on that?

Mr. REED. Could I just continue?

Mr. SANTORUM. Certainly.

Mr. REED. He was subject to a filibuster and subject to cloture votes before he was ultimately confirmed, and then ultimately went on to the U.S. Supreme Court.

So this is not a procedure or a device that has not been used by the Republicans, because, in fact, it is part—indeed, a significant part—of the procedural devices of the Senate, something that is appropriate.

As I pointed out yesterday, what I find disconcerting and indeed somewhat contradictory to the argument of the Republicans today is that they were quite adept during the Clinton administration of using delay and denial of hearings to frustrate the nominations of so many individuals, so many potential judges, because many of these individuals never even reached the floor of the Senate for a vote. It was, in my words, a pocket veto.

We are all familiar with the notion of a pocket veto. The President of the United States, in the last 10 days of a session, can simply put the bill in his pocket, not sign it, not comment on it, and it essentially dies as legislation. Well, that was done all too often in the Clinton administration.

The most significant case is the one I mentioned before. In fact, the Senator from Pennsylvania and I yesterday had a bit of a colloquy about this. That is a nominee, Elena Kagan, who was nominated in 1999, spent 18 months waiting for approval, no action was taken, and her nomination expired. Fortunately for Ms. Kagan, she has found other employment. She is now the dean of Harvard Law School, which might suggest that she certainly had some legal abilities that could have been used on the Federal bench. But that is an example of a pocket veto.

Again, we are engaged in this discussion, this debate. It is a serious one, but it is taking place at a time when there are other very serious issues pressing this country. As my colleague from Nevada, Senator HARRY REID, pointed out in his long floor statement preceding this debate, that as we worry about four individuals who have not yet been confirmed, other Americans are seeing their jobs undercut. We are looking at unemployment rates of about 6.0 percent. They are hovering there. They seem to be persistent. Long-term unemployment is growing. It is becoming increasingly difficult for people to maintain their employment with good, solid jobs. We see the poverty rate going up. Meanwhile, the vacancies on the Federal courts have diminished significantly. We are at almost record levels of Federal judicial employment. But as we look at the people throughout this country, the poverty rate is growing. It is affecting children particularly. The rate of the uninsured, or people lacking health insurance, is increasing. Our budget deficit is soaring. The national debt is soaring. These are difficult issues, and yet we are here today talking about 4 individuals, out of 172, who have not been confirmed as judges and not been confirmed based, I think, on sound analysis and sound review of their records.

So I think, again, to place this in context, we are performing our historic responsibilities that have been used and deployed by countless other Senates, both by Republicans and Democrats, throughout the course of this country's history. And indeed I think that is our responsibility and we are doing it.

What I regret, and I hope after the conclusion of the votes this morning we can get back to, is critical business such as how do we expand economic opportunity in this country? How do we reinvigorate our manufacturing base, which is eroding dramatically? How do we give working families additional resources by raising the minimum wage? That would be something that would be very beneficial to millions of Americans. Can we pass good legislation that allows us to continue to invest in our infrastructure, in our highways, in our roads? And then in international affairs, how do we come to grips with the increasing crisis overseas in Iraq, a crisis that sees our soldiers, marines, airmen, and sailors each day engaged in conflict over there in a very difficult insurgency?

As Senator PRYOR mentioned, yesterday several of us had the opportunity to go up to Walter Reed Army Hospital. I have been there a few times over the last several months and have seen a Rhode Island military police unit, National Guard, assigned to Baghdad. They have suffered, unfortunately, casualties. To go there and see these young men, to see them having suffered, having served so magnificently, it makes you wonder why we are spending so much time on this debate, and not more time talking about the way ahead in Iraq, not talking about other situations of international concern.

I find it startling just a few days ago the Central Intelligence Agency released a report concluding the North Koreans likely have several nuclear devices and likely will be able to deploy

those devices without testing. That they have apparently mastered a technological means to circumvent testing is startling, in fact, horrific information, but this is being lost in the shuffle with the Iraq situation. This is a fact that is startling and is pressing on our national security and our future security.

But there is no extended debate on North Korean policy. There is no extended debate on the way ahead in Iraq. We have committed ourselves as a nation to a course of conduct that requires sacrifice, and yet we are not fully coming to grips with the nature of that sacrifice and what we should do.

For many of these reasons, although this debate is certainly appropriate—that is one of the great things about the Senate, you can talk of the issues of the moment, the issues of the time, but certainly there are so many more pressing issues, so many more critical issues to the future of this country and to the future of America's families the continued obsession with this topic does disservice.

Mr. SANTORUM. We have had debates in the past and I would like to ask the Senator from Rhode Island this question, and I am posing a hypothetical. Assume that, and I am sure some in this country would like to see this happen, in the next election President Bush is overwhelmingly defeated at the polls, after his defeat at the polls in November, President Bush nominates a judge to a circuit court after the election, and that the Senate happens to be in a lame-duck session after the election. He would nominate a judge to the circuit court. Let's also assume when President Bush gets defeated, not only does he get defeated but the Republicans lose control of the Senate. It is a huge win by the Democrats. Assume all that happens.

President Bush, in the face of that, comes out after the election, nominates a judge to the circuit court and the Republicans jam that person through committee, get him to the floor and try to move a vote on that nomination to confirm him prior to the end when the Republicans would lose control and a new Democrat President is in place. Does the Senator believe your side of the aisle would confirm that nominee like that?

Mr. REED. Reclaiming my time, I like your hypothetical. I like the context.

Mr. SANTORUM. I thought this would be an interesting example.

Mr. REED. I think you are being overly generous. I like to believe if the nominee was of the quality to serve on the Federal bench as a circuit judge, he or she would be approved, which is the rule that applies so far to 168 of the nominees of President Bush.

I do say quite sincerely that, indeed, if someone was nominated by a President who did not measure up to those standards, the 168 judges who have been affirmed, they would not be voted in because they lack ability, skill, or judicial temperament, or the other criteria, and they would be opposed.

Again, the record suggests that in dealing with President Bush's nominees, 168 have been confirmed. I suspect all of them are more conservative than any nominee suggested by President Clinton. All of them are individuals who, had a Democratic President been in office, would not have been nominated. That is the nature of the nomination process. Nonetheless, they were confirmed.

Now, the last 2 days of a legislative session, with a change of power, et cetera, that introduces a unique aspect.

Mr. SANTORUM. Do you believe anyone on your side of the aisle would try to block or attempt to filibuster given the unique nature of that circumstance?

Mr. REED. There might be an attempt to do that, but your question to me is, what do I believe. Maybe this is an expression of my beliefs. I would like to think that, as in the case of 98 percent of President Bush's nominees, they would receive not only careful review but ultimately confirmation.

Mr. SANTORUM. I ask the Senator two more points quickly. A nominee in November, to be confirmed within 3 or 4 weeks, the Senator would agree a careful review would be very difficult during that period.

Mr. REED. I think the Senator is trying to refer to the more philosophical than pragmatic logistics. The reality is if someone, either someone who is a sitting judge or otherwise, was nominated——

Mr. SANTORUM. Even assuming it was not a sitting judge.

Mr. REED. Nominated in November, simply the FBI, background checks, the questionnaires, reviews, all those things, take time. In fact, the reaction, frankly, if any President did that, President Bush or President X or President Y did that, the public reaction would be very adverse, regardless of the Senate. I would like to move on.

Mr. SANTORUM. The final point is, Justice Pryor, 1980, nominated by Jimmy Carter after the November election in 1980. The President's party lost the election, the Democrats lost the Senate, he was nominated after the election and was brought to the floor with no judicial experience, and the Republicans, who then took control of the Senate in 1980, were asked to confirm him.

What did the Republicans do? There were some on our side, I think the Senator can understand in response to the question, who said we should filibuster because we do not have the time to read his record, he has no judicial experience, but the Republican leader who was going to be the majority leader pushed his side not to filibuster, and moved him through. It was Justice Breyer.

Mr. REED. My point was Justice Breyer was subject to a cloture vote, subject to a procedure that is being used here.

Mr. SANTORUM. Under extraordinary circumstance, I think the Senator from Rhode Island would admit.

Mr. REED. Let me reclaim my time. The circumstances might have been extraordinary but, again, this was an example of Republicans using the device of cloture votes, of threatened filibuster, of extended debate, to make a point that they felt uncomfortable with a judicial nomination. That is the principle.

There is no special rule for the last 20 days of a session. There is no special rule that says that is when the filibuster is OK. There were sincere, well-meaning Senators, Republican Senators, who felt that because they did not have a chance to evaluate his record or because they felt his record was too liberal, they needed to do what they did. Justice Breyer, in fact, was well known to every person in this body. He had been the counsel to the Senate Judiciary Committee, and worked for Senator KENNEDY on the deregulation of the airline industry. He was someone who had personal knowledge of every Senator in this body at the time.

So this was not a question of who is this person. This was a question of some people expressing their sincere belief that because of his judicial philosophy, because of his temperament, because of the way he conducted himself, the Senate should not go forward in this automatic fashion.

The point remains the same. This notion of the unprecedented, unconstitutional, un-American use of cloture votes and filibuster is quite wrong. It has been used before by both sides.

The question must be back to the original hypothetical posed by the Senator from Pennsylvania, What is the criteria we are using. I urge that criteria has to be based upon a careful review of the conduct and temperament of the nominee. That is a better construct of the individual. Is this person someone who recognizes the careful balancing a judge must perform daily? Is this someone who, although he has very strong beliefs, strong ideas about the way the law should be interpreted, respects the fact that as a circuit judge or a district judge he or she has to follow precedent? Is this someone who does not try to impose their views on the law but tries to faithfully judge based on the law? That is the issue. That is the issue of all of these nominees, and 168 of President Bush's nominees have passed that test with flying colors. Four have not. That, I believe, is what we have to focus on.

Once again, as we move forward—and this is an appropriate debate, this is one of the virtues, the glories of the Senate. We can stand here at 4:50 in the morning and talk about great issues that affect this great country. However, this is not the only issue. I would say there are so many more pressing issues. We will conclude this extended

debate this morning. We will vote, and then we have the responsibility of getting back to some very critical business the business of this economy, of this country, both here and across the globe.

There is one issue among many issues we have to be particularly concerned about and that is the issue of our long-term economic vitality. We have a situation in the country where we are losing jobs left and right. We are particularly vulnerable to the loss of manufacturing jobs. Under the Clinton administration, in a huge jobs growth of the late 1990s, we saw an increase of 257,000 manufacturing jobs. Now we are seeing a contraction of employment generally, and particularly in manufacturing. We have lost about 2.45 million jobs in manufacturing. We have to do something. I hope we can.

So far we have not taken action aggressively or as aggressively as we should. What we have seen in many respects is our manufacturing sector are jobs being lured overseas by lower wages, poor environmental quality standards, very little in the way of labor rights. It is attractive to employment. We have to do something about it. We operate in a context of international trade rules where we cannot simply put up a wall of tariffs around our country, so we have to be more creative and innovative. One of the problems that inhibits our creativity and our innovation is the fact that to help manufacturing concerns we have to provide some resources, in terms of manufacturing tax credits, in terms of a solution or at least progress when it comes to the issue of health care costs to companies throughout this country, which is probably one of the key problems facing every business enterprise in this Nation. That does not come cheap. When you look as it as we are, not only erosion of jobs but an erosion of the Federal budget moving in this administration from a surplus projected to be in the trillions of dollars over a decade, to deficits which are equally now being projected into the trillions of dollars, it constrains our ability to respond to these issues, to provide some type of benefits to alleviate the cost of health care for the manufacturing sector, to provide incentives for manufacturing, to provide tax credits and other programs so we can help manufacturing companies particularly deal with environmental concerns.

One of the consistent complaints I get in Rhode Island is it is not fair, Senator, I have to abide by very strenuous rules on environmental emissions, yet I see competitors in China and other countries spewing smoke out of their smokestacks and pouring solids into the wastewater streams. I cannot do that.

In fact, up my way, the manufacturers have been zealous in protecting the environment. But they are in a terrible dilemma. How do we help them? We could provide tax credits for environmental improvements. But again that costs money. It costs something else, too. It costs the time and attention of this Senate on this issue. It costs the same time we are spending to talk about judges to invest in the future of our economy and the future of this Nation. I hope we can spend the time.

We have seen over the course of the last several years an economy that is beginning to at least show some signs of life, but we are not back yet by a long shot. There is a real fear we are leaving millions behind, a real fear in parts of this country that those jobs that were there 3 years ago, particularly in manufacturing, have not only been lost temporarily but have been lost forever. That goes not just to the individual families that have been affected, it goes to the fabric of the lives of those families.

When a manufacturing plants closes, it is not just a sad day in the lives of the workers, it is a community feeling a loss. We are seeing too much of that.

We have not only this challenge, we have the challenge of the tumultuous world. Again, when we look at the requirements and demands on our economy, and the requirements and demands of protecting ourselves internationally, we have to ask ourselves where are we going to get the resources, given the budget, to fund our military? To provide the resources to conduct a very expansive and aggressive foreign policy?

Just a few days ago this body voted $87 billion for reconstruction of Iraq. That is $87 billion in the context of a deficit in which we are spending money literally we do not have. I am sure that will not be the last time we consider additional resources for Iraq, Afghanistan, and other countries. Yet we are not doing those things we need to do to ensure fully that our nation is entirely protected.

So we have serious challenges before us. I hope again at the conclusion of this very extensive debate and at the conclusion of these votes this morning, we can get back to that critical business. Interestingly enough, we interrupted Senate proceedings at a juncture where we were ready to pass the HUD–VA appropriations bill to get on to the discussion of these judges. At that point, we were considering how we could strengthen further, increase further, the resources going to our Veterans Administration. That is another area of concern I have and I am sure we all have. We have to make sure those young Americans who are today struggling—and the fact those young Americans I visited yesterday who are being sent literally from Walter Reed Army Hospital to a VA facility, many of them amputees because of the nature of the conflict in Iraq that 5 years, 10 years from now they have the same quality of services they are getting today.

That is a challenge. And it is a challenge we cannot meet unless we focus our attention and our time and our effort on this bill. That was the very bill we left to come on to this discussion of judges.

How much time remains?

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

Mr. REED. I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SANTORUM. Mr. President, before I resume debate on the judicial nominations, all this talk about not having done work on the economy ignores the fact this Senate early this year passed a jobs and growth package that is working—7.2 percent growth in the last quarter. A lot of people, maybe some, may be upset we are having great economic growth and 300,000 jobs have been created.

As this chart shows, we are now in the most jobs in the history of America, 138 million people. See the signs of doom and gloom and 6 percent unemployment that 10 years ago would have been full employment, we are at that level now. The idea we are going to hell in a hand basket with the economy, some may wish that to be the case for political purposes, but it just is not. It is not a fact.

The facts are this economy is growing. Sure, we have more to do. That is why we have the jobs and growth package we are trying to push through having to do with litigation reform, which is being blocked by the other side of the aisle. On several fronts, whether it is medical lawsuit abuse, whether it is class action reform—which we lost on the floor of the Senate by one single vote—whether it is asbestos legislation—talk about manufacturing jobs. Asbestos litigation is killing us. What is happening? The other side of the aisle is blocking it because their trial lawyer friends in the Democrat Party, who support the Democratic Party more than any group, they are blocking productivity, they are blocking job creation.

They come to the floor and complain that there are no jobs available. The fact is, the policies of this administration are working, and it is just driving the other side crazy. They want to complain about the past.

Look to the future. Things are looking great, except when it comes to the third branch of Government.

The third branch of Government, the judicial branch of Government, is one of the most important branches of Government because it interprets our Constitution. It says what our rights and responsibilities are according to that Constitution.

You have to wonder because I get this question all the time: Senator, why are you spending all this time on judicial nominations? What is so important? How does it affect me? I get reporters' questions all the time. Reporters sometimes can be insightful and sometimes they can ask the most basic of questions. And you wonder why. But in this case the basic question is a good question: Why should we care about this?

Now, if you would listen to some on the other side, they would tell you, you should not care about this. Turn your televisions off. Nobody is paying attention. The sign from the Senator from Iowa: I am going to be watching ''The Bachelor'' tonight. That, to me, was one of the most telling things. It was a joke. Oh, but you know humor. Humor is one of the great things in our society, every society, because for humor to be really effective, there has to be a little bit of truth in it. The little bit of truth in that—I am going to be watching ''The Bachelor''—is don't pay attention. Please, don't pay attention to this. Go do something else. We would rather have you not know what is going on. We would rather have you, at 5 o'clock in the morning, be safely snuggled asleep in your bed knowing that, trust me, we have taken care of all of your concerns and needs. So go watch ''The Bachelor,'' something really important, something really significant, something that is going to elevate your life. Don't pay attention to one of the most important debates this Senate has ever had. Go watch ''The Bachelor.'' Go watch the continued debasement of our society. That is what you should be doing.

Now, I know that people are going to say: Oh, well, you can't take a joke. But in humor is truth; otherwise, the humor does not work, does it? Go watch the debasement of our society. I would argue, if you want to watch the debasement of our society, you should turn on to C–SPAN right now because what is happening on the floor of the Senate is an attempt by a minority to circumvent the Constitution.

Why? Circumvent the Constitution by requiring a higher standard for the confirmation of judges than has ever been held before. Well, they say there have been filibusters before. There has never been a case where there has been an organized attempt to block a nomination by requiring a supermajority. There have been cloture votes filed here.

In the case of Stephen Breyer, Justice Breyer, nominated after the 1980 election, after Jimmy Carter lost, after the Democrats lost control of the Senate in a landslide election—can you imagine if President Bush had the gall to nominate someone to a circuit court after getting swamped in an election? There would be audible laughter on the other side of the aisle that we would consider a nomination at that point. Filibuster? My goodness, they would be screaming how dare you have the gall to do something like that?

I know the Senator from Rhode Island said: Well, I would hope we would consider this. Oh, please. Please. Look at the nominations they are blocking now, ''out of the mainstream'' nominations they are blocking now.

Janice Rogers Brown: 76 percent of the vote in California. Out of the mainstream?

Priscilla Owen: 84 percent of the vote in Texas. Out of the mainstream?

Oh, I would hope we would consider these nominations in due course? Really? Really not. No. What the Senate Republicans did in 1980, by confirming someone to an appellate court, shows what the Senate was like years ago. But it has fundamentally changed. Why? Well, back then we had leaders. You had Howard Baker. You had people here on this side of the aisle who put the institution first, who said, as a leader: We are not going to filibuster. In fact, they moved the cloture vote to move the judge. Why? Because we only had a week or so left when the nomination came up.

Here in the Senate just to move anything takes weeks. At the end of a session, one Senator has enormous power because they can make you go through the procedures in the Senate to get to a vote, which takes weeks if there is not consent. So just one Senator, at the end of a session—we all know it. We all use this leverage. It is the beauty of this place. It is why one Senator is so much more powerful than dozens and dozens of House Members. It is because of the rules here.

But the Senate minority leader, soon-to-be majority leader said: We are not going to do that. We are not going to filibuster. If there is a hold on soon-to-be Judge Breyer, we will work with the soon-to-be minority that was swept out of the election—huge losses; hemorrhaging—we will work with you to confirm someone who, by the way, is now on the United States Supreme Court and is writing opinions that make me throw up.

But we did it because the Senate was a different place then than it is now. We did it because the leaders were different then. Leaders did not respond to the latest pro-choice Web site. They were not manipulated by organizations far from this place, who fund their campaigns and support their grassroots activity, narrow special interests, who seep into this Chamber like hidden gases underneath the door panel. That is what is poisoning this atmosphere. That is what is poisoning this atmosphere. It is narrow zealous special interests. That is what has changed in this place.

But it is not just them. They cannot do it without us because there have been the NARALs and the ACLUs, and People for the American Way, and the trial lawyers association and all—labor unions—they have been out there before. But people in the Senate always stood up for the Senate against the passions of the moment, the special interests of the moment, the needs and wants of your supporters at the moment.

They felt a responsibility. They felt a responsibility for their leadership in the Senate.

It is amazing to stand here. The Chamber is basically empty. No offense to my colleagues from Kansas and South Dakota, but it is 5:10 in the morning, as my voice echoes, resonates without very many people here. But you still look around this place, and you look at the empty chairs and you close your eyes and you can just feel the presence of the greats who have been here in the past, of the people who have sat in these chairs—these very chairs at these very desks in this very place, this beacon of deliberation, this beacon of sometimes delay and sometimes not particularly pretty debates in the Senate, but yet the essence of democracy here. And for 214 years—214 years—the leaders in this Chamber, not necessarily all the Members—we are a society of saints and sinners and everything in between, but the leaders in this Chamber always took the responsibility of leadership of this august body as a sacred trust because what we do here sets precedent for what will happen.

The Senator from West Virginia changed the filibuster rule. I know with his sense of history he knew the consequence of his action. When he changed the rules postcloture for the recognition of a quorum, the Senator from West Virginia knew what the consequences of that would be. When we change any procedural thing in this Senate, we know because history has taught us that there are profound consequences.

So when Senator DASCHLE, Senator REID, Senator KENNEDY, Senator LEAHY, Senator DURBIN, Senator CLINTON, and Senator SCHUMER—the leaders of this new strategy—decided they were going to enlist their colleagues on a new course, they could not help but know. You cannot help but know, if you spend any time in this place. If you are a page, who comes in 15, 16, 17 years old, and comes in and just sits in this place for any period of time, you know that what you do here over the years remains in some way because you set precedent.

You all know, just by looking at these sometimes not particularly attractive, sort of stodgy-looking leather chairs that this place is a place of tradition. It is a place of precedent. These are old wooden desks. We have little ink wells. Look at this little sand that comes out of these things that were used for people who signed documents with feathered pens. Come on. You cannot be here and not know that this is a place of tradition and precedent. It reeks of it.

So when you change something here, you have to realize that it has a huge impact on our society. So I ask, what is the great issue of the day—issues of the day—that are so urgent, that are so powerful, that are so necessary for this precedent of the Senate, for a leader never to involve his party in a partisan attempt to block a nominee by requiring an unconstitutional supermajority to confirm the nominee. Never has been in history. Mr. President, 2,730 nominees since the filibuster rule was put in place in the last century. No nominee—never, never with a nominee in the history of the country did a minority leader ever enjoin his forces to

block by using the filibuster. Never before. Now that is a precedent-setter, folks.

Why? Why? Why is it so important? What has changed that would not lead George Mitchell to do that? That would not lead Howard Baker to do that? That would not lead Mike Mansfield to do that? That would not lead Everett Dirksen to do that? That would not lead Senator Taft or Senator Vandenberg or Senator Johnson to do that?

Let's go on back through history. All of these men—the giants of the Senate—the giants of the Senate never once employed this tactic. Do you think that Lyndon Johnson, as majority leader, ever had a nominee he did not want? I assure you, having read some of the history of Lyndon Johnson, and Caro's book—the Senator from Arkansas talked about it—there were people the Senator from Texas did not like. There were people the Senator from Ohio, Mr. Taft, did not like.

You could go on throughout history, but did they ever apply a higher standard? Did they ever do that? The answer through history is no. Could they have? Well, obviously from what is happening right now, the answer is, yes, they could have. But did they do it? No.

Were there issues of great importance during those times? Well, I would suggest if you were living through those times of war and depression and communism and segregation, and in prior centuries, slavery, reconstruction, and trust busting, and human rights, I would argue those are pretty big issues. Never before used.

So I am going to go back to what the Senator from Kansas was talking about in the last hour. What are the issues—or what is the issue—that is so important that the Senator from South Dakota and the leadership of the Democratic Party would seek to change the way the Senate does business, would seek to change the precedent of the Senate and potentially forever change the judiciary of this country?

Let's make no mistake about it, you are going to dramatically affect who is going to be applying for these judges, who is going to be confirmed, and what their point of view is going to be—I would argue what their competence is. The issue is clear, it all centers around this issue called the right to privacy—the right to privacy.

Now, here is a copy of the U.S. Constitution. I am holding it up in my hand. I challenge any person in this country, in the world, to find the words ''right to privacy'' in this document. It does not exist. It does not exist. Wait a minute. I always thought—I ask students all the time: What section of the Constitution is the right to privacy? Will you please read the section that the Founders, or through constitutional amendment, established the right to privacy? Can you please find that for me?

Well, oh, yes, it is in the—let me see. Is it in the 14th amendment? Is that where it is? No. I am sitting here reading: ''All persons born in the United States subject to jurisdiction . . .''—no, no, I don't see the words ''right to privacy'' in there. Maybe I was wrong. Maybe it is the 10th amendment: ''No powers delegated to the United States Constitution prohibit the States or reserve the States with respect to . . .''—no. Oh, it has to be the first amendment. Good: ''Congress shall make no law respecting the establishment of religion, prohibiting free speech or the exercise thereof, or abridging the freedom of speech or the right to peaceably assemble . . .'' —no, it is not there.

Where is this right to privacy? Well, it was created by whom? It was created by judges. Was it amended because there is a provision in the Constitution, we can find that, that says how you amend this document. Is that the way it happened? No, it did not happen that way.

We amended the Constitution because we put in place a power of authority, people on the highest court of the land who decided it was their responsibility to change the Constitution, that it was their responsibility to find new meaning in these words that have been around for a couple of centuries.

I have always thought we were a government of laws and not of men, but that is not the case anymore. That is fundamentally what this debate is about because, you see, the written words of the Constitution that says a majority vote is necessary do not mean anything anymore because the Constitution is a dusty old document we can manipulate and change for whatever purpose because we have advances in society; we know more than they did then; we are enlightened. Come on, folks, 240 years ago, they didn't have the level of sophistication and knowledge of our culture today, and so these dusty old documents need to be revised; it is so complicated to go through the amendment process of the Constitution; it is so cumbersome; we, the enlightened, will change it as, of course, the culture demands us to do, to free us from the bonds and shackles of these now long departed Founders of our country who couldn't possibly understand the complexity of the world today and the advancements today that have made this document so unnecessary. So we don't need to find anything in this piece of paper. In fact, if we can't find it, that is fine; we will simply create it.

Who does this creating? It is the very judges we are debating today. The Senator from Kansas talked at length in the last hour about the line of cases that is taking an eraser to the word ''God,'' religion, erasing it from our public consciousness. It is as if the first amendment was never written:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

''Free exercise thereof.'' I asked a group of students yesterday what were the first words in the Constitution, separation of church and state or exercise of free religion. Half said separation of church and state. Of course, if you listened to the judges and what popular culture says, you would believe that.

Can you imagine, half the people I talked with yesterday did not think free exercise of religion was in the Constitution? Can you imagine? Why would they think that? Because in practice that is the message the culture sends about the Constitution. It is not about freedom of religion. If it were about freedom of religion, we wouldn't be erasing God from everything that is public in our culture.

Who is doing the erasing? Is it Congress? Did Congress pass a law that says you can't have prayer before a football game? Did Congress pass a law that says we will scrap ''under God'' from the Pledge of Allegiance? Did the people speak out and say, We don't want the mention of any faith in the public square? Is that what Congress did? No.

So people ask: What are the consequences of what we are doing here today? The consequences are clear. We have elected people who are erasing from the public consciousness some of the most important and fundamental rights and, I would argue, some of the most important and fundamental principles that keep our country moral, safe, free, and prosperous.

Mr. BROWNBACK. Mr. President, will the Senator from Pennsylvania yield for a question?

Mr. SANTORUM. I will be happy to yield to the Senator from Kansas.

Mr. BROWNBACK. Mr. President, I have been listening, and I think the Senator from Pennsylvania puts forward a brilliant and eloquent argument, and it gets to the nub of what we are talking about instead of the areas. It is in this last 4-year time period that a constitutional right to privacy has been discovered and which has spawned a series of cases. This is done by the Court. The Court has discovered this, and the Court has done this.

Let me ask a simple question: Has the U.S. Supreme Court ever been wrong?

Mr. SANTORUM. You would think from the debate here that this right to privacy, that has now been established as this incredibly well thought out and documented thing, is wholly supported within this document. I have folks on my side of the aisle—I always think of the former Senator from Washington, Slade Gorton, who is for abortion rights who thought Roe v. Wade was one of the worst legal decisions he had ever seen. So many people who are for abortion rights, who would have voted as a legislator to allow the legalization of abortion, saw this judicial construction or deconstruction of the Constitution as an abomination to our legal system.

Has that ever happened before? Obviously, the Senator from Kansas is referring to some of the cases such as

Plessy v. Ferguson where the Court looked at this Constitution and said: You know, equality really doesn't mean equality. The words here aren't exactly what we think they are, and you can be separate and equal. Or we can go back to Dred Scott. They looked at this Constitution and said: You know, equal doesn't mean equal. This rash of cases we have seen where the courts have just decided to take these hallowed words and twist them into the culture of the day, this is not a new thing in America; unfortunately, it is a very old thing in America.

The Court in Dred Scott said: Yes, people have rights and people should be treated equally, but—I think of ''Animal Farm''—some people are more equal than others. Some people have more rights than others. In the case of the slave, they really don't have much in the way of rights at all.

We look back at those cases now with disgust, but judges found in this incredible document the right to do incredible harm to this country—incredible harm—and, in many cases, with complicity from the Senate, for it is we who are the guardians of this document because we put these judges in these places. So it is an important responsibility.

That is why this debate is so important. That is why we shouldn't be watching ''The Bachelor.'' We should be watching out for the future of this country.

In my next block of time in the next hour, the Senator from Kansas and I are going to talk about this right to privacy, this line of cases that has tried to erase God from the public memory and consciousness, all instigated by judges who would find wide praise and admiration on the other side of the aisle, who would be called mainstream judges—mainstream judges who are striking at the heart of this document.

What is a mainstream judge? Let's understand it. A mainstream judge says God has no place in the public square. That is a mainstream judge.

A mainstream judge says you have the right as an individual to have dominion over somebody else and terminate their life if you want to. That is a mainstream judge.

A mainstream judge says we are going to take the institution of marriage and corrupt it, deconstruct it, tear it apart, put it back together to mean nothing. It means any two people for any reason who want to get together should be recognized as married, irrespective of who they are. It has nothing to do with fathers and mothers and having children. What does that have to do with marriage? That is a mainstream judge.

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

Mr. SANTORUM. It is an extreme judge, not a mainstream judge.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. JOHNSON. Mr. President, reference has been made at this early hour this morning about debasing the values of this institution and this country. If any American sadly wants to see debasing of the institution, they have only to look at the strategy that has been foisted upon this body and on the American people by the Republican leadership of this Senate with their fabrication of a ''crisis'' relative to the nomination and approval of Federal judges.

There is no crisis. The fabricated crisis the media has talked about is a polite way of saying the phony crisis, the fake crisis.

The reality of the situation is that this Senate has approved 168 Federal judges nominated by President Bush. The Senate has blocked the approval of 4 Federal judges, a remarkable 98 percent success rate.

The ratio of unfilled judgeships is now at its lowest point in some 13 years. The pace of approval of judges is at a higher rate than that of past Presidents of either political party, and I think it is fair to say that of these 168 judges, most of whom I voted for, virtually all, if not all, were conservative Republican judges. That is to be anticipated. They were all nominated by President Bush.

The question is not whether we should approve conservative Republican judges. We have, overwhelmingly. The question is, Should there be some shred of moderation, some shred of bipartisanship in this institution relative to these judges who will serve life terms on the bench? These are not Cabinet officers. These are not people who come and go with whatever President happens to be in office. These are people who will serve virtually their entire lives on the Federal bench. So this body has a constitutional obligation of advice and consent.

Apparently, the other side believes unless there is 100 percent approval of Federal judges, that somehow we haven't done our job. I would say the opposite, that if all we do is rubberstamp the nominations of any President, Republican or Democrat, this body has fallen down in its obligations, constitutionally and ethically.

One of the great things about the Senate and the great traditions of the Senate—and there are great traditions in this body—is that unlike the House—I served in the other body, as did many of my colleagues—unlike the House of Representatives with its majoritarian philosophy, set up that way by the Founders, where if you have a majority of one vote, that is sufficient to ram through almost anything, the Senate was devised by the Founders of our Republic to be a moderating, cooling institution. That is why we have 6-year terms—because Senators are invited to take a longer term view of what is good for our Nation and what is not.

The Senate is designed to be a body that doesn't jump every time a whim is expressed by the public or in the political whims of the day. Our role is to take a longer term view and to moderate what is oftentimes the hot politics of the House of Representatives.

It is very difficult, because of the rules of this body, to jam through legislation for the approval of virtually anything of any controversy without some bipartisanship. That is the course of action we are seeing here today.

While we have approved 168 of President Bush's judicial nominations, the minority party, a 51-to-49 minority, has said these are such important positions, let's make sure there is a general consensus about the support of these nominees. That is what the 60-vote rule requires.

The other side is very frustrated because they like to jam things through the Senate with 51 votes, but that is not the way the Senate works on this or many other issues.

I have to say President Bush's nominees have received prompt hearings compared to virtually any other standard. That contrasts greatly with President Clinton's experience. President Clinton was told: Don't bring us a nominee who is liberal; they will not receive a hearing. And, indeed, they did not.

We had people nominated, closed up their law practices and put their family on hold for years upon years, and could not get a hearing under the Republican leadership during the Clinton years.

That doesn't happen anymore. Now people who are nominated do receive timely consideration. They do get votes. They get votes on the floor of the Senate. But the Senate has chosen to use its prerogative to require bipartisanship on some of the judges who many in this body believe fall outside the mainstream of conservative thought in terms of their politics, in terms of their legal interpretations.

There is no crisis in terms of judges. For over a decade, we have not had the ratio of judgeships filled as we have today. President Bush has an enormous winning record in terms of the nominations that have been approved. Again, virtually all of them are conservative Republican judges. That is his prerogative. The Senate has gone along with that. There is no problem there. This is not as though somehow the President is getting jammed.

What is happening here, I think, is that there has been a strategy concocted by the leadership of the other side to try to gin up political support among a faction of their supporters. What we have here is politics, an effort to play to the radical right. It is costing $100,000 or more of the taxpayers' money for this debate, and yet what we have here is a phony, fake, fabricated crisis. This is no crisis. The Senate is dealing with judges in a timely and responsible fashion.

President Bush, obviously, could have the approval not of 98 percent but 100 percent of his nominees if he were to send to us mainstream conservative Republican judges, as he largely has

done. Clearly, it is part of the political strategy to look around the country and find a handful who fall far outside the mainstream of Republican or Democrat judicial thinking and nominate them, knowing there will be resistance to these individuals.

The thought is that by nominating these individuals, they can energize the radical right-wing political faction within the Republican Party. They will contribute money then if they see all this going on. It is a very cynical strategy. This has nothing to do with the interpretation of the Constitution. We are approving conservative Republican judges. It does have to do with able people who are in the mainstream, broadly thought.

I think it is regrettable that we find this Senate and our work hijacked by those who want to push aside timely consideration in the Senate of issues pertaining to jobs, education, health care, energy, environment, our veterans and our military—all the issues with which this body ought to be dealing.

The Federal fiscal year began October 1. Yet the Federal budget is not concluded. So there is so much that needs to be done, that we are being prevented from doing as we spend these many hours around the clock on a fabricated, phony crisis that does not exist. All of this to play to a very small faction politically in America. It has to do with political fundraising. It does not have anything to do with the quality of the court.

I note that 95 percent of the Federal judicial seats are now filled. That is the lowest vacancy rate in 13 years. Last year, this Senate, led by my colleague Senator DASCHLE, confirmed the largest number of judicial nominees in a single year since 1994. There ought to be celebrations on the part of the other side in this body over the remarkable, timely, aggressive approval of Federal judges, the highest number of judicial nominees approved in a single year since 1994. The highest level of judicial seats filled, ratio of seats filled, in 13 years. That ought to be cause for celebration. That is a remarkable level of progress, and it was done in a bipartisan fashion.

Part of that time, the Democrats controlled the Judiciary Committee with Senator LEAHY as chairman. Part of that time the Republicans controlled the Judiciary Committee. So the track record is truly extraordinary. What an irony that in the face of that reality, we find ourselves through the wee hours of the night, through the day yesterday, through the day today, being prevented from dealing with the real legislative issues while we talk about this political gamut that we have before us.

Some say, well, what about the appellate court judges? That is the highest Federal court next to the Supreme Court itself, and one that truly does write law. Well, even there the Senate has confirmed 29 of President Bush's appellate court nominees to date, more Bush circuit court nominees than—get this, President Bush has had more of his appellate court nominees approved by this Senate than President Clinton, President Reagan, or President George Herbert Walker Bush had by this point in their administrations. Yet here we are, the other side posing as though there is some sort of terrible crisis going on when, in fact, it is just the opposite. Conservative Republican judges are being approved at a record pace by this body.

What the other side seems to find unacceptable is that the Democratic Party is insisting that one should not go to a lifetime Federal bench unless there is a generally broad consensus, bipartisan consensus, not unanimous but a broad consensus, of at least 60 votes that that person deserves to sit on the bench dealing with legal issues that are of monumental importance to every American citizen for the rest of their lives. I think that is one of the great strengths of this body. That is one of the great strengths of the United States Senate, that we cannot be stampeded into the radical actions of a few but that we take a longer term view of what is good for America, what is consistent with American values, what is consistent with American priorities, for all of our people. That is what is happening in this body this year, and that is why a few on the other side are objecting so strenuously.

Now, other judges have been filibustered; cloture votes have been held. Other judges have been held up in committee, which has been the favorite mechanism of keeping people from having a vote at all. That is to be said even for these four. They have been allowed votes in committee and cloture votes on the floor. They cannot get the 60-vote requirement and so they are not going to the Federal bench because they do not have that broad-based consensus of support in this body.

That is what this body is all about. It is not just judges. This same 60-vote rule prevails on virtually everything we do in the Senate, from the passage of health care, to education, to appropriations legislation. Virtually everything is subject to that consensus requirement. I think it reflects the best of our values in America and, in fact, it represents America coming together in this body to try to produce legislation that is good for us all. It is not ideologically driven. It is not the product of the far left or the far right. The product of the far left or the far right does not do well in this body because of the nature of the rules that have been the rules since our Republic began. It is one of the geniuses of the Founders of this Nation, that that is the profoundly important role of the Senate to moderate the radical winds that occasionally blow politically through this country and through Washington, DC.

So it is a bulwark of individual freedom and of American values and priorities that we have a body like this that mandates that there be greater thoughtfulness, greater moderation, greater reflection than would otherwise be the case.

There are other issues that we rightfully ought to be moving on to. Recently—yesterday, in fact—I visited the Walter Reed Army Hospital in Washington, DC. One of my constituents, a soldier injured in Iraq, was there. Senator DASCHLE and I and a contingent of other Senators visited our troops. We can take great pride in the quality of these young men and women and what they have done for America, what they are doing for America. They are extraordinary people with great courage, and they are getting on with their lives as best as they can.

It was heartbreaking to go from room to room at Walter Reed and see our Iraq military veterans. In one room, a soldier has lost an arm. The next room, a 20-year-old young man has lost both arms. In the next room, a young man has lost his leg all the way to the hip. In another room, there was a young man with brain damage. In another room, a man has lost his feet. Another room, a man has lost his hand. In another room, an individual has lost his arm again. It goes on and on.

There has been a lot of reference to those who have lost their lives and made the ultimate sacrifice in Iraq. Our hearts and prayers go out to them and their families, but we should not forget those as well who are alive and with us but whose bodies are shattered, whose lives are forever changed because of what they were willing to do for the United States of America in their military service.

Their families were there. Young wives were there yesterday, many of them with very small babies, some pregnant. Now they have a husband who has no arms, who has no legs, who has brain damage. We need to give some thought to these families as well, think about the enormous sacrifices they are making for America.

One of the great ironies and sad ironies of this debate that is going on is that the legislation that was taken off the floor in order for us to have this debate was the VA–HUD appropriations bill, the very bill where we will make determinations about whether these young men and young women, once they conclude their military service, will have the health care, the job training, and the therapy they need to get on with their lives. That was pushed aside. We do not have time for that debate apparently because we need to spend 2 days or more of the Senate's time on this phony crisis because 4 out of 172 judges have not been approved by this body. What a sad commentary about the priorities of the Republican leadership in this body.

I do not ordinarily make partisan references lightly. I am a Democrat. I am elected in a State that is overwhelmingly Republican, and I am proud of the Republican support that has been

extended to me for many years. They are good, wonderful, thoughtful, patriotic, religious people on both sides, no question about that. But I am profoundly disappointed, to the point of contempt, for what has happened in this body the last day or so with the hijacking of the Senate's agenda already behind schedule on these important issues that we ought to be talking about in order to take up this question of 168 to 4.

I suggest that if it was 172 to 0, that would be good evidence that the Senate is not doing its job of advice and consent. This body is not meant to be a rubber stamp. That is not what the Founders of this Nation thought that they were doing when they wrote our Constitution and devised the rules of the Senate.

Mr. President, in 1968 New York Senator Robert Kennedy launched a Presidential campaign at a time of great unrest and dissent in our nation. He ran a campaign that lasted 85 days to empower those who did not have the power, to bring justice to those who did not have justice, and the protest the direction of our great nation. At the beginning of that campaign, he addressed criticism of anti-war protesters by saying:

There are millions of Americans living in hidden places, whose faces and names were never know. But I have seen children starving in Mississippi, idling their lives away in the ghetto, living without hope or future amid the despair on Indian reservations, with no jobs and little hope. I have seen proud men in the hills of Appalachia, who wish only to work in dignity—but the mines are closed, and the jobs are gone, and no one, neither industry or labor or government, has cared enough to help. Those conditions will change, those children will live, only if we dissent.

So I dissent, and I know you do, too.

Mr. President, I rise today to dissent. I dissent to the majority of this body's unwillingness to focus and deliver on healthcare and education. I dissent to this body's inability to provide for our veterans. I dissent to the President's blatant disregard for treaty and trust responsibilities to Indians. And most of all, I dissent this political charade.

Instead of talking about judges, as a body, we should be addressing the unmet needs across this country.

Our Veterans made tremendous sacrifices in service to our Nation. They have answered the call to defend our freedom and served our country at the time of its greatest need. We are trying to provide our veterans with the full benefits they have earned. While the White House can find money for tax cuts for America's wealthiest families and a $20 billion lavish grant for Iraq, too often poverty is pled when it comes time to providing our veterans the benefits they deserve. Right now 60,000 veterans are waiting 6 months or longer for an appointment at VA hospitals. I think it is important to fully fund VA health care so that veterans of Operation Iraqi Freedom can get the care they need when they return home.

My own son served with the 101st Airborne in Iraq. He is home now. He is safe. He did not suffer one of these horrific injuries. We are grateful for that, but we are very mindful that tens of thousands of others are still there, have suffered horribly, have lost their lives, and their families have gone through enormous painful stress.

In contrast, the Republican leadership in the Senate has broken their promise to provide an additional $1.8 billion for veterans health care this year and even proposed an increase in prescription drug copayments that impose a $250 annual membership fee for veterans seeking health care. Should we not be talking about these kind of priorities? It is astonishing to me that the Republican leadership of the Senate has set a target adjournment date only days from now, November 21, and has scheduled 39 straight hours of executive session to discuss this phony issue; not 39 straight hours to discuss critical legislation such as lack of prescription drug coverage facing millions of American beneficiaries in this country. Do not the 40 million Medicare beneficiaries deserve as much attention as this phony issue is receiving?

We are at an impasse. We do not have a final Medicare bill. At this rate, spending hours and hours discussing nominations which have overwhelmingly been approved, instead of debating important Medicare legislation, makes me wonder about the priorities of the majority party in this body. They are dedicating nearly 10 hours each of discussion for four individual judges, but we cannot spend 1 hour each for every million individuals on Medicare. What is wrong with that picture? High drug spending is placing a heavy burden on American families, and many businesses are responding to rising drug spending by increasing the amount that employees must pay for prescription drugs. The public programs such as Medicaid and the Veterans Health Administration are also struggling to respond to soaring drug spending. Finding a solution to the prescription drug crisis in this country is a priority for me, for many in this body. It should be a priority for the entire body.

States and local communities are struggling with the worst budget shortfalls since World War II and many have cut back on education funding, on instruction time, have laid off quality teachers and school staff. School district after school district in my home State of South Dakota are having opt-out votes, trying to do something to try to make sure that children in our communities have the resources they need to learn. Parents and students are holding bake sales and auctions to save teaching jobs, music, art, other student activities. It would be impossible for our public schools to meet the strict demands of the new Federal education law if vital school services continue to be cut all across our Nation.

I believe that fighting to bridge this gap by increasing Federal aid to the States and raising public awareness of the school public crisis is essential. I think it is important to recognize that money alone is not the solution to improving our schools, but we need also to be cognizant of the fact that public schools need the financial resources necessary to successfully implement No Child Left Behind. The National Education Association's State-by-State report on layoffs and cuts affecting public schools and the responses of students, parents, and communities, NEA collected anecdotal data from 2003 through the end of September and finds the school district stress all across this country.

In my home State of South Dakota, our Native-American community is struggling badly—high unemployment, lack of health care, high infant mortality, lack of jobs. Again, that is another area that deserves the attention of this body.

These are the real crises that face America, not a 98-percent approval of conservative Republican judges, which this body has done.

This President has been served very well by the Senate on the timely approval of 98 percent of these judicial nominations. I submit that the four who have been rejected were selected with the thought in mind that they would be rejected because what the other side of the body wants, and I think what the President wants, is a fight. They know that a fight will energize the radical right wing of the Republican Party and will energize political contributions. Sadly, that is what this debate is all about. That is why the taxpayers are having to fund $100,000 or more for the cost of this. That is why we are not able to get on to the other issues that truly we ought to be addressing right now.

One hundred sixty-eight conservative Republican judges have already been approved, most with my support. That is not the question. The Federal bench has a higher ratio of judges seated now than we have had in 13 years. The appellate judges are being approved at a faster rate than Clinton, Reagan, or George Bush, Sr.

So the record of this body, Republican and Democrat on the Judiciary Committee, has been one of accelerated consideration of judges in a way that has not been seen in many years. I think that reflects well on the body. What does not reflect well on this Senate is this hijacking that has taken place of our agenda, where we are being prevented from talking about the real issues, the real crises having to do with our children, having to do with our schools, having to do with our seniors, having to do with our veterans, having to do with health care costs. That has been hijacked by a body that wants to talk about these four judges who were selected, I think, by a process where the President and the leadership of the other side knew very well that these

would be lightening rod candidates, that they do not fall within the same mainstream body as the other 168 conservative Republican judges.

That has led to this dispute, and the dispute, I think, is not about principle. It is about energizing politics. It is about raising money. That is a sad commentary. That is contrary to the values of this body and of the American people, Republican and Democrat. The American people deserve better than what has gone on on the floor of this Senate over these last many hours. We are going to see the rest of today wasted as well.

Mr. President, our roads, schools, and infrastructure are crumbling as Nero fiddles here in the Senate. Yet our friends in the majority complain about a 98 percent approval rate for President Bush's judicial nominees. In baseball, that would equate to roughly a batting average of .980. A power hitter is someone with a batting average in the range of .330. That means if the Bush Administration's judicial approval rate in the Senate were considered in baseball terms, we would be batting nearly triple what any major league manager would love to have.

And consider a baseball team that would have a .980 winning percentage. A winning percentage like that would far surpass any record set by any team in major league baseball; and would certainly beat the losing seasons of the Texas Rangers when President Bush was their managing general partner.

In fact, the quality of some of the judicial appointments sent up here by President Bush shows the same judgment he used when he traded Sammy Sosa, a perennial home run leader, to the Chicago Cubs.

The PRESIDING OFFICER (Mr. COLEMAN). The Senator's time has expired.

Mr. JOHNSON. Mr. President, I yield the floor. I am sure it is a great place. I have not been there. I am sure it is wonderful. He used the whole day to talk about that, while we hear endlessly, Why are we not talking about veterans benefits or unemployment when all Monday was used by the Democratic side to talk about Searchlight, NV.

It is a wonderful place, I am sure, but I don't know of any legislation pending about Searchlight, NV. Why weren't we talking on Monday about these things and not addressing the great issues of the day or addressing what we need to be doing about the war in Iraq? Instead, we are talking about Searchlight, NV. Where was the protest? Where was the anger? Where was the outrage. How about rabbits eating cactus? Again, I am sure it is a great place. No offense to anyone from Searchlight, NV.

A week ago Friday, a week ago today, the other side ate a whole day up and we got no votes done on appropriations bills because they were chewing it up on filibustering at that point. Where was the outrage? We were not dealing with the great issues of the day. I guess it did not matter at that point in time.

I find it interesting that this is all about fundraising. It seems the people fundraising are the left. This is NARAL, National Abortion Rights Action League, their Web site, going to task on Charles Pickering; others on the left, pushing this hard for fundraising and organizational purposes. I don't think that is at the root of what we are talking about and why we are spending this time and why we are being tied up on something that has been without precedent, a blockage of Federal judges. This is really about a big issue, and that is why we are here at 6 in the morning on Friday, because we are talking about a big issue and we need to talk about other issues as well—which I agree with; we need to talk about other items, but we need to talk about this one, too.

When you get a judiciary that is blocked, you need to talk about it. Why would these folks be blocked? These are highly qualified. They get painted different ways, but we have been through ad nauseam the qualifications. They are highly qualified judges in mainstream positions in their States on the highest courts in Texas and California—I guess Texas and California are mainstream—they are on the highest courts. One is on the Federal bench in Mississippi, approved by this body previously.

What this comes back to—and the Senator from Pennsylvania was hitting it when we last had the floor—was a discovered right by the Supreme Court, the right to privacy. If we blow away the smoke and we are stating why we are here at this point in time and why would such qualified judges be blocked, it is because of the court that has been writing laws and about the right of privacy, or this constitutional right, discovery. It is not in this document, as the Senator from Pennsylvania pointed out, the right to privacy.

I find it interesting that others have mentioned that the appellate court writes laws and that is why the judges are important. The lower court, the Federal district trial court, does not write laws, but the appellate court does. There is the issue and the problem. The appellate court does not write laws. The Supreme Court does not write laws. They interpret the laws. They interpret the Constitution. They do not write it.

Unfortunately, people in this body look at it differently. Some are saying, yes, the court can write laws at the appellate and the Supreme Court. If that is the case, we have a second legislative body in Washington: We have three units of government, but two happen to be legislative and one executive. Yes, one legislative also has a court and judicial judges as well, but we have a second legislative body. And we are seeing this stream develop further with some people on the other side of the aisle saying we should examine the political opinions of people we are appointing to the bench.

If they are going to be a judge and they are going to interpret the law, why should a political opinion be of significance in the consideration? That is not their role. They are not a legislature. I am a legislator; you are a legislator; people in this body are legislators, but those on the Supreme Court or court of appeals are not legislators.

Some say, OK, we need to examine the political ideology of the people coming forward for the bench even though they are saying we will follow the law and that leads to writing laws on the bench. I hold to the opinion—most people on this side do—what you want in a judge is someone who interprets the law and interprets the Constitution and does not write it. There would be times I would have actually liked a judge to interpret something to the right and write it more conservatively. I would think that would be appealing to me, but I don't want a judge like that. I don't want a judge to do that. That is my job. That is not his or her job.

I am asking for one to stay within the document and not to discover or write amendments to this document. I want them to interpret the law. This is what we are seeing seep into this. These are not legislators. These are not legislators-to-be, going on the bench, who write laws. They interpret the laws.

What we have seen taking place is one of the biggest laws written by the bench over the last 4 years, the right to privacy, or as is more common vernacular today, this is about abortion and the Supreme Court's discovering this right. That is why all the judges are always quizzed ad infinitum about their views, because if the court can write that law, the court can repeal that law, so they do not want someone to go on with a political philosophy contrary to this, who might write the law differently.

Now, we have a bad premise here. The court should not be writing law. The court should be interpreting laws. So stick within the documents.

We also have a bad premise in the second step, looking at the political philosophy of someone being appointed. No, look at the qualifications and their willingness to uphold the Constitution. We are down a bad road a couple of steps already. That is why we are here at this time of day, because these four appellate court judges would be not questioned to any degree if it was not about political philosophy. That is the issue, and it is a big issue, and it is worthy of this discussion. And it is sad we are at this point because I have some of my colleagues here who want to speak and I do not want to dominate this half hour.

Mr. SANTORUM. I would like to ask the Senator a question. You may have answered the question I posed earlier: Why, throughout the history of the United States, have we not had a leader of the Senate, minority or majority,

join in blocking of a nominee to require a supermajority? Why has it never happened prior to this session?

I think the Senator landed on it when the Senator said for the first time we are seeing people come to the court not to be judges but to be legislators, to make law instead of decide constitutional interpretation and to settle disputes. So we have entered into a time when political considerations now become much more important than the quality of the judge, the temperament of the judge, the qualifications of the judge, the experience. Those are now important, but they are almost secondary issues to the political philosophy of the judge because the courts now are fundamentally different than they were 50 years ago or 60 years ago.

Is that what the Senator from Kansas is saying?

Mr. BROWNBACK. It is what I am saying. And it is bad that we are seeing this route taking place. This is going to lead us down a bad road. We are already started down the road.

Now we appoint legislators for life with superpowers, and we are unable to pull them out other than maybe for moral turpitude. You have people who become—in essence, they can almost be dictatorial or tyrannical, and they are appointed for life. That is why so many people are so passionate about what takes place on the bench today, because now you have a superlegislator who does not answer to the public. It starts to get irritating to a lot of people.

This is not the way we should be going. We should be backing up and saying these are three coequal branches of government with different jobs—not legislators each, but a legislative and executive and a judicial branch. This is the problem.

If we keep going down this trail, and you have to examine political philosophy because judges can write laws or you can discover rights, including rights of privacy in the Constitution, and what other rights can you discover in the Constitution, and it will be important to know the political philosophy. Say we get one or two Supreme Court nominees to come up. Now we have somebody such that we are looking at a superlegislator for life in the highest court of the land who can, with a couple of other people, rewrite this document—not just legislate but rewrite the constitutional document. That is why we have the huge fights on this floor.

We used to say in the past—thanks to the question my colleague raised, we say, I disagree with the philosophy of Ruth Bader Ginsburg, I disagree with the philosophy of someone else, but they said they would uphold the law. They are confined, as I am as a legislator, with a set of power and authority. I do not agree philosophically, but they are qualified and will do a good job and I don't have a good reason to vote against them.

Mr. SANTORUM. This gets to the heart of this 168-to-4 number. The vast majority of the 168 are at the district court level, trial court level.

What the Senator from Kansas is saying—and I want to make it clear—the district court judges, by and large, do not make law. They are trying cases. Appellate court judges, we have seen now in recent years, have begun to take on the mantle of legislator in making law, and therefore all of the nominees who are being blocked on that side are these quasi-legislative-type judges.

The Senator is suggesting the superlegislator is the Supreme Court. So if we are in for filibusters for appellate courts, can anyone imagine what a Supreme Court nominee fight will look like in the Senate now versus 20 or 30 years ago?

Mr. BROWNBACK. Absolutely. That is the point. We will be in such a mammoth fight and engaging the entire country with this, how will you ever get that person through?

It does go to this constitutional case that is being considered by the Supreme Court now on the flag salute, ''One Nation under God.'' Here was a continuation of the discovered set of laws that somehow discovered that our kids cannot say our flag salute, ''One Nation Under God.'' Ninety percent plus of the public is for the flag salute. I am confident that percentage is ahead of that. In this body, there is outrage. And the Ninth Circuit, in a consistent opinion with 40 years of discovery law, says: No, you cannot do that.

So now you put somebody in a legislative role—circuit court, lifetime appointment, cannot remove them—and the Ninth Circuit, which gets overturned all the time—as a group of legislators they get overturned all the time by the Supreme Court. Now, say you get a Supreme Court position that opens. They are not going to get overturned by anyone. And you get people fearful of the tyranny of the judiciary which the Founding Fathers were fearful of themselves. They wanted the judiciary to be the most limited because they have the lifetime appointments. They have a pretty big set of powers. They feared tyranny could become an issue because it was a lifetime appointment and was not subject to the checks and balances of the people.

People check and balance everyone in this body. But do they check and balance the judiciary? Where is the populace's ability to check and balance? That is why this is an important debate and why so many are concerned.

What we should be doing is backing up and saying, no, this is about the strict construction of the documents that pass through the legislative bodies that are in the Constitution that go through an extraordinary process. Where, as the Senator from Pennsylvania pointed out, the Supreme Court discovers a new right in this Constitution, if we had written that in there, it would have taken a vote of two-thirds of this body, three-fourths of the States, to become law. This is a big, lengthy process and, as such, we have a limited number of constitutional amendments, as it should be. It is a strong document, standing over two centuries, and yet a court can discover this.

We should back up and stand on the issue of, this should be about strict construction of what is taking place. This is a very important key fight to have.

With that, I yield the floor. There are several other Members who seek to speak.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SANTORUM. I take a step back here and go through what we are doing. What is going on? What is going on in the Senate that has brought about this debate which has been so important? Can we agree on what is going on? I think we can. Let me use the words, and I would agree with these words written by JON CORZINE, the Senator from New Jersey, who happens to be the chairman of the Democratic Senatorial Committee.

The Senator from South Carolina was here and the Senator from Minnesota was here talking about this throughout the night. We can agree on what is going on.

Senate Democrats have launched an unprecedented effort. By mounting filibusters against the Bush Administration's most radical nominees. . . .

Unprecedented. And what does ''unprecedented'' mean, according to the dictionary? Having no precedent. What is precedent? An earlier occurrence.

So, having no earlier occurrence. What does that mean? It has never happened before. That is not me. It is not Republicans saying this. You have protestations on the other side. This happens all the time. Come on, no big deal. The Senator from Illinois will show a chart, look at all these filibusters. Come on, no big deal. We do this all the time. Unprecedented. Their words, not mine.

To whom? To their people? Guys, this is what we are really doing. We are not going to say this on the floor of the Senate, but this is what we are really doing. It is unprecedented.

So what is going on? An unprecedented filibuster to raise the bar for certain nominees. That is what is going on. Not my words, the words of the Senator from New Jersey to the people he relies upon to support their party.

Let's look at the facts. Is it unprecedented? Since the filibuster rule was put in place, 2,372 nominees came to the floor of the Senate. Has anyone been blocked by filibuster? No. So you see, 168 to 4—stack that percentage against 2,372 to zero. Four? Let me ask if it is four.

UNANIMOUS CONSENT REQUEST

I ask unanimous consent that the Senate now proceed to the consideration of Calendar No. 169, the nomination of Carolyn Kuhl to be a United

States Circuit Judge for the Ninth Circuit; and further provided there be 100 hours of debate equally divided for the consideration of the nomination; and provided further the Senate proceed to a vote on the confirmation of the nominee, with no intervening action or debate.

Mr. DURBIN. I object.

Mr. SANTORUM. Now it is 168 to 5. So that chart is now outdated that the Senator from Illinois will show.

UNANIMOUS CONSENT REQUEST

Mr. SANTORUM. I ask unanimous consent that the Senate now proceed to the consideration of Calendar No. 455, the nomination of Janice Rogers Brown to be United States Circuit Judge for the DC District Court; provided further that there be 200 hours of debate equally divided for the consideration of the nomination; provided further that following the debate, the Senate proceed to a vote on the nomination of Janice Rogers Brown, with no further intervening action or debate.

Mr. DURBIN. Mr. President, I ask unanimous consent that that unanimous consent request be amended and that we move to legislative session immediately to consider an increase in the minimum wage and additional unemployment benefits for the 3 million Americans who have lost their jobs under President Bush's administration.

Mr. SANTORUM. I want to make it clear that you are asking, in addition to this unanimous consent, that we would do this unanimous consent in addition to this?

Mr. DURBIN. I ask unanimous consent that before we consider any unanimous consent request by the gentleman from Pennsylvania, that we first——

Mr. SANTORUM. I would object. I object.

Mr. DURBIN. Mr. President, reserving the right to object.

The PRESIDING OFFICER. Objection is heard.

Mr. DURBIN. Mr. President, I reserve the right to object.

Mr. SANTORUM. Mr. President, I have the floor.

The PRESIDING OFFICER. The Senator—

Mr. SANTORUM. Thank you.

Mr. President, I renew my unanimous consent request.

The PRESIDING OFFICER. The Senator may object or not object.

Mr. DURBIN. Mr. President, parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state his inquiry.

Mr. DURBIN. Will the Presiding Officer tell us what the pending business of the Senate is at this moment?

The PRESIDING OFFICER. The nomination of Janice R. Brown, of California, to be United States Circuit judge for the District of Columbia Circuit.

Mr. SANTORUM. I renew my unanimous consent request.

The PRESIDING OFFICER. Is there objection?

Mr. DURBIN. Mr. President, I object. If the Senator is not going to consider the——

The PRESIDING OFFICER. Objection is heard.

Mr. SANTORUM. Mr. President, I have the floor.

Now that chart the Senator from Illinois is going to show is 168 to 6. And I would project that 168 to 6 will soon be 168 to 7 and then 8 and then 9 and then 10; and that this number is going to actually, looking forward into the future of the Senate, be a good percentage. I might agree with him looking forward because we will have set a precedent tonight. We will have set a precedent in this session of Congress that will go to haunt both sides forever. If we maintain it, it will. I guarantee it.

What we are doing here is playing with real bullets. I tell you there are folks on our side of the aisle who are loving what you are doing. They are loving what you are doing, man. They just think, go, baby, go. Do this because we can't wait to get our arms around the next Democratic President who wants to stack the court with a bunch of people who believe God does not belong in the Pledge of Allegiance. We can't wait—who, by the way, got confirmed by the Clinton administration and by this Senate. We can't wait to get our arms around people who find in this Constitution things that are not in it, who believe it is their job to be the super Senator, the super legislator, the super President. We can't wait to block those nominees because, do you know what. You did it first. You did it first. You can say, oh, no, we didn't do it first. You did it first. You crossed the line. Oh, it has been threatened. It has been talked about around here. I will not deny that. I talked about it.

Richard Paez, by the way, who tried to stop the California election a few days before the election, found somehow or other that ''you can't hold this election,'' that, to the people wanting to recall the Governor, ''you can't do that because, of course, I know more than the people.'' Richard Paez, Ninth Circuit, overturned more than any other circuit in the history of the United States. Clinton nominees, liberal, activist judges, out of step with the mainstream, the Senator from New York and maybe other Senators call mainstream, who says ''under God'' does not belong in the Pledge of Allegiance, who said ''three strikes and you're out,'' that the people of California voted for, is unconstitutional. The Supreme Court overturned that.

That is the mainstream. Can't wait to get at the next Richard Paez. Can't wait to get at the next Marsha Berzon. Go on down the list of folks. Did I want to filibuster them? Did I want to filibuster Richard Paez because he was a district court judge? And he was awful. He expressed values and views that were so out of step with America and with my constituents in Pennsylvania, I just could not stand it. I said, come on. How can we continue to let these judges, who think they are God, who think they are Senators, who write laws that do not exist, who take the laws we do write and turn them into what they think, not what the Senate believed and what the President believed—how do we let these people keep coming at us and not do anything?

My leader, TRENT LOTT, and my chairman of the Judiciary Committee, ORRIN HATCH, said that is not the way we do things in the Senate. This is the passion of the day. But in the Senate, one of the great things—and you hear it on both sides all the time—one of the great things about the Senate is we do not get caught up in the passion of the day. We understand the long term. We understand the greatness of America. We hear we are the cooling off. We do not get caught up with the passion of the day. We are the deliberative body. Therefore—and therefore—we have a higher calling than to respond to the NARAL ads or the People for the American Way ads. We have a higher calling. We are Senators. We look out for the long-term interests.

How do you preserve the long-term interests? You do it by following the laws and the precedent. You do it by using what has been established over 214 years to protect rights, and we are throwing it away. We are throwing it away, and understand the stakes of what we are doing here. Understand the precedent we are turning over and what we are going to unleash on the floor of this Senate. Do you know what. Maybe it is a good thing. I have sat here now—I will not argue against my colleagues, but I have sat here now, and I listened to the Senator from Kansas.

I would ask the Senator from South Carolina: Do you believe there are some on our side who, after listening to the Senator from Kansas and listening to the judges who have been put through—because we have been good stewards. We have allowed the Richard Paezs of this world to come and undermine our Constitution. We have allowed the left to seed into the court system those who would destroy this Constitution.

Are there not Members of our side, I ask the Senator from South Carolina, who would say, thank you, we never had the courage—we never had the courage—to change the way the rules are here in the Senate to make sure that we could protect—as I think the Senator from New Jersey said—''protect our courts?'' We did not have the courage—as the Senator from New Jersey said—''to stop judicial extremists.''

So maybe what we should be doing, I ask the Senator, is thanking the Senator from Illinois—and the Senator from North Dakota is here—and the Senator from South Dakota, Senator DASCHLE. Maybe what we should do is instead of protesting this is to thank them for giving us a tool, for giving us a tool to protect this document.

I assure them—maybe I should not assure them—maybe I will ask the Senator from South Carolina, what do you think will happen now?

Mr. GRAHAM of South Carolina. Well, to the best I can, to the Senator from Pennsylvania, for the last year—this is my first year—I have seen a trend that seems to be getting worse and worse. I can assure you, as the Senator from Pennsylvania has indicated, that for every liberal special interest group there is a conservative special interest group that feels just as passionately as the People for the American Way.

The Senator is absolutely right. I have been trying to say this all night. We are in political quicksand. You have put us in a place we have never gone before, and the more we fight and the more we fuss, the quicksand takes you deeper and deeper, quicker and quicker.

The truth is, the Senate will never be the same if this stands because the Senator from Pennsylvania is exactly right. There will be so much pressure on people on our side to stand up against anybody who is perceived to be liberal—not just whether or not they can follow the law, but they may have written an article when they were in law school. They maybe made a speech somewhere about the philosophy of life. And it will be seized upon, it will be touted, and it will be shouted, and 41 of us may buy into that.

The advise and consent clause has stood the test of time. But the formula that you are imposing upon the Senate is a formula for disaster, and a big loser. Who loses? It is average, everyday people who will be shut out because of special interest politics on the left and the right. The real big loser is somebody who loves the law who wants to be a judge but has said: I am not going to put myself and my family through that.

So Senator SANTORUM is exactly right.

The PRESIDING OFFICER (Mr. BOND). The Senator's time has expired.

Mr. GRAHAM of South Carolina. There will be no turning back, and this will destroy us over time in terms of the rule of law.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Thank you, Mr. President.

Let's not forget what this is all about. Mr. President, 168 of President Bush's nominees have been approved by the Senate; 4 have not—168 to 4. That is the score. This President has 98 percent of his nominees approved. We have now consumed 36 hours of the time of the Senate railing about the four who were held back.

Those on the other side of the aisle believe the advise and consent clause of the Constitution is meaningless. They believe their President, their Republican President, should have every nominee, every judge. They really argue with the premise that these judges should be asked hard questions. They do not believe that a judge seeking a lifetime appointment to the bench should be asked, What do you believe? What values will motivate you if you were in a position of power, a position to decide cases and basically the position to decide the outcome of people's lives?

They do not believe in that. Frankly, they are arguing that this Constitution, that they have sworn to uphold, which provides for the advice and consent of the Senate before a Presidential nominee is appointed to the bench, should be tossed out.

Those of us on the Democratic side disagree. I think, frankly, in their heart of hearts a lot of the more moderate Republicans disagree. They understand that no President gets everything he wants 100 percent. No President should, Democrat or Republican. But they are loyalist, and their partisan loyalty is showing. It has shown for 36 hours.

Let me show you the judicial confirmation scorecard so you will understand what has happened to nominees sent by Presidents to the Senate.

President Clinton's nominees: 248 confirmed, 63 blocked. So 20 percent of the nominees, one out of five sent to the Senate by President Clinton, were blocked by the Republicans, Senator ORRIN HATCH, and the Senate Judiciary Committee.

President Bush's nominees: 2 percent have been blocked.

I listened to the Senator from Pennsylvania tell us, warning us that, frankly, stopping four judges will be remembered, and they will revisit this if the Democrats ever take control of the White House again.

Well, let me remind my colleague from Pennsylvania, those 63 Clinton nominees who were blocked, most of them were never even given the courtesy of a hearing. I know this personally. Three judges from Illinois, three good people seeking Federal appointments, were stopped because one Republican Senator—in the case of one of my nominees, former Republican Senator John Ashcroft of Missouri—personally stopped this nominee. This nominee, a good person, who would have been an excellent judge, was stopped because Senator Ashcroft objected to him. In objecting to him, he never got a hearing.

So for the Senator from Pennsylvania to come and warn us that if there is ever a Democratic President, you can count on nominees being stopped, we learned that lesson. We learned it when President Clinton offered nominees who were quality people, moderate people, and stopped because of some perceived slight, stopped because of some perceived position on issues that the right wing did not agree with.

Let me show you some of the photographs of some of these nominees. You can see that even this small gathering of nominees here represent a rich diversity of people across America. The Republicans would have us believe these people sent to the Senate Judiciary Committee by President Clinton were somehow radical people, people who did not share the views and opinions of America.

You can count on this: Within those people are excellent judges, people with the highest ratings from the American Bar Association, people who were rejected. It gets back to this, as shown on the next chart: The final score here is 168 to 4. So 168 of President Bush's nominees have been approved; only 4 have been held back. Ninety-eight percent have been approved.

I listened to the speech just given by the Senator from Kansas. I hope that those who are following this debate, even though I cannot imagine at 3 o'clock in the morning on the west coast a lot of people are tuned in, but if those who are following this debate heard what the Senator from Kansas said, I think it was chilling and troubling, if not alarming. It is a clear indication of what is at stake here in this debate. The Senator from Pennsylvania joined in the chorus because the Senator from Kansas said they were opposed to judges who were ''discovering the right of privacy in the Constitution.'' Those were his words, ''discovering the right of privacy in the Constitution.''

Well, the Senator from Kansas is correct. The word ''privacy'' does not appear in the Constitution of the United States. But those who have interpreted this document have come to the conclusion that Americans have a basic right of privacy. I suppose from what the Senator from Kansas said, that is judicial activism in his eyes.

But let's remember how that right of privacy first came to the Supreme Court and the decision made, the landmark decision of Griswold v. Connecticut, a Connecticut statute which said they would prohibit the right of married couples to buy birth control devices, contraception, an archaic statute from the 19th century that said that married couples could not buy birth control devices. We are talking about the ones most commonly known.

The Supreme Court said that is wrong. We believe that the people of Connecticut, the people of America, have the basic right of privacy and that married couples should be allowed to make that decision, and no State government should prohibit them from making that decision.

So in this case, the Supreme Court ''discovered'' the right of privacy in the Constitution. The Senator from Kansas believes, I suppose, that this is judicial activism, that the court went too far. How many people in America believe that? How many people in America believe that States or the Federal Government should prohibit the right of couples or even individuals to buy birth control devices, to buy birth control pills? Is that this discovered right of privacy at work? The same right of privacy, I might add,

that was at the core of the Roe v. Wade decision.

So there we have it. They are looking for judges who even question the right of privacy in the Constitution. You wonder why we would even stop four judges because given free rein, I am afraid that my Republican friends would turn the clock back, turn the calendar back to the 19th century, questioning the right of privacy of Americans.

I thought conservatives, by their nature, were opposed to the overreach of government. But what we hear this morning from the most conservative members of the Republican caucus is that we have to question the right of privacy. That is hard to believe.

They also went on to say, the Senator from Kansas agreed with the Senator from Pennsylvania that we need a check and balance on the courts. Think about that for a moment. Oh, it is a nice-sounding phrase. But think about the check and balance on the courts, and then think about the principle of an independent judiciary. Those two are inconsistent.

The check and balance on courts comes in the process when the President nominates a judge, and when we review that judge's credentials and decide whether that judge receives a lifetime appointment. Then there is the correct belief that short of impeachment, judges in America are independent to make decisions. It is one of the bedrocks of our democracy. That has been challenged on the floor of the Senate today by the most conservative members of the Republican caucus.

You wonder why we are here for 36 hours? You wonder why we are taking all this time. It is because of the views just expressed this morning by two members of the Republican caucus which indicate the extreme position they are prepared to take, indicate why 168 of President Bush's nominees being approved and 4 being stopped is unacceptable, and indicate that they want to change the profile and complexion of the judiciary across America in profound ways.

The Senator from Pennsylvania has political amnesia. He comes to the floor this morning and forgets that 63 of President Clinton's nominees never even received a hearing, not even the dignity of a hearing. And he warns us in a booming voice: We will remember this if there is ever a Democratic President.

I say to the Senator from Pennsylvania, he is suffering from political amnesia. He has failed to acknowledge that 63 of President Clinton's nominees were never even given the dignity of a hearing. That was a sad outcome for those nominees and their families. To think we are not going to stop this process at this point in time, that we are going to continue on for another 3 hours is, frankly, I think, unfortunate.

Yesterday, I went with a group of Senators out to Walter Reed Hospital to visit with some of our injured soldiers. Senator TIM JOHNSON from South Dakota was in that group, as well as Senator BYRON DORGAN of North Dakota. There were about a dozen of us who went out and visited with these soldiers. It is something I am not going to forget. These are some of the best we have who have given the most. They have been subject to injuries which are truly sad and tragic in a way, but their courage and their determination are going to stick with me.

Why aren't we talking about Iraq? Why aren't we talking about the veterans? Why aren't we talking about the need for this country's national security or its economy? Really, because there is another agenda in play here. We are involved in a made-for-TV filibuster. That is what this is all about. This isn't for real. Those cots were props on a stage. I walked around the Senate. Most of those cots are still cold as ice. They have never been warmed by a Senator's body. They were brought in here so Fox TV News and all the right wing talk shows could say: My goodness, we are staying up all night. There is a handful of Senators who have given a lot of hours here, no don't about it. This is a made-for-TV filibuster. Sadly, we are ignoring the agenda of this country.

My colleague from North Dakota is here, and I yield the floor to him.

The PRESIDING OFFICER. The Senator from North Dakota.

Mr. DORGAN. Mr. President, I appreciate the comments of my colleague from Illinois. This is, in many ways, an interesting debate and certainly an important debate largely because it is alleged that we have embarked on something unusual, something unique. Of course, that is not the case.

The issue of filibusters is not a unique issue in the Senate. Let me talk just for a moment about something I listened to on the radio on the way in. C–SPAN is covering this by radio. I heard my colleagues, as my colleague from Illinois indicated, on the other side of the aisle talk about this issue of right to privacy. There is no right to privacy, they say. What is this right to privacy that somehow has been manufactured? They don't agree with the right to privacy. The American people don't have a right to privacy, they say; that is not in the U.S. Constitution.

Let me give an example of right to privacy issues that relate directly to the issue of judgeships. We have a nominee before us named Carolyn Kuhl who is a State judge. Carolyn Kuhl was involved in a case and dismissed a claim and then was overturned in her dismissal. Let me describe the claim. It was an egregious invasion of privacy.

An oncologist was giving a breast exam—in fact, a full examine, including a breast exam—to a woman in his examination room. Another person was in the room with a white coat, another male. That male turned out to be a pharmaceutical salesman. No, not a doctor, a pharmaceutical salesman observing the full physical, including the breast exam of this patient.

The patient sued. Judge Kuhl dismissed it, just threw it out. This woman had no right to privacy, no right to expect privacy. That is what the judge said.

That judge was overturned on appeal, and the court that unanimously overturned that said: The conduct was highly offensive—that is, allowing another male in the room to observe, and not even a doctor but a pharmaceutical salesman—that conduct was highly offensive and the patient had an ''objectively reasonable expectation of privacy.''

My colleagues suggest this is a manufacturing of some right that doesn't exist. This woman has no right no privacy in the Constitution. Judge Kuhl would have it right, they would say.

Judge Kuhl didn't have it right. This happens to be one of the judges who has been held up by the Senate—one of the 4; 168 approved, 4 not approved. This particular judge we decided does not merit approval by the Senate. The other side says there is no right to privacy, so don't be critical of this judge; there is no right to privacy for the American people.

I don't understand that argument. I hear it, but I don't understand it. That is rooted somewhere in the 1930s or the 1920s or perhaps the 1880s. It is certainly not what the American people would expect someone in the Senate to be asserting in the year 2003, that the American people have no right to privacy, or that Judge Kuhl's decision is the right decision, and that has already been determined. That was thrown out on appeal—unanimously, I might say. So Judge Kuhl is not advancing in the Senate. We make no apologies for that. This is someone far outside the mainstream whose record of decisions indicates to us we don't want to elevate this person to a lifetime on the Federal bench.

Let me just say with respect to the 168 approved, 4 not, 2 of those are North Dakota Federal judges, judges from my State. Both are Republican and both nominations I was proud to support. They are both now on the Federal bench in North Dakota. I played a role in getting them there, and I am pleased I did. I think they will be great Federal judges.

That happened the right way. The administration visited with Senator CONRAD and myself and selected from among some good candidates two judge candidates we supported who we think will do well on the Federal bench.

There are other approaches to this. One is, for example, saying to the two California Senators: It doesn't matter what you think, we are going to pick an ultraconservative in California whose record doesn't merit support by the Senate, and we are going to try to shove it down your throat because we believe we have a right to do that. That is the attitude. There is a kind of arrogance there, in my judgment.

When they wrote the U.S. Constitution, the Framers decided they were

going to have a couple of steps to this process. I am glad they did. In fact, they almost decided the President should not be involved in the process. That was part of the discussion because they didn't want to give that much power to one person in this country, but they finally made a compromise with respect to judges. They said the President will nominate and the Congress will have a role of advising and consenting. That is, the President will nominate and the Congress will say yes or no.

We have been extraordinarily cooperative with respect to this President. In almost all cases, we have said yes. In four, we have said no. For that, we now have a 30- or 39-hour extravaganza in which, when I was driving in this morning, I heard my colleagues talk about corruption and all the code words they have developed especially for this debate, especially for their political friends so the word will mean something and it becomes much more than actually exists. This is all a manufactured debate.

They say there has never been a filibuster. That is not true. But if you say it eight times an hour for 39 hours, maybe some people will believe it. I don't know.

This is the oft-repeated old story about the man who comes home at 2 o'clock in the morning, having been drinking and with lipstick on his collar. And his spouse angrily confronts him and says: Where have you been?

He says: Riding my bicycle.

She says: That can't be true, I took your bicycle to the shop yesterday.

He says: That's my story, and I'm going to stick to it.

That is what is happening here: It is my story, patently untrue, obviously false, but they stick to it. They say there has never been a filibuster. The fact is, when the Republicans were in the minority, they filibustered 16 nominations in 1 Congress alone. So if they say it eight times the next half hour, just understand, it is not true. They can say it, say it, and say it, but it is not true.

I guess debate is an opportunity to exchange views. It does not require someone to tell you the facts. The facts are, as my colleague from Illinois indicated, many of the nominees in the previous administration never even got a hearing—not even a hearing. But in addition to that, there have been numerous filibusters, and some of my colleagues, in fact, who are here this morning voted against cloture to sustain a filibuster, some of the same ones who are making this claim.

I don't understand, I guess, how they think it sticks just to stand up here and say something they believe to be the case when they know it is simply not true.

Let me, in the couple of minutes I have remaining, talk about some of the issues I wish they had passion to address. This, in many ways, relates to the right to privacy.

The President and my colleagues on the other side of the aisle have decided in recent days that this young lady—her name is Joni Scott, who went to Cuba to distribute free Bibles—will be fined $10,000 by the U.S. Department of the Treasury. Why? Because she exercised her right to travel and distributed free Bibles to the poor people of Cuba.

She now is subject to a $10,000 fine. I tried to change that the other night. I couldn't do it. The majority in this Congress and the President said: Absolutely not, we are going to maintain these travel restrictions that restrict the right of the American people to travel.

By the way, this woman is going to get no relief. A $10,000 fine for an American citizen who distributes free Bibles in Cuba—maybe we could be talking about that this morning and see if we can agree that it is a perversion to do this. It seems to me this woman has some rights. Yes, the right to travel, perhaps the right to privacy, the right to distribute free Bibles. But the majority party says: No, she has no such right, none at all.

Let me ask if we might not want to talk about another subject during these 39 hours. We have lost 3 million jobs in the last couple of years with a failed economic policy.

This is a picture of a Huffy bicycle. They used to be made in the United States. In fact, right here under the handlebar they used to have a decal that was the American flag decal. Mr. President, 850 workers in Ohio were fired because they were making $11 an hour, and they moved this bicycle manufacturing plant to China where they can pay 33 cents an hour, and they took this flag decal off the handlebar and put on a decal of the globe. Not an American flag, a globe. Why? Because they decided $11 an hour is an egregious wage, outrageous amount of money to pay people when you can make it for 33 cents an hour in China, working 16 hours a day, 7 days a week. So we lost 850 jobs. These 850 people went home and had to tell their families: I lost my job. I am a good worker. I tried hard, but I couldn't compete with 33 cents an hour.

I wonder if maybe we wouldn't have the same passion on this floor to talk about jobs that Americans had but don't have any longer. Could we have a few of our friends stand up and join us to have a 39-hour debate about jobs the American people need, want, and deserve but don't have because these jobs are moved to parts of the world where people are paid 33 cents an hour.

I could hold up another chart to show you 12-year-old kids working 12 hours a day, being paid 12 cents an hour, and they get the jobs and those jobs leave this country. Is there a passion on this floor to talk about that? Oh, no, we don't have time. This isn't a big issue.

The passion is to stand up here and say with respect to the four nominees to the court who have not advanced that we are engaged in a filibuster that has never before been done. That is absolutely, patently false, and the people who make that charge know it.

My hope is we can stop some of this and get on to the things that really matter to the American people and the economy and the future of this country.

My colleague from Illinois I know has additional comments.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, I thank my colleague from North Dakota for reminding us that there are issues out there about which the American people really care. I dare say if you go to Missouri, Illinois, North Dakota, South Carolina, Georgia, or Minnesota and take the average person on the street and ask them: ''Where in the list of priorities in your life is the fact that 4 judges out of 172 nominated by President Bush have not been approved,'' my guess is they are going to say: I didn't even know that. Is that a big problem?

In fact, this morning's Washington Post has an interesting story about what we are doing here, this made-for-TV filibuster. They say:

> The greatest deliberative body shows what it does best—talk itself silly.

That is the Washington Post this morning. They refer to filibuster buttons—we have them on both sides of the aisle—filibuster T-shirts, and filibuster bingo games.

I am glad they didn't disclose the identity of this man, but they went out and asked one of our Capitol Police officers what he thought about this marathon debate. He probably would lose his job if his name were disclosed because of the Republican majority. Here is what this man said, a Capitol policeman who has been standing guard over the Capitol through the wee hours of the morning while we gassed on here on the floor about our favorite political issue: the lack of confirmation of four judges.

Incidentally, for those who are keeping score, I believe it cost us about a quarter of a million dollars in taxpayer money for additional pages to be printed in the CONGRESSIONAL RECORD and for additional Capitol Hill Police overtime protection because of this 39-hour marathon—a quarter of a million dollars.

Let me get to the quote from this Capitol policeman. They asked about the made-for-TV filibuster. He said:

> I can see it if it was something important, like the budget or Iraq, but who cares about judicial appointments. They should get a life.

There is a lot of wisdom out there standing in the hallways and in the streets in the cold wondering what in the world we are doing here. The Senator from North Dakota knows full well, if you go to his State or my State and talk about 3 million jobs lost under the Bush administration, those are the numbers they care about, not 168 to 4.

The Republican majority is out of touch. They just don't get it. They don't understand what real families and real businesses across America care about.

The cost of health insurance—for goodness' sake, how much time have we spent in the Senate talking about the cost of health insurance this year? Nada, zero, rien, not at all. No time to discuss the cost of health insurance, the biggest single issue facing families and businesses across America, but, boy, for four judges we are prepared to stand on this floor for 36 hours and grind red meat for Fox TV News and the right-wing radio boys. We will spend night and day. We will bring in our props such as cots and suitcases, and we will pretend this is a really serious filibuster and ignore the really serious issues that America really cares about.

You wonder why fewer and fewer people take the Senate seriously? You wonder why fewer and fewer people vote? It is because of this kind of charade.

Mr. DORGAN. Mr. President, will the Senator from Illinois yield?

Mr. DURBIN. I yield for a question.

Mr. DORGAN. In the previous administration, over 50 nominations were sent to the Congress in which there wasn't even 1 day of hearing—not even the courtesy of allowing someone to come to the Capitol for a hearing. Were any of the folks who are now on the floor of the Senate complaining about our holding up four judges who did get a hearing but we decided not to confirm—were any of the folks complaining back then that those 50 nominees never got a hearing?

Mr. DURBIN. I say to the Senator from North Dakota, their passion for justice did not apply to a Democratic justice. Their passion for justice did not apply to 63 nominees who were not given a chance to come to the Senate floor. Their passion for judges did not apply to those men and women whose lives were changed forever. But when it comes to these four, we take up the time of the Senate, take up the money of the taxpayers to divert us from issues that people really care about. It tells us what it is all about.

When the Senators from Kansas and Pennsylvania come to the floor and say, We want judges who don't discover the right of privacy in the Constitution, is that a conservative value, is that a family value—to reject the right of privacy? That is what they said, and I don't get it. If that is what they are for, they are clearly out of the mainstream, and we ought to take a closer look at every job.

I even think Robert Bork, when he was trying to get on the Supreme Court, said he agreed with Griswold v. Connecticut, a right to privacy case. What we heard this morning from the most extreme members of the Republican caucus is they will not even acknowledge a right of privacy for individuals and families across America. That is a sad outcome and one I think, frankly, should be challenged because if that is really the standard we are going to play to, I am going to look a lot harder on the Senate Judiciary Committee to make sure we don't have nominees given lifetime appointments to the bench who would have our Government raiding the bedrooms and private lives of Americans. That is what it is all about. It should not be allowable.

I see the majority leader on the floor and I respect him very much, but this is wrong. What we are doing is wrong. This made-for-TV filibuster over 4 judges after the President had 168 approved—why aren't we talking about issues people really care about, such as the cost of health care, the loss of jobs, the poor soldiers coming back injured who need help in veterans hospitals?

The Presiding Officer is chairman of the Veterans' Administration and HUD subcommittee on the Appropriations Committee. We had to pull his bill from the floor the other day. We did not have time to finish the bill, the 2 hours it would take to finish that bill—$62 billion, if I am not mistaken, or $68 billion for the Veterans' Administration—because we had to hurry on to this made-for-TV filibuster. That is sad. We should do the people's business. We should focus on things that Americans really care about.

I yield the floor.

The PRESIDING OFFICER (Mr. COLEMAN). The Senator from Pennsylvania.

Mr. SANTORUM. Mr. President, to be referred to as an extreme Member of the other side of the aisle, I would like to suggest that this extreme Member on the other side of the aisle never voted against cloture on a judicial nomination. How extreme is this Member versus the Member who just spoke, who has voted repeatedly and repeatedly and repeatedly and repeatedly and repeatedly against cloture? Who is the extremist?

I will posit that to the American people. Who is the extremist? The Senator from Pennsylvania, who never in his career voted, ever, against a cloture petition for a judicial nomination or the Senator from Illinois, who has led the effort, organized the posse, to filibuster, for the first time in American history, nominations for the court?

This is only 168 to 4. When the rules are changed, upon changing the rules you have to start with one. Then you do two. Then you do three. Then you do four. And today we do five. Today we do six. Next month it will be seven. Then it will be eight. Years from now, it will be 127, and then 3,455. It starts with one. It starts with the change.

There have been 2,372 nominations since the filibuster rule was put in place; zero blocked on the Senate floor. It has never been done in history.

Oh, it is only four, just a few. We are doing great. ''We just started,'' is what they are not saying—we have only just begun. We just started this, folks. Not the Senator from Pennsylvania, not the Senator from South Carolina, not the Senator from Missouri. The Senator from Missouri opposed a judge. He said, look, have an up-or-down vote and then I will vote no. That has been the way it has been done here. This idea that we have filibustered nominations by folks not getting a vote in committee, let us look at the record.

Fifty-four Bush nominees under the Democratic Senate got no hearing, did not get confirmed. Have we complained that they were filibustered? No, because they were not. Every President at the end of his term has judicial nominations in committee who have not gotten through, for a variety of reasons. It is just the flow of the Senate. In this case, 54 Bush nominations. How many Clinton nominations, after 8 years? Forty-one.

Let me repeat this again because we are saying this is different; Clinton was treated so unfairly. There were 377 nominations, 1 defeated on the floor, up-or-down vote. No filibuster.

I remember—the Senator from Missouri, I am sure, can remember this—Richard Paez. I do not know if the Senator from Missouri voted against him or not, but I sure did. I did not vote against cloture because the Senator from Mississippi, Mr. LOTT, and the chairman, Senator HATCH, said: Do not set this precedent. Do not change the rules. It is going to come back and bite us. We cannot do this. It is too important to the future of the Senate. It is going to undermine the judiciary. The Ruth Bader Ginsburgs of this world, the Antonin Scalias of this world will not have a prayer getting through this place. The best and the brightest are going to get knocked away or scared away if we raise this bar, if we allow the extreme elements of either party to start to run the Senate. We cannot let this happen.

As much as we may want to, as much as we did not want Richard Paez to be a Ninth Circuit Court judge, you have to hold back. You cannot let the passion of the moment completely destroy the precedent that has served this body and this country so well. Do not succumb to the special interest groups who are pleading with you. Come on.

The Senator from South Carolina said just in the last hour that for every one liberal special interest group there is one conservative one. Guess what. When the shoe is on the other foot, do you think we are going to say, oh, well, we are going to go back to the way it was; we are going to let you have all of your liberal judges; we are only going to require 51 votes? Fat chance. Fat chance.

Mr. GRAHAM of South Carolina. Will the Senator yield for a question?

Mr. SANTORUM. I will yield the floor to the Senator from South Carolina.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM of South Carolina. For something that is a waste of time, it

has been hard as heck to get to say anything around here because everybody is so fired up about talking, which I think is good. We have been in almost 39 hours, and if Senators get 15 minutes to express themselves they are lucky, which I think is a testament to how important this is to people.

I am very proud of what the Senator from Pennsylvania has tried to tell the body about what the future will be like. The Senator from Minnesota and the Senator from Georgia, my two good friends, my classmates, we were not here during a lot of these problems of the past. We are worried about the future.

I want to very quickly respond to my good friend from Illinois. Here is what I am willing to do—and I do not know who the Capitol Hill policeman was, God bless him for serving—I am willing to stand by a poll of all the cops in America and see whether they think appointing a judge is a big deal. It is my belief that most cops in America have had experiences in court that they really would like us to pick judges wisely. As a prosecutor, I can assure my colleagues who the judge is matters. I can assure my colleagues that most police officers do watch how the court operates, and they are concerned about the quality of judges because many of them have made cases risking their lives only to see it bounced.

So I totally disagree that this police officer is speaking for the mainstream of cops. Cops care about judges.

The Washington Post—I am not a great fan of the editorial page, but I read the Washington Post about what they think is going on here today. On February 5, 2003, the Washington Post said this filibustering of judges—Miguel Estrada—is really not a good thing. A world in which filibusters serve as an active instrument of nomination politics is not one either party should want.

Well, the extreme Senator from Pennsylvania shares the same views as the Washington Post, which begins to bother me a little bit. Maybe he should be a little more extreme. But what he is saying is what the Post said back in February. You do not have to be a rocket scientist to figure this out because I figured it out. I am not a rocket scientist.

This is about manufactured controversies. Judge Pickering, oh, this is no big deal. Why are the Senate Democrats sending out urgent e-mails saying send us money, my God, the country is about to blow up because the Bush administration is devoted to using the courts to its political advantage? If that does not get your blood boiling, what would? It would scare me if I got a memo from somebody who is a responsible member of the Senate Democratic leadership saying, send money quickly. The Bush people are taking over the courts, and they are going to put a guy on the court named Charles Pickering. While he was in law school, he wrote an article about making sure the ban on interracial marriage in Mississippi was not stricken down.

As a State senator in the 1970s, Pickering worked to repeal the important provisions of the Voter Rights Act. That ought to scare you to death if you believe in racial harmony and justice.

This e-mail is totally in contradiction of what has been said on the Senate floor. The e-mail says that Senate Democrats have launched an unprecedented effort. If you have listened to everybody for the last 33 hours, this is just business as usual. The e-mail is the best evidence of what is going on over there. They have picked a few judges, for whatever reason. They have manufactured controversies about who these people are, and they are ruining their lives.

Judge Pickering was approved by this body 12 years ago. I would daresay this body would not have unanimously put him on the district court as a Federal judge if they believed he was writing articles supporting interracial marriage bans and that while he was a State senator he actively undermined the rights of African Americans in Mississippi. That makes no sense. That means this place is totally asleep and worthless when it comes to screening, or they are manufacturing controversies about this judge.

Judge Pickering was voted well qualified, the highest rating one can get from the American Bar Association. I am convinced that the ABA is not putting people on the bench well qualified if they believe they are a bunch of racists. It goes on and on with all four of these people, and it soon will become 12. That is why I am so upset.

Special interest groups who do not live in Mississippi have declared war on the basic essence of who Charles Pickering is, defying all of the evidence out there by people who know him the best and what he has done with his life. That is a sad state. That will lead to chaos, and the Senator from Pennsylvania is absolutely right. You are going to have people applying for these jobs in the future who will have never uttered a word about anything because if they say anything that may get a liberal or a conservative special interest group mad at them, they will come and knock their head off. That is why we are here at 10 minutes after 7 and you have to really watch it to make sure you do not deny your colleagues a chance to speak because contrary to what they say over there, this is a big deal to everybody, and, my God, it ought to be. If it gets to be where it is not a big deal to how a judge is appointed and nominated, and whether you follow the Constitution, our problems with the economy pale in comparison with our problems as a nation. When politics enters the judicial arena and the judicial arena just becomes another form of politics, then we have drifted far astray from where our forefathers wanted us to be.

I will yield to my colleague from Missouri.

The PRESIDING OFFICER. The Senator from Missouri.

Mr. BOND. Mr. President, I could not agree more with my colleague from South Carolina. When I hear asked on this Senate floor, who cares about judicial appointments, who cares about the important judiciary that makes decisions that affect our everyday lives, I would join with him in saying that the people in Missouri care.

I have found all of the problems—and there are many problems, there are lots of concerns. People are concerned about Iraq. They want to see the President carry on the war against terrorism. They are concerned about jobs. They are very grateful, I might add, that the Republican Congress has given the economy such a boost with its good fiscal policy and gotten the economy growing, an economy that President Bush inherited that was in the tank, but it is starting to grow, and we want it to grow faster. They ask me more about this unprecedented filibuster of judges than anything else.

No matter where I go, in the rural areas, in the big cities, in the suburbs—my colleagues on the other side ask, who cares? Well, people in my State understand. They know how important the judiciary is. They know that appellate courts, the courts that oversee district courts usually in many States, make decisions that affect our everyday lives.

The Senator from South Carolina was right. The police officers, the sheriffs, these are the folks who go out and risk their lives and then they see appellate judges, people on appeals courts, making decisions that turn these criminals loose. And they say what is this all about? I am risking my life, I am out there getting shot at, trying to bring somebody in, and an appellate court judge misuses the law to set him free. Our police officers, our law enforcement officers today understand the constitutional rights. They know. They have to abide by the standard. They have to respect the rights of all citizens. But when they do that, when they go through all of the steps and do it right and then a criminal is turned loose, they, who have risked their lives, know how important these judges are.

My Democratic colleagues complain that we are taking time. Well, I have been waiting to get on the floor because this is something we need to talk about. We have listened to them all year long delay, filibuster. They bragged about they finally passed the Healthy Forests bill to stop the wildfires that have burned in California and threaten many States, and do my colleagues know what they are doing? They are filibustering the ability to take that bill to the conference so we can get it passed. They are filibustering that.

My colleague from Illinois was talking about how long it took us to get to the VA-HUD bill, a bill I am responsible for. Well, something may have

interfered with taking up that bill when the minority whip spent 8½ hours on the Senate floor on Monday complaining about filibusters. Excuse me, but what is that when he will not release the floor beginning at 1:30? I gave up. I heard he went 8½ hours, maybe it was 9½ hours. I decided to turn on the ball game about then. But we were blocked from doing anything. We were blocked by the same Democrats who complained, after they filibustered all year long, that we are talking too much.

There is a lot to be said, but the most important thing I can say is that the President has nominated 46 people to serve on the Federal circuit court, and the Senate has confirmed only 63 percent. This is what we are talking about, unprecedented. The President has made four nominations to the Court of Appeals for the DC Circuit, the second highest court in the land, and only one has been confirmed.

Despite the self-congratulations of the Democrats who say they have confirmed 168, they have not confirmed 37 percent of the circuit judges. What nominee has withdrawn his name? One of the most qualified people ever nominated for the judiciary. Three remain filibustered. Three more are being threatened with that fate. Numerous others are being blocked or delayed by the minority. The reason most cited is that these nominees are out of the mainstream.

The mainstream, it appears, is defined by a few of my colleagues and some of the most liberal interest groups in the country. I know the liberal interest groups, the Hollywood group, put in a lot of money, and they have strange ideas of what the mainstream is. When you talk about some of their mainstream Hollywood people or People for the American Way ideas, I tell my colleagues, that dog does not hunt in Missouri. I imagine it does not hunt in South Carolina, Georgia, and Pennsylvania either.

If that is the litmus test, let us talk about who is in the mainstream. For the Ninth Circuit, Judge Carolyn Kuhl, the American Bar Association says she is well qualified for the position. Oh, earlier on, that was going to be the gold standard. The Democrats said: We cannot appoint anybody who is not rated at least qualified by the American Bar Association.

She is rated well qualified, a distinguished career as an attorney with the Department of Justice, U.S. Solicitor General, a clerk for the United States Supreme Court. Twenty-three women judges on the Superior Court of Los Angeles, and nearly 100 judges who serve with her have spoken out on her outstanding abilities and professionalism. The litigation section of the L.A. County bar has also. Are those people out of the mainstream? Are they somehow different? Are they somehow unworthy?

Then Judge Janice Rogers Brown, she is the first African-American woman to serve on the State's highest court. She was retained by the support of 76 percent of the voters in her last election. That is in California. Is 76 percent of the California voters out of the mainstream? Academics from colleges across the State have written in to speak about her professionalism and evenhandedness. Sounds like mainstream to me.

They like to think that the panel of the Ninth Circuit, which is the most liberal, most overruled, most out of touch circuit court in the Nation, is mainstream, but this panel of Ninth Circuit judges tried to stay the recall election in California. The Ninth Circuit judges declared that the words ''under God'' in the Pledge of Allegiance are unconstitutional. Is that the mainstream? Two Democrats appointed to the Ninth Circuit ruled that convicted felons serving a life sentence have a fundamental right to procreate by artificial insemination. Are they in the mainstream? Where is that in the Constitution?

Mr. President, I have many colleagues who need to speak. I have a whole lot more to say. I will be sharing it with you. But most of all, I am hearing from the people in Missouri who know their lives could be affected by what the nominees of the appellate courts in the Nation can provide.

After 9/11, a Jordanian named Osama Awadallah was apprehended after material linking him to some of the hijackers was found in a car parked at Dulles by one of the hijackers. It was established that Awadallah knew two of the hijackers and had met with one of them up to forty times. But Clinton appointee Judge Shira Scheindlin dismissed his charges and in the process struck down a federal material witness statute long used by the Department of Justice to detain witnesses who are a flight risk. The fact that this was well-settled law used by the prosecution was no deterrent to the judge. Fortunately, she was overruled by the court of appeals.

Yesterday, we also heard about Clinton appointee Judge Jed Rakoff, who ruled that the federal death penalty is unconstitutional, again disregarding well established precedent. In his opinion, the judge likened the statute to murder. The judge seemed to have total disregard for the fact that the arguments he made were those that should be made in a legislative body, but that would require one to be responsive to the will of the voters—what an old fashioned notion! Even the Washington Post—which opposes the death penalty—condemned this blatant overreaching decision as entirely inappropriate for a judge.

Another recent Clinton appointee has ruled it necessary for the government to permit criminal illegal immigrants bail, rather than holding them for deportation—A very useful tool for our immigration services to ensure that criminal aliens are sent back to their native countries.

President Clinton nominated a New Jersey federal judge to the court of appeals who once ruled that a homeless man, despite the disturbance he was causing the patrons, had a right not to be removed from a public library. Of course, he was supported unanimously by the Democrats. On the circuit court, he went on to rule that prisoners had a constitutional right protecting their mail from searches and argued that the government could not go after the proceeds of drug forfeitures—fortunately for the war on drugs, he was unsuccessful.

Speaking of prisoner cases, one of the decisions issued by Judge Pickering that the Democrats have been critical of was a prisoner's rights case. A prisoner was dissatisfied with the prison issue typewriter because it was lacking a memory system—Judge Pickering ruled that this prisoner's typewriter was adequate and he did not have the right to one with memory. What a cruel decision. Is that what this debate has come down too? This hardly puts Judge Pickering out of the mainstream, in fact I would bet just about everyone listening to this debate would agree this decision is mainstream—It makes common sense.

I could stand here all morning reading decision after decision handed down by Democrat appointed judges that simply defy reason and bear no resemblance to what most people in this chamber or in their states would consider to be the ''mainstream''. Yet a few of our colleagues have taken it upon themselves to make this critical determination. By their history, they have no credibility on this question. In fact, all the nominees who have been labeled as such actually enjoy the majority support in this body and have the support of Republicans and Democrats alike.

Mr. President, it is time to give these extremely well-qualified, high-respected individuals an up or down vote. It is time for the minority to quit hiding behind this flimsy argument about being in the mainstream.

It is too late for Miguel Estrada, his nomination was withdrawn after 848 days and 7 cloture votes, unanimous rating of well qualified by the ABA, but it is time to give Justice Priscilla Owen a vote, her nomination has been pending for 917 days and there has been three cloture votes, unanimous rating of well qualified by the ABA, it is time to give Judge Charles Pickering a vote, his nomination has been pending for 901 days and he has an ABA rating of well qualified, it is time to give Attorney General William Pryor a vote, his nomination has been pending for 217 days and he received a qualified rating, it is time to give Judge Carolyn Kuhl a vote, her nomination has been pending for 873 days and the ABA has give her a well qualified rating, it is time to give Justice Janice Brown a vote, her nomination has been pending for 110 days, and it is time to give Judge Henry Saad a vote, his nomination has been pending for 743 days.

Mr. President, it is time for the body to give these candidates an up-or-down vote.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. CHAMBLISS. Just like the Senator from Missouri, I want to talk for just a second about who cares about these judicial nominations because obviously the folks on the other side of the aisle who have been obstructionists in not allowing circuit court judges to come to a vote think the American public does not care about our Federal judicial system. Sure, our supporters understands it and they care. Sure, every Rotary Club I go to understands it and they care because they ask me about it. Every church where I go to speak, they care, they understand it, because they ask me about it. I have been walking down the street in my hometown and some stranger will come up to me. He understands it and he cares.

Obviously, the Senator from Illinois is totally insensitive to these kinds of people.

Let me tell you who else cares. That criminal defendant who is sitting in jail and who is having to wait longer than he ought to wait because we do not have Federal judges on the bench, he or she cares. That plaintiff or defendant in a civil lawsuit who is having to sit and wait and wait for justice, whatever that justice may be, on either side of the appellate case, he cares because he is not getting his case served.

Obviously, the folks on the other side of the aisle who are complaining about and conducting this filibuster think those people are OK and they do not care. They care.

I guess one of the major other differences between the Senator from Illinois and this Senator is that I don't go to the Washington Post to get my anecdotes. I don't go to any conservative newspaper to get my anecdotes.

Yesterday I drove to my office over in the Russell Senate Office Building, and as I pulled my car up to the gate, just like all of us—we stop, the Capitol Police have to come around and run the mirror under your car—the Capitol policeman came over to me and he knew I had been up except for an hour the night before, and I could tell he was dead tired, and he looked at me and he said: Senator how are you doing? And I said: I am tired. He said: Senator, you guys are doing the right thing. Make your point.

You know that guy cares because he is like every other law enforcement officer in America. They depend on us to make sure we provide them with good judges to take the bad guys off the street which makes their job easier.

There is one other point I want to make because I have heard this comment off and on for the last 38 hours. And that is, the fact that the score of 98 percent is a pretty good score. I don't care whether it is a math, English, or a reading test. They keep bringing this point up that we have confirmed 98 percent of the President's judicial nominees.

First of all, the numbers are not right, but I will not get into that. I want to talk about the 98 percent. On its face, that might sound fine. When you come to messing with the Constitution of the United States, when it comes to the confirmation of judges, 98 percent is not good enough. The reason is that every other President in the history of the United States of America—and we have had 43 of them now—every single one of the other 42 Presidents of the United States has had a score of 100 percent when it comes to the issue of not having their judges filibustered.

For these folks to stand up on the other side of the aisle and say 98 percent is pretty good, they don't care about the fact that they are the first in the history of the United States of America to filibuster a judge.

I repeat, if 98 percent is OK and they are smiling and happy about it, I would like to hear how many of them go home this afternoon and think they would get a good reception from their spouse if they said: You know, honey, I have been faithful to you 98 percent of the time. Or I wonder how many of them would feel good as they get on an airplane this afternoon and head home smiling and thinking, boy, we have done great work defending our judges and defending our filibuster of these judges but that airplane had a safety record of landing 98 percent of the time.

There is a difference. We live under this document that has served us so well for so many years and 100 percent of the judges who are nominated have been confirmed by every other Senate for every other President prior to this one as per the language of this great document.

I close by reading some comments out of a book written by a man of which I am a big fan. The Democrats in this Senate are not particularly a fan of his right now, but let me tell you, he is a great American. He is a great American who speaks the truth, and he is speaking the truth about what is going on in this body right now. ''The National Party No More, the Conscience of a Conservative Democrat.'' It is written by my colleague, my good friend from the State of Georgia, Senator Zell Miller.

I ask unanimous consent that the entire chapter, chapter 8, entitled ''41 Beats 59—That Strange Senate Math,'' be printed in the RECORD.

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

41 BEATS 59—THAT STRANGE SENATE MATH

The United States Senate is the only place on the planet where 59 votes out of 100 cannot pass anything because 41 votes out of 100 can defeat it. Try explaining that at your local Rotary Club or to someone in the Wal-Mart parking lot or, for that matter, to the college freshman in Political Science 101. You can't, because this strange Senate math stands democracy on its head.

By name, this incongruous, obstructionist procedure is known as a filibuster. The word filibuster comes from a Spanish word for ''pirate,'' and that is exactly what this procedure does. It hijacks the democratic process. Filibusters first caught the fancy of the nation after James Stewart, in Frank Capra's classic movie Mr. Smith Goes to Washington, made Mr. Smith a hero standing up to the Senate bosses on behalf of the people. But now, however, most Americans understand vaguely that in the Senate any member can stand up and talk endless drivel for hours in order to prevent legislation he or she opposes from coming to a vote. The process is so ridiculous that the filibuster, like that old comics-page blowhard Senator Claghorn, has unfortunately become, in the minds of many, just another caricature of the Senate, just another thing to laugh at, just more hot air from the Cave of the Winds.

Realizing that with the scrutiny of television, the people would not stand for such nonsense, the ''Old Bulls'' of the Senate fuzzed it up. They made it subtler. These verbal gunslingers can now be forced to shut up, and the process and the Senate move along toward a vote if sixty members remove the cotton from their ears and vote for cloture. A cloture shuts off what is called a debate but isn't because it takes two sides talking to constitute a debate. If this sounds confusing, it is meant to be. That is precisely the objective.

The short version of this debacle is that the way filibuster is being used in the Senate gives the minority an absolute veto on just about everything. In fact, the U.S. Senate has become similar to the Security Council of the United Nations where one country can veto the will of a clear majority and castrate the entire process.

Winston Churchill once said, ''Democracy is based on reason and fair play.'' Well, there's nothing reasonable or fair about what's been happening in this august body. It's not just that it's an expensive waste of time and taxpayer money, but it's also a flagrant abuse or majority rule, the principle that democracy operates on everywhere. Everywhere, that is, except in the U.S. Senate.

Rule XXII of the Senate is the reason for all this. It was adopted in 1917 and was meant to move things along. President Woodrow Wilson had lashed out at what he called a ''little group of willful men'' who had blocked his proposal to arm our merchant ships against German submarines. Sixteen senators could file a petition against a bill or an amendment and if two-thirds approved it within two days, debate was to be limited to one hour per member or one hundred hours. Later it was modified to sixty votes, not two-thirds, necessary to halt a filibuster. And in 2003, for the first time, it was used to prevent a vote on the presidential judicial nominees.

The longest filibuster in congressional history was waged against the Civil Rights Act in August 1957 by Senator Strom Thurmond of South Carolina, when he held the floor for twenty-four hours and eighteen minutes. Wayne Morse of Oregon comes in a close second with twenty-two hours and twenty-six minutes. Probably the most entertaining was the Kingfish, Huey P. Long of Louisiana, who in 1935 only went on for fifteen hours, thirty minutes against one of President Roosevelt's New Deal proposals. When asked how he kept from answering the call of nature for that long he answered, ''Why do you think I wore a navy blue suit?'' Strom Thurmond had dehydrated himself in a sauna before taking the floor for his record-setter and didn't worry about that problem.

James Madison, the Father of the Constitution, feared some future political leaders would pervert the legislative process in

just this way. He warned in Federalist Paper #58 that when it happened, ''The Fundamental principle of free government would be reversed. It would be no longer the majority that would rule. The power would be transformed to the minority.'' I'm sure the man who wrote the Constitution is spinning in his grave.

Alexander Hamilton may be taking a couple of revolutions as well, because he agreed with Madison. He pointed out in his Federalist Paper #68 that the vice president was given a tie-breaking vote for ''securing at all times the possibility of a definite resolution of that body.'' A ''definite resolution''; how well put. But no one has said it better than Senator Henry Cabot Lodge in 1893, when obstructionism was not nearly as bad as it is today: ''To vote without debating is perilous, but to debate and never vote is imbecile.''

Years ago, when I was teaching freshman political science at Young Harris College, I always repeated the old story about the origin of the Senate. Thomas Jefferson was in France when the Constitutional Convention was being held. Later, he asked his friend George Washington, who presided over the convention, about the purpose of this upper chamber, the Senate. Washington, so the anecdote goes, then asked Jefferson, ''Why do you pour coffee into your saucer?'' To cool it,'' Jefferson replied. Washington responded, ''Even so, we pour legislation into the senatorial saucer to cool it.''

Cool it, yes. but not freeze it into an ice cube. Truth is, there is nothing at all said in the Constitution about protecting Senate minorities. Our Founding Fathers, I believe, thought the smaller size, longer and staggered terms, as well as state legislation on the selection of senators, would provide more wisdom.

Some constitutional lawyers have argued that any kind of super-majority vote is unconstitutional, other than for the five areas specified in the Constitution: treaty ratification, impeachment, override of a presidential vote, constitutional amendments, and expelling a member of Congress. As I write this, Judicial Watch is doing just that. They have filed a lawsuit arguing that confirmation of judges is not specified in the Constitution and, hence, does not require a super majority.

That's one possible remedy. There are others. We could abolish Rule XXII that protects this travesty and let the U.S. Senate operate under rules like every other democratic legislative body in the world where a simple majority rules. That's about as likely as a day dawning in Washington without ten fund-raisers.

Or we could modify what I call the ''two-track trick'' or filibuster by stealth adopted a few years ago, where another piece of legislation is considered at the same time a filibuster goes its windy way. I call it ''filibuster-lite.'' It's a way to avoid the inconvenience and pain of a real filibuster as if we are using powder-puff, 16-ounce gloves instead of bare knuckles. I'd much rather just duke it out in a real debate and get it over than try to deceive the public that no blood is being spilled. Many veterans of the senate—not a newcomer like myself—have expressed dismay wit the process. Henry Clay, generally recognized as one of our greatest senators, condemned the first organized filibuster when it occurred in 1837. Even back then, he though there needed to be some workable limitation for endless debate. If only he could see what happened late in the twentieth century, Clay would be another grave-spinner. In the nineteenth century, there were twenty-there filibusters. In the last thirty years of the twentieth century, there were more than two hundred.

Two pieces of crucial legislation that filibusters have stymied over the years include the anti-lynching bill of the 1920s and abolishing the poll tax that was held up for twenty-two years from 1942–1964. The Civil Rights Act of 1964 was filibustered for ninety-three calendar days.

With Georgia's Senator Richard Russell as their leader and unlimited debate as their weapon of choice, a small band of Southern senators for years had managed to defeat or drastically weaken any civil rights legislation that came before the Senate. But it was different in 1964. The Senate membership had changed and President Johnson was pushing it with all his considerable power. He told the nation that passing the legislation would be the most fitting memorial that recently assassinated John F. Kennedy could be given. He also managed to peel off Minority Leader Everett Dirksen who often sided with Russell. In the end cloture was invoked 71–29 and the bill went on to pass by an overwhelming margin.

Obviously, both parties have used filibusters time and time again, one just as guilty at the other. In 1996, Democrats blocked a vote on a constitutional amendment on term limits and the Republicans blocked a vote to reform campaign finance. Many conservatives would disagree with me, but I happen to think the political process would have been improved if both those measures had passed. Certainly, it would have greatly weakened the current death-grip of the well-heeled special interest groups because electing their pet incumbents over and over with little or no opposition is what gives both the tremendous power they have. I call it ''the dance,'' and it's nothing like that Garth Brooks song by the same name. After the music of election year stops, it's the public that gets screwed.

In the mid-1990s there was a bipartisan group of distinguished citizens called ''Action, Not Gridlock'' that came together with great ballyhoo, intent on reform and majority rule. Republican Barry Goldwater was among them. Then in 1995, Democratic Senators Tom Harkin and Joe Lieberman introduced a rule change that I believe is the best that's been proposed.

Two years earlier, Harkin had let a committee hearing have it with both barrels: ''There comes a time when tradition has to meet the realities of the modern age. The minority's rights must be protected. The majority should not be able to run roughshod over them, but neither should a vexatious minority be able to thwart the will of the majority and not even permit legislation to come up for a meaningful vote.''

The Harkin-Lieberman plan called for a four-step process that kept sixty votes on the initial cloture vote, but decreased it by three votes with each of the next three cloture attempts until finally it got down to the majority of fifty-one. They argued, logically, that this would preserve the Senate tradition while giving the minority plenty of time to plead its case without blocking the majority forever. I liked this idea so well that in March 2003, I introduced an identical bill. In May I joined with Majority Leader Bill Frist in a modified version applying the process only to judicial nominees. That seems to have the best chance for any kind of change and I'm afraid that's not much. Both Harkin and Lieberman now oppose what they so eloquently promoted a few years earlier.

As far as the fate of the Harkin-Lieberman rule change, the New York Times celebrated New Year's Day 1995 with a lengthy editorial beginning, ''The U.S. Senate likes to call itself the world's greatest deliberative body. The greatest obstructive body is more like it.'' The article continued, ''Once a rarely-used tactic reserved for issues on which senators help passionate convictions, the filibuster has become the tool of the sore loser, dooming any measure that cannot command the sixty required votes.''

All of this came to naught, however, after the Republicans solidly opposed the amendment and Democratic Senator Robert Byrd who, like that mythical, hell-guarding, ferocious three-headed dog Cerberus, punctuated his opposition with the story of how Cato the Younger, in 60 BC, got the floor in the Roman Senate at midday and valiantly spoke until sundown, the time of adjournment, in order to thwart one of Julius Caesar's proposals. That story marked the end of the Harkin-Lieberman filibuster reform bill. Never mind that Byrd didn't tell the rest of the story, that Caesar was not thwarted and fourteen years later Cato committed suicide while Caesar was at the height of his power and still going strong.

Now, I must admit I greatly admire and respect this man, Cato the Younger. He was one of Rome's greatest statesmen, not at all like his great grandfather Cato the Elder, who exemplified the corruption and hypocrisy that later undermined the traditions of republican liberty. Cato the Younger was different. He was a moral man and a great defender of the Constitution and the dominant role of the Senate. That was his role and he always played it to the hilt. His reputation was such that our Founding Fathers admired him as a symbol of opposition to tyranny. In fact, George Washington ordered a play about Cato performed to inspire his soldiers at Valley Forge.

But, truth be told, Cato met an ignoble end. His reputation was greater than his ability. After he was defeated by Caesar at the Battle of Thapsus, rather than accept the generous offer of clemency from his old antagonist, he committed suicide. And he botched that; he didn't fall directly on his sword and it didn't kill him swiftly so he tore out his own intestines with his bare hands. It gave ''spilling your guts'' a new meaning and was a messy end for the First Filibusterer. While today we can find many good books on Caesar, I have yet to find one on Cato. So, you lovers of the filibuster, I say that is a history lesson worth thinking about.

For all the good stories that have come down through the centuries inspired by the filibuster, in the end, it has nothing to do with ancient history.

The filibuster has nothing to do with the British Parliament.

The filibuster has nothing to do with coffee cooling in a saucer.

The filibuster has nothing to do with freedom of speech.

The filibuster has nothing to do with tradition.

The filibuster has nothing to do with the Constitution.

The filibuster has nothing to do with protecting minority rights.

The filibuster has everything to do with personal political power. It's about Alpha dogs defending their turf in that great big kennel under the dome.

Mr. CHAMBLISS. Here is what he says:

The United States Senate is the only place on the planet where 59 votes out of 100 cannot pass anything because 41 votes out of 100 can defeat it. Try explaining that at your local Rotary Club or to someone in the Wal-Mart parking lot or, for that matter, to the college freshman in Political Science 101. You can't, because the strange Senate math stands democracy on its head.

He then talks about ''Mr. Smith Goes To Washington'' and the perception about a filibuster. And he continues:

Realizing that with the scrutiny of television, the people would not stand for such nonsense, the ''Old Bulls'' of the Senate fuzzed it up. They made it subtler. These verbal gunslingers can now be forced to shut up, and the process and the Senate move along toward a vote if sixty members remove the cotton from their ears and vote for cloture. A cloture shuts off what is called a debate but isn't because it takes two sides talking to constitute a debate. If this sounds confusing, it is meant to be. That is precisely the objective.

The short version of this debacle is that the way filibuster is being used in the Senate gives the minority an absolute veto on just about everything. In fact, the U.S. Senate has become similar to the Security Council of the United Nations where one country can veto the will of a clear majority and castrate the entire process.

He goes on and gives several anecdotes about the Constitution and what a great document it has been and cites Jefferson's comment to Washington about the function of the Senate and Washington's statement that has been mentioned several times about the function of the upper Chamber, the Senate. The story is told with Washington asking: Why do you pour coffee into your saucer? To cool it, Jefferson replied. And Washington said: Even as we pour legislation into the senatorial cup to cool it.

Here is what Senator MILLER says about that: Cool it, yes. But not freeze it into an ice cube.

There is a significant difference.

Again, he goes on talking about the history of the filibuster. In the history of Democratic Senators, Democratic Senators who are serving in this body today who in recent years have asked that this filibuster rule be changed so that we would not go through the process that we are experiencing today. All of a sudden those Democratic Senators have amnesia and are voting not to invoke cloture.

This is the way Senator MILLER winds up:

For all the good stories that have come down through the centuries inspired by the filibuster, in the end, it has nothing to do with ancient history.

The filibuster has nothing to do with the British Parliament.

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The filibuster has nothing to do with protecting minority rights.

The filibuster has everything to do with personal political power. It's about Alpha dogs defending their turf in that great big kennel under the dome.

I agree with Senator MILLER.

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

The Senator from Louisiana.

Mr. BREAUX. Good morning, Mr. President and colleagues.

I was very interested in listening to the distinguished Senator from Georgia and the Senator from Pennsylvania. I am trying to keep track of what he was quoting from. We decided he was quoting from Miller, chapter 1, verses 6 through 12. I am sure it is considered a holy document. And of course, as most documents, there are two sides to every story. Indeed, on that I imagine you have at least two sides to Miller, chapter 1, verses 6 through 12.

I arrived in this institution over 30 years ago and remember quite well driving up from Washington 35 years ago in a U-Haul with two small children and my wife. I was in absolute awe of the Capitol. In fact, the first time I had ever had an opportunity to visit Washington was when I came here to work as a very young aide to a then-sitting Member of Congress on the House side.

Over those 35 years, I have come to love and respect and appreciate all of the good things that this institution, including the other body, as well as the Senate, stands for. It is a wonderful opportunity to engage in serious debate about the important issues of the day and to address the important issues and problems facing the people of this Nation. That is what this institution does best.

Unfortunately, every now and then the institution tends to break down and we spend an inordinate amount of time doing things that do not address the great issues of the day or contribute anything to solving the great problems of the day. This is one of those times. I have not lost my respect for this institution, and particularly the Senate, even though as in most things in the real world, sometimes things did not run quite as they should. We have now engaged in a couple of days of exhibiting how this institution does not work very well, although on very rare occasions. I still have the utmost respect for this institution and will continue to have that respect for as long as I live despite the fact that every now and then it breaks down.

The issue it has broken down on—I imagine most people in this country are probably watching the morning news show; some are probably watching cartoons with their children. I doubt very well most are watching what some would consider a cartoon-type of atmosphere in this debate which has been on longer than it should. The issue is quite simple: Are Democrats stopping Republicans from getting their judges approved? And are we doing it in a way that is somehow unconstitutional or outside the rules of the Senate?

If you look at the record of the judges, our side has pointed out we have approved 168 judges while only 4 have stopped. I was trying to say, how does that relate to the average American? If the Washington Redskins had a 98 percent win-loss record, people would think that is absolutely astounding, and Spurrier would be given a big raise if they had 98 percent win-loss. If Tiger Woods won 98 percent of the tournaments he entered, people would be writing in amazement about that incredible person capable of winning 98 percent of the time. I happen to play tennis, and if Andre Agassi won 98 percent of his matches, I would imagine people would say this is truly incredible, someone would be capable of winning 98 percent of the time. I guess I should throw in the New Orleans Saints because if they won 98 percent of the time, I cannot imagine what the State of Louisiana would do.

But that is, in fact, the record the President of the United States, President Bush, has established with regard to the judges he has submitted for confirmation. It is truly a remarkable record of having almost every person he has submitted to the Congress be considered by appropriate committees and considered on the floor and approved. A 98 percent record is truly a remarkable achievement by any measure, whether it is a sports metaphor or whether it is any other type of metaphor we can imagine.

I will bring it closer to home. Imagine any Member of this body getting 98 percent of the vote. Maybe the distinguished Senator from Georgia who is in the Chamber is capable of that, but I don't know if any of us would ever get 98 percent of the vote. Some have been fortunate to get over 50 percent every now and then, but no one ever gets 98 percent of the vote. Teams do not win 98 percent of their games, golfers do not win 98 percent of the tournaments, and neither do tennis players. It is unheard of.

If the average person starts looking at a record where 98 percent of the nominees have, in fact, been approved and are sitting on the bench and doing their duty, by any measure of any standard of operation in this country, people would say that is a pretty outstanding record. Yet the Senate has spent the last several days complaining about a 98 percent achievement record by the President of the United States, saying somehow that is not enough; somehow it should be 100 percent every time with every nominee.

Most American people would say: What are they talking about? Why are they spending so much time saying 98 percent achievement is not enough? That is where we are. That is what we are talking about.

Enough said about that. After 2 days of talking 24 hours a day, we have heard enough about the 98 percent record. Some I voted for cloture and some I decided not. But the record speaks for itself. It is an outstanding record.

Let me talk about one of the things we ought to be doing if we are going to be the greatest deliberative body in the history of the world, which I think the Senate truly is, something I have been working on for over 5 years as former chairman of the National Commission on Medicare Reform and now a member of the Senate Finance Committee working with our colleagues, trying, in a bipartisan fashion, to address one of the really important issues of this Nation.

We are at a health care crisis in America. We have literally millions and millions of Americans with no health insurance at all. They have to go to emergency rooms. They are in the poorhouse and get services under the State Medicaid Program. Many of these people work hard every day. Yet the companies they work for no longer provide health insurance. It is truly a national problem of monumental proportions, yet we are not talking about that in the Senate today.

Another issue is the fact that we have something over 40 million American citizens who have a health insurance plan that is inadequate, outdated, and in desperate need of reform in terms of how much money we spend on the program. The current program we have for seniors is unsustainable in terms of the money we spend and where it will come from.

All of the Members in this Chamber and all of our employees have health insurance that is significantly better than every single one of the 40 million Americans who do not have health insurance. Our health insurance covers hospitalization, our health insurance covers doctors, our health insurance covers emergencies, and our health insurance covers prescription drugs. Yet we have not been able to do for seniors what we have done for ourselves. That is something that challenges this institution and something to which this institution has to pay attention.

The simple fact is that Medicare today does not cover 47 percent of an average senior's health care costs. It is embarrassing that we, arguably the strongest Nation in the history of the world, have a system where the seniors of this country who have worked, earned, and paid into a fund to provide health insurance when they are old, now are covered by a policy that only covers 53 percent of the average senior's medical costs, and leaving 47 percent somewhere else.

We have been working very hard for a long period of time to reform Medicare. The groups that have been working together have reached an agreement that is a tentative agreement, and no one is bound by it until we see the final product, and that includes me.

The interesting thing about this is that if anything should not be political, it is health care. But I can think of no subject that has become more political than health care, and no subject that has become more political in health care than how we treat the Nation's seniors.

Republicans continue to talk about why Democrats will not do what is needed and necessary to pass a reform bill. And Democrats continue to say Republicans want to privatize it and end Medicare as we know it.

There are Republican political pundits in this city who have said we should pass a Republican-only bill in the House of Representatives and send it to the Senate so the Senate Democrats can kill it; it will be a terrific political issue for us. On the other hand, there are Democratic political pundits in this city who will say there is no way we can support and pass a Medicare bill. Why? Because it would give President Bush an opportunity to sign a bill in the Rose Garden and he might get credit doing so.

So we continue to play what I would call the political blame game. We are more concerned about ourselves and our political parties than we are about the 40 million seniors who desperately need the help in order to get prescription drugs under a reformed Medicare plan.

If we go along those lines, what we will have done is to say, once again: It is their fault it did not get done. And they will say: No, it is your fault it did not get done. But once again what we will give to America's seniors is a basket of excuses. And I have suggested many times that seniors cannot take an excuse to the drugstore and get their prescriptions filled. It is not possible.

What they need is both sides to act like grownups and both parties not just to look at their political base but to look at what is good for America, and join forces and say: Yes, it is going to be a compromise. No, it is not going to be everything I would like if I had an opportunity to write the bill, but we do not. Each of us is part of a larger body, and each of us is part of a body that is almost evenly politically divided.

So that is a challenge that is facing us. What we have tentatively agreed to is an insurance program under Medicare, for the first time since 1965, which will cover prescription drugs for America's seniors. They will pay a premium and have a small deductible and have some copayments, but every Member of the Senate has that type of a drug plan. The Federal Government will pay 75 percent of it, and the senior beneficiary will pay 25 percent.

We will spend $400 billion over the next 10 years trying to make that happen. We see seniors every day going to Mexico and going to Canada to buy drugs from foreign countries. Why? Because they do not have insurance that covers it. Hospitalization in Canada is cheaper than it is here. Doctor treatments and doctor visits are cheaper in Canada than they are here. Why do seniors not complain about that and say: ''I am going to have my doctor visit in Canada. I am going to go to a hospital in Canada''? It is a very simple reason. Because they have an insurance policy in this country that covers doctors, and it covers hospitalization. But it does not cover prescription drugs. There is no insurance. So they have to bear the burden of 100 percent of the costs of prescription drugs.

This legislation will be designed to say: All right, we are going to solve that problem. We are going to give you a prescription drug plan. We are going to take seniors who are now under the Medicaid Program for the poor and put all of them into the Medicare Program for all 40 million American seniors. I think that is good, solid, public policy. We are going to make sure all low-income seniors get a special rate by reduced premiums or no premiums at all to make sure we take care of the most vulnerable among us as far as the senior population is concerned.

It is important, as I conclude, when we look back on this session, that we will be able to say we have done more than create more excuses. The seniors can no longer live on political excuses coming out of Washington as to why we have not completed the job. There will be things in this bill that both sides will be able to pick and find and say, I can't be for it because of this. But I would just ask my colleagues to look at the broader picture, to look at the total package and say: When we have an opportunity, perhaps once in several decades, or once in a lifetime, to truly get something done to put in place a system that can be improved upon in the future, we will seize that unique opportunity and come together in a bipartisan fashion. And the American people will be able to say: Yes, they did it, and they did a good job.

I think that is what this body should be dealing with. That is one of the critical, important issues of this day. And I would suggest we get on to it just as soon as we possibly can.

With that, Mr. President, I yield to the distinguished Senator from New Mexico.

The PRESIDING OFFICER. The Senator from New Mexico.

Mr. BINGAMAN. Thank you very much, Mr. President.

Let me, first of all, commend my colleague from Louisiana, Senator BREAUX, for the hard work he has been doing to try to get us to a prescription drug bill for Medicare beneficiaries that will, in fact, preserve the Medicare system but will also meet this very real need that most seniors and all of us have, to be able to afford prescription drugs.

Let me say a few words about the issue of judicial appointments before I then talk about a couple of other issues I want to briefly visit as well.

As I approach this whole question about judicial nominations, I guess my starting point is to ask, how is the system supposed to work? How is this system of choosing and nominating and confirming of judges supposed to work when it involves Federal judges?

I think it is supposed to work the way it generally has worked with this President; and that is, it is supposed to work the way it has worked with regard to these 168 judges who have been confirmed. The truth is, these judges who were confirmed, they were nominated by the President, were confirmed by the Senate These are judges who are conservative in their political philosophy, in their legal philosophy. That is sort of a given with this President. We understand that. Everyone understands

that. Democrats understand it. Republicans understand it. I have no problem with that.

This President was elected as our President. He has the right to choose judges who have a conservative perspective, and clearly that is what he has done, and clearly that is the way the system is supposed to work. But as I think about how the process should work, it seems to me the very first step the President should take—and the President and his assistants, his general counsel have taken with regard to most of those 168 judges, maybe all of them, at least the ones I am familiar with—the first step is to go to the Senators from the State involved and ask those Senators if these are acceptable persons to be nominated.

That is exactly what has a happened in the case of judicial nominations from my home State of New Mexico. And I am very appreciative of the President and his counsel for including me in that discussion and in that decisionmaking. Essentially, what has happened is that my colleague, Senator DOMENICI, and the White House have identified a person—in the case of each vacancy we have had in New Mexico—they have identified a person who they thought should be nominated for that position, and they have asked me to talk to that person and give them a response as to whether that was someone I would support as well.

In each case, I had been very pleased to support those nominees. In each case, I have had the chance to sit with those people, talk to them, acquaint myself with their qualifications. And, as I say, I have been very pleased to support those nominations.

That is the way the system, in my opinion, is supposed to work. But once the President has determined that the Senators from a particular State—at least one of the Senators, but preferably both Senators from a particular State—will support the nomination of a judge or judicial candidate from that State, then, of course, it is much easier to get the full Senate to go along with that. Frankly, that is the way the system ought to work.

I have had circumstances where individual Senators have come to me, Democratic Senators have come to me and asked: Are you sure you want us to support this nominee for a judicial position in your State? because my staff tells me there are questions—and this and that. I am pleased at that point to be able to respond, yes, that I have checked out these nominees, I have determined that they are people I support, and I urge that the full Senate support them.

Now, we have two judicial nominations coming before us today that are coming up for a vote on cloture that have not come up before, but in both cases my understanding is they are being presented as nominees over the strenuous objection of both Senators from the State from which the judges come.

I have difficulty understanding why I should want to support a judicial nominee from a State if the Senators from that State oppose that nominee. I try to think of how I would feel if I were opposed to a nomination from my State and the President and a majority here in the Senate were trying to confirm that nomination over my strenuous objection.

I think we have some obligation to our colleagues to defer to their own understanding and their own knowledge and their own opinion on these issues, particularly as it affects their State. Now, not exclusively; we do not have to defer. But I am just saying that as a precondition for going forward and considering a judicial nominee, we ought to begin by asking: Do the Senators from the State the judge comes from support the nomination? That seems to me to be a threshold question.

In the case of Carolyn Kuhl, on whom we are having a cloture vote later today, as I understand it, and in the case of Janice Rogers Brown, about whom we are also having a cloture vote later today, I am informed that the Senators from California have determined they do not support these nominations. They are urging that the Senate not go forward with these nominations. They urge that the Judiciary Committee not report these nominations. And in spite of all of that, the President says we are going to do it any way.

We are doing this over the objection of the Senators from California. That, to me, is a cause for concern. We are talking about a breakdown in the traditions and a breakdown in the system that is supposed to be functioning. To me, that is a clear breakdown in the system for choosing and nominating and confirming Federal judges.

So I hope we can get back to a policy with regard to all the nominations that come from the White House and this President that is consistent with the experience I have had in my home State of New Mexico; and that is, that before a nomination is sent to the Senate for confirmation, Senators will be asked to give their opinion as to the appropriateness of the nominee.

One good thing about this country—it is certainly true in my State; I am sure it is true in every State in this country—we have a wealth of very capable, honest, hard-working members of the bar who would love to serve on the Federal courts. There is no shortage of good people for these positions. Accordingly, it is not difficult to find a person to serve in these key positions who has the strong support of Senators, Congressmen, and public officials in these States.

The list of organizations and public officials, and both California organizations and national organizations, that oppose the two nominees I have referred to here is extensive, and I have been given that list.

Twenty-two members of the California congressional delegation have indicated their opposition to our going forward with the nomination of Janice Rogers Brown. We have members of the Judiciary Committee of the California Assembly who have come out in opposition to our going forward with Carolyn Kuhl's nomination to the Ninth Circuit Court of Appeals. There is a very long list of individuals and organizations.

I know neither of these nominees personally myself, but, clearly, I have to give deference and some consideration to the opinions of those who have worked with them.

Mr. LEAHY. Will the Senator yield for a question?

Mr. BINGAMAN. I am very pleased to yield to my colleague.

Mr. LEAHY. Mr. President, the distinguished Senator from New Mexico had an exemplary career as attorney general of New Mexico and, obviously, is in a position probably to know more about the bar of New Mexico than anyone else in his State; and his service replicates that of other Senators on both sides of the aisle from their representing their States.

My question is this: The traditions of the Senate mean so much, and most of them are there for a reason. The tradition of having to get clearance from home State Senators—and, of course, every State is equal in the Senate. But Federal judges have an enormous impact on the States. The tradition has always been that the home State Senators have the best idea who the Federal judge is who is going to be making decisions that affect the men and women of that State. This has not always been perfect, but has it been the experience—I ask this of my friend and former attorney general of his State, a Senator of great respect and competence—has it been his experience that in the main, very much in the main, this has worked extremely well?

Mr. BINGAMAN. Mr. President, in response to the question, I certainly would say it has been my experience that this does work. In fact, when the name of someone is being considered for appointment to a Federal judgeship in my State of New Mexico, I have been getting calls. I get calls from lawyers who have worked with these individuals. I get calls from people who have tried cases against these individuals. Some of them, frankly, are favorable and some may not be as favorable.

I get a great deal of feedback on these individuals who are being considered by us for nomination. And, of course, I have the ability, as a Senator from New Mexico, to call people whose opinions I respect and to say: You have spent your lifetime practicing law in the courts in New Mexico. What do you think about the qualifications and the temperament and the appropriateness of this person for this kind of a judicial position? Based on that kind of feedback, then I am in a position to advise the President, advise my colleagues, advise anyone in the Senate that, in my opinion, this person would be well qualified.

I am sure that same process occurs with every Senator in every State, and it should. I think that is exactly what the Framers of the Constitution had in mind when they talked about advice and consent. I think they were talking about Senators being able to give their advice before the President made a final determination as to who would be elevated to a judicial position, and Senators being able to either give their consent or withhold their consent.

It is far preferable, in my view, if that advice and consent is requested and provided at an early stage in the process, not once the nominee has been sent up here, not once the President has had a press conference at the White House with the nominee in attendance. I think it is in many ways unfair to the people being nominated to have them pushed to that stage without the necessary advice and consent having been sought from the Senators in question.

I think that is the unfortunate circumstance we find ourselves in this morning, that there are individuals being pushed upon us as appropriate members to be elevated to court of appeals positions, and the nominations are being strongly opposed by the Senators from the States from which those individuals come.

So I think it would be unfortunate in the extreme if the Senate were to disregard the views of the Senators from those States and say: Regardless of their views, we are going to go forward here, regardless of the feedback they have provided; regardless of the numerous groups and individuals who have come forward to state objections here, we are going to push this nomination through the Senate.

I do think there is a very valuable purpose the Senate serves; and that is, to slow things down. That is what we have done here as to some of these nominees. These are nominees who, in my view, should have been better vetted with the Senators from the States involved.

If those Senators had been given an opportunity to make their case to the President and to his counsel at an early stage, perhaps we could have avoided some of the votes we are going to have to cast this morning. I think that would certainly be preferable.

Has my time expired, Mr. President?

The PRESIDING OFFICER. The Senator has 4 seconds.

Mr. BINGAMAN. I will yield back my time, Mr. President.

The PRESIDING OFFICER (Mr. CHAMBLISS). The Senator from Minnesota.

Mr. COLEMAN. Mr. President, I have great respect for the Senator from New Mexico and the principles he just talked about: his deep concern of the breakdown of the system, of the tradition of the Senate. It is important. This is a very special place. This is the greatest deliberative body in the world. I believe that. That is really what we are talking about today—the tradition of the Senate. That is part of why this debate is important.

This is not a game. This is not a charade. This is important. The past 11 Presidents' judicial nominees confirmed v. filibustered: 2,372 confirmed, 0 successfully filibustered until now—the traditions of the Senate, the traditions of this great institution.

We have been up all night. We have had a lot of conversation, a lot of debate. My colleagues across the aisle said it is absolutely, patently false to say we haven't successfully filibustered circuit court nominees. Read my charts. They are real. Here is the list. Judicial nominees subjected to cloture attempts 1968 to 2003 time after time: No. 1, Abe Fortas, rejected. The Senator from Michigan, who was part of that process had a letter saying, by the way, that was a bipartisan effort. The Republican leader supported cloture on that. Of all these, not a single partisan effort where the nomination was successfully blocked.

The folks involved in making those decisions who predated me reflect what the Senator from New Mexico talked about—a reverence for the tradition of this body, a tradition I believe that is reflected in the Constitution that says decisions about judges are done essentially by a majority—two-thirds for treaties.

As I listened, I understood what was happening here. Part of this tradition is any single Senator can stand up and say: I object. That is who we are. That is a great power for an individual Senator.

We talk about advice and consent. I think perhaps the concept now in people's minds is that we all should be part of this advice and consent process; we all should be heard. But the reality is, in the end, and again according to the Constitution, the decision is going to be made by a majority. It is not about the President being successful 98 percent of the time. It is about 100 percent of the time giving an opportunity for an up-or-down vote. That is what this is about, 100 percent of the time giving an up-or-down vote and then let the vote be what it may.

In fact, nominees may be rejected. It is not about guaranteeing the outcome, but it is following the Constitution to give people a right to a vote. That is the process, that is the tradition, and that is the history. We run such a terrible risk when we cast that aside.

This has been a very sharp debate. There has been a lot of discussion about all sorts of other issues about which we should be talking. I reiterate again, I am deeply concerned about jobs. I am deeply concerned about the economy. Some folks say it is hard, but we can actually multitask around here. We can absolutely uphold our constitutional responsibility to advise and consent and give a vote and do other business.

We passed the third largest tax cut in the history of the country, and we are seeing the impact of that now. The economy is moving forward. GDP is up 7.2 percent in the last report. There are over 250,000 jobs over the last couple of months. There is more to be done, but we can do more than one thing.

For those of my colleagues who protest, oh, we are spending all this time, we spent 10 or 11 hours on Monday talking about Searchlight, NV, talking about rabbits eating cactus and rocks. That is part of the process. People get frustrated. I understand that.

The bottom line is, we stand here after 30 hours of debate, now almost 38 hours, and what do we get out of that? What do we understand? We understand that the history of the Senate is one in which this body up to now has not used a partisan filibuster to block judicial nominees. We see that happening today. We see the record of that.

They talk about 168 to 4 and talk about all the judges. Clearly, when we talk about appellate judges, we have 29 confirmed and 6 who have been blocked and 6 who are threatened to be blocked. Now we are talking about 29 and 12. That is 30 percent. Not only is that nothing to be proud of, but it is in contravention to the constitutional direction the Framers and the Founders gave us.

The consequences of this are ones about which we should all be concerned. We are talking about our judicial system. This is not a game. This is one of the fundamental underpinnings of this constitutional democracy, and we have a solemn obligation and responsibility to choose men and women of good judgment and good character who bring a willingness to apply the law to the table and to make judgments.

The reality is that those candidates before us are folks their own peers have said are of the highest quality. The American Bar Association, the gold standard that my colleagues on the other side talked about so many times, say they are highly qualified. In some cases, the voters, those who have run for office—Priscilla Owen, Janice Rogers Brown—have received overwhelming shows of support. That tells you something about the mainstream, the bipartisan nature of the support.

Judge Carolyn Kuhl: A bipartisan group of nearly 100 of her colleagues said:

> We believe her elevation to the Ninth Circuit Court of Appeals will bring credit to all of us and the Senate that confirms her. As appellate judge, she will serve the people of our country with distinction, as she has done as a trial judge.

A bipartisan group of 23 women judges of the superior court who served with Judge Kuhl wrote:

> As sitting judges, we, more than anyone, appreciate the importance of an independent, fairminded, and principled judiciary. We believe Carolyn Kuhl represents the best values of such a judiciary.

The fact is, these judges hold strong opinions, there is no question about that, but to a person they said they will do what a judge needs to do and put those personal opinions aside and apply the law. Their colleagues who

know them have raised their hands and said: Yes, that is what they have done; that is what they will do. The voters who know them reaffirmed their positions by reelecting them by overwhelming majorities. That is what we should be looking at. That is mainstream. That is not extreme.

In the end, we are grasping for something simple: for every Senator on this floor to do what every Senator has the right to do—to be heard, to give your advice to the President of the United States, and if you don't agree with his nominees, do what has been done through the entire history of this country, for 214 years: Give your advice, give a vote; vote them up, vote them down, but give them a vote. It is what the Constitution requires. It is what I believe the future of this institution requires.

Let's get beyond the partisan politics. Let's put it aside. Let's do the right thing. Let's come together. Let's focus on getting things done. That is our opportunity, and I hope we don't squander it.

I yield to my colleague from South Carolina.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM of South Carolina. Mr. President, I thank the Senator for yielding. It has been a real pleasure to talk with him throughout the night. It has been a great debate. For something considered a waste of time, so many Senators have participated. It has not been a waste of your time or the country's time. We have a good record the people can look upon and make a decision about what we are doing here in this Senate.

If I had to boil it down to what all this means to me, which I have to do between now and a quarter after, here is what I think is the down side of what we are doing in the Senate: Special interest politics is being given a green light to go after people they may disagree with because they think the nominee doesn't share their philosophy or political persuasion.

You are giving them a green light to manufacture controversies, to go after people in a personal way, and we are going to rue the day we did that. The left is doing it today. The right will do it tomorrow. We are unleashing special interest forces. We should be deterring them. Right now we are emboldening them, and the country will be worse for the wear.

There are people at the end of the process. We are talking about individuals. Miguel Estrada has claimed to be outside the mainstream. All I can tell you is that the Washington Post on February 5, 2003, not exactly a right-wing rag, said:

> Estrada is well qualified for the bench. This should not be a tough case for confirmation. Democrats who disagree should vote against him.

I think that pretty well sums up the idea that he can't be that far out of the mainstream or the Washington Post would not have said that about him.

If you disagree with me and think he is out of the mainstream, vote against him. Please don't continue the process of filibustering people because we are going to change the Senate forever, for the worst, and the future nominees to come, whatever they said in law school, whatever letter they may have written to their wife, whatever decision they made about going on a trip, if they said something that offends the left or offends the right, people are going to come after them like gangbusters, knock their heads off, and you are going to keep good men and women from wanting to serve. That is going to happen, sure as I am standing here. It will be a great tragedy. Please let's turn this around.

Judge Brown will be No. 5. She sits on the Supreme Court of California. She is objected to. She is out of the mainstream allegedly. I would argue that 76 percent of the voters in California are not right-wing zealots, and that anybody who can get 76 percent of the vote in California has to have some sort of moderation about them. She has written the majority of the court's opinions. She is respected by her peers. You wouldn't get 76 percent of the vote in California if you were out of the mainstream in any real way.

Justice Owen from Texas, No. 1 in everything. She serves on the State supreme court. She received 84 percent of the vote. The only people left who didn't vote for her are probably the extreme people. I would argue that 84 percent of the people who chose to vote in Texas is probably our best evidence about who she is and the way she conducts herself.

Pryor: If you read in the paper today, the attorney general of Alabama has just successfully removed the chief justice of Alabama. It was his job to bring the case to the grievance committee in the State of Alabama, and the reason the chief justice was removed was that he defied a Federal court order to remove the Ten Commandments out of a courtroom in Alabama.

Whatever you want to say about Attorney General Pryor being out of the mainstream, let me tell you that the Ten Commandments are popular in Alabama. He chose the less traveled route for a politician. He chose to enforce the law against a rogue judge who is pandering to the political moment. He followed his constitutional duty, and I bet you he agrees the Ten Commandments have a right to be displayed, but he said: It is not about me; it is about the law.

Mr. SESSIONS. Mr. President, will the Senator yield?

Mr. GRAHAM of South Carolina. Yes.

Mr. SESSIONS. With regard to that matter, Attorney General Pryor did file a brief on behalf of Judge Moore and argued that the Ten Commandments were legitimate because there are three depictions of the Ten Commandments in the Supreme Court. And right on this wall are the words ''In God We Trust.'' He defended that.

When the case was lost, the judicial inquiry commission brought a charge against the chief justice because he did not comply with the court order, and it was the duty of the attorney general to bring that case under Alabama law. So he was required to present the case that had been brought by something akin to a grand jury.

Mr. SANTORUM. Will the Senator from Alabama say that is following the law?

Mr. SESSIONS. It is absolutely following the law. There are a host of other examples to a degree I have never seen before in America. Bill Pryor always does what he believes the law compels him to do. Many times it is something he does not personally like to do.

Mr. GRAHAM of South Carolina. Senator LEAHY said in 1998:

> [I]f we don't like somebody the President nominates, vote him or her down or up.

He was right then. I am very afraid that we are opening the darkest chapter in the history of the Senate when it comes to judges. I don't want to be a part of it. I reject the past. I embrace a better future. Please, for God's sake, let's not continue to do this because we will all regret it.

The PRESIDING OFFICER. The majority has 30 seconds remaining.

Mr. SANTORUM. Maybe what we are finding out here is the minority doesn't want someone who is going to follow the law. I think what they really want is someone who is going to make the law, make the law politically, exactly maybe as the Senator from Vermont would like it to be made. Maybe there are things he or other Members on his side can't accomplish in the legislative chamber, so they want judges who will make the law they want. That is why the litmus test. They want activist judges on the court not to follow the law but to make it the way they really want it. That is what is at issue here.

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

The Senator from Vermont.

Mr. LEAHY. Mr. President, I am glad to see my friend from South Carolina used a tiny part of a quote of mine. I am always glad when somebody quotes me, even when they don't do it accurately.

What I was referring to, if you look at the quote, was the one-person filibusters of 63 of President Clinton's nominees, where one person, one Republican, usually anonymously, would object to President Clinton's nominees and then those nominees would never get a vote at all. Those were filibusters by one person done anonymously, not in the open.

Here, of course, unlike what was done to President Clinton, the Democrats have cooperated to make sure that 168 of President Bush's nominees to the Federal judiciary have gone through and only 4 have not. We can see only 4 have been blocked. We have confirmed 168 and only blocked 4. That contrasts to the 63 anonymous filibusters done

by the Republicans—63 done by the Republicans when they were in charge.

As I walked over this morning, I thought: Finally, the Republican leadership is bringing to a conclusion three really ''Alice in Wonderland'' kind of days, really wasted days in the history of the Senate. During those days, as much as the Republican leadership wanted to waste the Senate's time, at a cost of hundreds of thousands of tax dollars, I am proud of our Democratic Senators who had to endure endless criticism for objecting to a handful of the President's most extreme, controversial, and divisive nominees.

What they have tried to do is get the Senate's attention back on the unfinished legislative business of this session that is of such concern to the lives of so many Americans. As I said, we have cooperated in the confirmation of 168 of this President's judicial nominees. We confirmed 100 in the 17 months I was chairman and confirmed another 68 in the 17 months my distinguished colleague from Utah was chairman. I am not going to criticize him that he didn't get as many confirmed as I did, but there are the numbers, 168 to 4. That is more judges than President Reagan, the ''all-time champ,'' appointed his entire first term in office when he had a Republican majority. So in less than three years, we have already eclipsed President Reagan's four year total.

Among the 168 confirmations are more circuit court confirmations than for any of the last three Presidents at this stage in their first terms. The scorecard is 168 to 4.

After this week, the total of those blocked could increase by two, but the number of confirmations will not have been increased. Rather than work with all Senators to confirm those nominees who can be confirmed after a vote or who may be confirmed after a reasonable debate and a vote, the Republican leadership has remained fixated on the most controversial and most divisive nominees.

During this 40-hour talkathon, the Republican leadership of the Senate has taken what could have been productive days at the end of this year's legislative session and decided to abandon work on the real priorities of the American people. I understand that the reason they have been spending so much of the taxpayers' dollars in doing this talkathon is that some of the Republican campaign committees have tried to use this to raise money. If they are, instead of charging the taxpayers for this, I wish they would do it themselves.

But what we have are our friends on the other side engaging in repetitive speeches about promoting a small handful of controversial nominees to lifetime positions as Federal judges. These are people who already have good well-paying jobs. They do not want to talk about the legislation that might help the more than 3 million Americans who have lost their jobs since President Bush assumed office.

Unlike President Clinton's term, where a million new jobs were created every year, in the 3 years of President Bush's term, 3 million jobs have been lost, but they do not want to talk about that.

The Republican leadership has already overshot the Senate's adjournment date by more than a month. We have already had to enact three continuing resolutions just to keep the Federal Government going because we have not passed our appropriations bills. The law says we have to enact our 13 appropriations bills by the end of September. The Republican Congress has enacted only 5 of the total 13. They ignore the law on that, but then they waste this time and hundreds of thousands of taxpayer dollars to have a campaign talkathon.

They do not want to vote on the appropriations bills and, instead, they want to waste time on this? They want to waste time giving lifetime jobs to three or four people but they do not want to do anything about the 3 million Americans who are out of jobs.

Here is what they are not talking about, here are the issues that are not being voted on, here are the bills that the Republican leadership will not bring up: Funds that go to improve our schools. Funds that NIH uses to advance our medical knowledge in fighting disease and illness. The resources used by EPA to enforce our clean air and water laws. They do not want to bring up appropriations for our veterans and for law enforcement. These are things that all people should be able to agree on, Republicans and Democrats, but we are told there is no time to bring up money for our law enforcement or for our veterans.

In fact, during the first evening of this exercise in the wind chambers, the senior Senator from West Virginia was trying to get the Senate to do its work. Senator BYRD, as the ranking Democrat on the Appropriations Committee, urged the Senate to complete its work on the appropriations bills that fund services for our military veterans. He said, Why do we not finish this? This administration has cut money for veterans benefits. It has cut money for veterans hospitals. It has cut money for disabled veterans. He said, Can we not at least take a couple of hours more—if you are going to spend 40 or so hours talking about four judges, can we do something, can we take 2 more hours to finish the bill that will affect millions of America's veterans?

He said we could do it in 2 hours. The Republican leadership objected. Those few minutes at the beginning of this debate may be the most telling of this entire so-called debate. Republicans chose to sacrifice the work of the Senate, the priorities of the American people and the interests of American veterans so they could pull a partisan political stunt.

In one of their many press conferences on this diversion, on November 6, the Republican leader committed to ''complete the appropriations process'' before beginning this charade. Even the junior Senator from Pennsylvania agreed with him and said: ''The leader's right. What we are about to embark in next week, after the appropriations process has run its course, is to enter into a debate. . . .'' Well, when given the chance to honor that commitment, the Republican caucus chose partisan theater over the work of the Senate.

We said can you not take 2 hours out of these 40 hours to at least do the appropriations bill for our veterans? I mean, you are not going to do the appropriations bills for our law enforcement. You are not going to do it for medical research. You are not going to do it for anything else. If you could just take 2 hours out of this, at a time when we are creating a lot more veterans, many of them horribly disabled and disfigured from the war in Iraq, we are told, no. We do not have 2 hours for that.

There is the unfinished business of the Nation's unemployment and lack of job opportunities that confound so many American families. With millions of Americans having lost their jobs in the last three years, the Republican Senate has, instead, insisting on spending these final days of this session on a handful of highly controversial judicial nominations that divide the Senate and the American people and ignoring the needs of the almost 10 million Americans who are out of work, including those more than three million Americans who have lost their jobs since President Bush took office.

Instead of working together on such important matters, we are being forced to repeat another cloture vote on the nomination of Priscilla Owen. The Senate has voted three times on this nomination, and three times, the Senate has decided against granting consent. Her nomination had been fairly and thoroughly considered by the Judiciary Committee last year, and her nomination was rejected on the merits. Never before has a President renominated a judicial nominee who was rejected on the merits by the Judiciary Committee.

She has shown herself to be a judicial activist and an extremist even on the very conservative Texas Supreme Court where her conservative colleagues have criticized her judging. All that has occurred since the cloture votes during the spring and summer is that Republican partisans have ratcheted up their name calling and Justice Owen has been made to serve as a political prop for the White House.

In fact, I commend to my colleagues an insightful article by David Margolick that appeared recently in Vanity Fair magazine entitled ''Bush Scored Advantage.''

The second in this series of votes is to be on Judge Carolyn Kuhl. This nomination to the 9th Circuit has been opposed by both the home-state Senators from California and for good reason. From her days seeking to change

federal policy and provide tax breaks to Bob Jones University, to her efforts to overturn Roe v. Wade, to her recent decisions seeking to excuse the invasions of the privacy of Ms. Sanchez-Scott, a breast cancer survivor, Carolyn Kuhl has been extreme.

Finally, the Senate will be required to vote in relation to a nomination that has been whisked through the Judiciary Committee in the last several days, that of Janice R. Brown. This controversial nomination is opposed by the Congressional Black Caucus, the National Bar Association, the California Association of Black Lawyers and a long list of African-American and civil rights leaders and organizations. Former Senator and former ambassador Carol Moseley Braun has recently written to us opposing this nomination. I ask that her November 12 letter be made part of the RECORD.

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

WOMEN'S ORGANIZATIONS OPPOSING NOMINATION OF PRISCILLA OWEN

National Organization for Women
National Organization for Women, Texas Chapter
NOW Legal Defense & Education Fund
Religious Coalition for Reproductive Rights
National Abortion Federation
National Women's Law Center
NARAL Pro-Choice America
National Council of Jewish Women
National Council of Jewish Women, Texas
American Association of University Women
American Association of University Women of Texas
National Family Planning and Reproductive Health Association
National Women's Political Caucus
Texas Women's Political Caucus
Texas Freedom Network
Women's Issues Network—Dallas
Women's Health and Family Planning Association of Texas
Republican Pro-Choice Coalition
Gender Justice Action Group
Feminist Majority
National Partnership for Women & Families
Greater Dallas Coalition for Reproductive Freedom
Texas Abortion and Reproductive Rights Action League
Planned Parenthood Federation of America
Planned Parenthood Association of Hidalgo County
Planned Parenthood Association of Lubbock
Planned Parenthood of Cameron and Willacy Counties
Planned Parenthood of Houston and Southeast Texas
Planned Parenthood of North Texas
Planned Parenthood of San Antonio & South Central Texas
Planned Parenthood of South Texas
Planned Parenthood of the Texas Capital Region
Planned Parenthood of West Texas

WOMEN'S ORGANIZATIONS OPPOSING NOMINATION OF JANICE RODGERS BROWN

National Organization for Women
California National Organization for Women
NOW Legal Defense & Education Fund
Religious Coalition for Reproductive Rights
National Abortion Federation
National Women's Law Center
NARAL Pro-Choice America
National Council of Jewish Women
National Council of Jewish Women, California
National Council of Jewish Women, Los Angeles
American Association of University Women
National Family Planning and Reproductive Health Association
National Partnership for Women and Families
Feminist Majority
Planned Parenthood Federation of America
Planned Parenthood of Golden Gate
Planned Parenthood of Los Angeles
Women Lawyers Association of Los Angeles
Women's Reproductive Rights Assistance Project
Pacifica Institute for Women's Health
Black Women Lawyers of Los Angeles
California Abortion and Reproductive Rights Action League
California Women's Law Center

WOMEN'S ORGANIZATIONS OPPOSING NOMINATION OF CAROLYN KUHL

American Association of University Women
Breast Cancer Action
Breast Cancer Fund
California Abortion and Reproductive Rights Action League
California National Organization for Women
California Women Lawyers
California Women's Law Center
Center for Reproductive Law and Policy
Coalition of Labor Union Women (CLUW)
Feminist Majority
Los Angeles African-American Women's Political Action Committee
NARAL Pro-Choice America
National Abortion Federation
National Council of Jewish Women
National Organization for Women
National Partnership for Women and Families
National Women's Law Center
National Women's Political Caucus—California
Pacific Institute for Women's Health
Planned Parenthood Federation of America
Planned Parenthood Affiliates of California
San Diego County National Organization for Women
Women's Committee, Labor Committee for Latin American Advancement
Women's Leadership Alliance Women's Political Committee
Women's International League for Peace and Freedom
Women's Reproductive Rights Assistance Project.

NOVEMBER 12, 2003.

Hon. BILL FRIST,
Majority Leader, U.S. Senate, Russell Senate Office Building, Washington, DC.
Hon. TOM DASCHLE,
Minority Leader, U.S. Senate, Hart Senate Office Building, Washington, DC.

GENTLEMEN: Respect for the rule of law, and the impartiality of the judiciary are almost synonymous concepts. It is out of concern for both that I want to convey my most serious concern about the State's consideration of the nomination of Justice Janice Rogers Brown for the United States Court of Appeals for the District of Columbia Circuit.

Justice Brown has not demonstrated the balance and judicial temperament and prudence that are central to a respected judiciary. Indeed, she has spoken to an organization of my own alma mater, the University of Chicago Federalist Society, in terms so radical as to bring into question her own regard for the position she currently occupies. The extremism of her views has been publicly demonstrated time and time again, particularly concerning matters of settled law regarding the national government's responsibility to protect civil and political rights of women and minorities. Such extremism undermines the confidence any citizen might have in the capacity of this nominee to fairly interpret and administer the law.

I am the only African American woman to have served in the United States Senate, or on its Judiciary committee. As such I have not only an appreciation for the gravity of the Senate's role and responsibility in regards to the appointment process, but I also have a keen appreciation for the diversity of opinion among African Americans. Not all black people think alike, and I have no doubt that there is a constituency that would be happy to see an African American of any political persuasion confirmed for such an important position as the D.C. Circuit Court of Appeals. However, it does both the black community as well as the courts a great disservice to confirm to such a position an individual who has so clearly demonstrated a disregard for the balance and impartiality required of the members of the bench.

I appeal to our President to exercise greater respect for the traditions of the judiciary in making future nominations. Justice Brown should be given an opportunity to mature in her demeanor and her judicial conduct, but not as a member of the Circuit Court. As such, I urge the members of the Committee to reject this nomination.

Sincerely,

CAROL MOSELEY-BRAUN.

Mr. LEAHY. The San Francisco Chronicle and the Washington Post editorialize against her as an example of the Bush Administration's efforts to pack the circuit courts with ideologues. In her decisions and her writings and speeches she has shown herself to be a consummate judicial activist who will disregard precedent when convenient to her ends. Her view of government is not consistent with the work of the D.C. Circuit in reviewing the environmental protections, workplace protections, consumer protections and other government regulations authorized by Congress to protect all Americans.

The obvious intent of these stacked votes is a partisan effort to paint opposition Senators as anti-woman. Women know better. Women leaders, women's rights organizations have opposed these nominations. I know the Republican partisan public relations machine will be cranking overtime to say we are anti-woman. Given that we are being led by Senator BARBARA MIKULSKI, Senator DIANNE FEINSTEIN, Senator BARBARA BOXER, Senator PATTY MURRAY, Senator MARY LANDRIEU, Senator BLANCHE LINCOLN, Senator MARIA CANTWELL, Senator HILLARY CLINTON, and Senator DEBBIE STABENOW, it is hard to see how Democrats can be subjected to such allegations with a straight face. I mean, tell them that they are anti-woman. These are all women who have the finest records of defending, upholding, and advancing women's rights. It is crazy.

When we were in charge, the Senate confirmed 100 of President Bush's judicial nominees, including 21 women, in just 17 months. They included 4 women to our Courts of Appeal. During the 107th Congress, President Bush nominated only 18 women to district court seats out of 98 district court nominees,

or 18 percent, and only 8 women to circuit courts out of 32 circuit court nominees, or 25 percent. Well, this year, Democrats have supported the confirmation of 12 additional women nominated to the Federal bench, including 3 more to our Courts of Appeal. The thirty-three women judges confirmed represent 20 percent of the 168 judges confirmed so far.

Perhaps, though, they are a little bit nervous about this. President Bush has nominated far fewer women to the Federal bench than President Clinton did. This President's nominees have included only one woman in each five judicial nominees. By contrast, nearly one of every three of President Clinton's judges are women. Of course, the Republicans who controlled the Senate and the Judiciary Committee during the Clinton administration also blocked 18 women nominated to Federal judgeships by President Clinton. They did it by their one-person anonymous filibuster. Do not give me this baloney that, oh, it is so terrible that we are standing out here in open session blocking four judges. They blocked 63 by anonymous filibuster, 18 of them women. The women who were blocked from getting Senate action on their judicial nominations by the Republicans include Kathleen McCree Lewis, Elena Kagan, Elizabeth Gibson, Helene White, Christine Arguello, Bonnie Campbell—all of whom were nominated to the circuit courts. Now, these six outstanding women lawyers and judges were not extreme or ideologues. They were blocked anonymously by Republican Senators. This was done without any explanation. This was done without a vote of any kind. We never had a debate on them.

These other judges, the 4 out of 168 of President Bush's who have been confirmed, at least there was a debate on them. We discussed the merits of their nominations. The 63 of President Clinton's nominees who were blocked by the Republican majority would have liked to have at least had a hearing or debate on the merits of their nominations. There was no debate. Nobody wanted to come to the floor and talk about them, not when they could do a one-person filibuster, and do it anonymously so the press in their hometown would never know who was holding them up, including some of the Senators from the States where they were nominated. They could do this anonymously, and they could do it in a way that they would never have their fingerprints on it.

Now, I have heard more crocodile tears shed on this Senate floor this week than I have heard in my 29 years. Why? Because 4 judges of President Bush's were stopped, out of 168 who were confirmed. He has had less nominees stopped than any President I can remember since I have served in the Senate.

I yield the floor.

(At the request of Mr. DASHLE, the following statement was ordered to be printed in the RECORD.)

• Mr. EDWARDS. Mr. President, my Republican colleagues are calling this 30-plus-hour marathon ''Justice for Judges.'' Now, I'm all for justice for judges. And that's exactly what every single one of President Bush's judicial nominees has gotten.

But I ask my colleagues, where is Justice for the American people? They seem more concerned about Justice for a handful of judges—the 2 percent of those Bush's nominee who haven't been confirmed—than justice, fair play and opportunity for the American people.

The Republican majority claims that we're facing a vacancy crisis in our Federal courts. Ninety eight percent of Bush's judges have been confirmed and this is a crisis? Two percent of Bush's judges have not been given lifetime appointments and we're in a crisis?

Under George W. Bush, the unemployment has risen to 6 percent the poverty rate has increased to 12.1 percent the percentage of Americans with no health insurance has gone up to 15.2 percent. And, during this time, the vacancy rate on the Federal courts has gone down to 4.5 percent its lowest point in over 13 years. In fact, there are more full-time Federal judges on the bench today than at any other time in U.S. history? The vacancy rate is now below the number that Senator HATCH called ''full-employment'' in the Federal judiciary during the Clinton administration.

Where is the concern for the 6 percent of the American people who can't find jobs? The same people who claim that 4.5 percent vacancy is a crisis think that 6 percent unemployment is great news, that a ''jobless recovery'' is a good thing. Why aren't they at least as concerned about Justice for the Jobless, Justice for Working People, Justice for the Poor, Justice for Families?

So, what does this marathon debate tell us about the priorities of the Republican majority? What does it tell us when they are more concerned about securing lifetime jobs for three sitting judges and a State attorney general than in securing jobs for the 9 million Americans who are out of work?

Why are they more interested in fighting for three judges and an attorney general—all of whom have received full and fair consideration—than fighting to bring hope back to the American people?

Why aren't we spending 30 hours debating how to help the 9 million Americans who no longer have the dignity and self-respect that comes from completing a hard day's work? Why doesn't the Republican majority schedule 30 hours of debate to figure out how to provide health care to the American people and prescription drug benefits to the elderly?

We should be figuring out how to bring back the 3 million jobs we've lost on George Bush's watch—one job lost for every minute he has been in office.

We should be addressing the anxiety of families who fear that by sundown they will be without a safe home. We should be working to find a way to lift the tax burdens on working families and provide real economic opportunities so they can provide food, clothing, and shelter for their families.

We should be debating about the best way to close the education gap and support and fund our public schools.

We should be working together to lift Americans out of poverty.

And we should be coming together, not to fight for justice for judges but to fight to end the injustice that still tugs on the soul of America.

In other words, we should be fighting for Justice for the American People.

But instead, my Republican colleagues have virtually shut down the Senate to force lifetime appointments for three judges and an attorney general.

This political stunt is getting lots of coverage, but it's not doing a thing to improve the life of one single American—except three sitting judges and an attorney general.

We have confirmed 168 of President Bush's nominees. I voted for the vast majority of these judges, even though many of these judges have held conservative ideologies with which I strongly differ, because I believed they would ultimately enforce the Constitution and the law.

But I cannot and will not vote for these four nominees, for good reason. These nominees not only do not represent the mainstream, but they have demonstrated an unwillingness to set aside their personal views to uphold the law and protect civil rights. We have good reason to oppose these nominees. And we not only have the right, we have a constitutional obligation to stand up to the President when he makes unacceptable nominations to the bench.

Our Founding Fathers did not give the President unilateral or unfettered power to select Article III judges. They wanted to ensure that the people—through their elected representatives—have a say in who will be appointed to the Federal bench. So they created a partnership between the President and the Senate by requiring the President to obtain the advice and consent of the Senate in nominating judges.

Every President—whether Republican or Democrat—must consult in a meaningful way with the Senate to appoint highly qualified judges to the Federal bench. The give and take that results makes it far more likely that we will have a judiciary that is not skewed too far to the right or too far to the left, a balanced judiciary that reflects the people it serves.

Meaningful consultation does not mean that the White House just sends us who they want and we rubberstamp them, without careful examination and consideration. Meaningful consultation often involves compromise and consensus.

This approach has worked reasonably well—with some exceptions—over the years. But now we find ourselves dealing with a White House that disdains

this longstanding principle of advice and consent. Instead, the President is appointing judges who are far out of the mainstream. Judges who are hostile to civil rights and equal justice. Judges who are not only willing but eager to put their personal views above the law. Judges he certainly knows are unacceptable to us and our constituents. These appointments are being made without our advice and without our consent. We have tried to work with the White House to find common ground, but most of our attempts to reach consensus with the administration have been dismissed. In some instances, our commitment to fairness and diversity has been attacked. This is not the way this process should work. It is wrong. It would be wrong, regardless what party the President belongs to.

Any honest observer must acknowledge that previous administrations of both parties attempted in good faith to work with the Senate in its appointments process. President Clinton put up numerous highly qualified mainstream nominees for Federal judgeships, only to have them blocked, denied hearings and denied votes by a Republican Senate. Twenty percent of Bill Clinton's judges were blocked by a Republican Senate. We heard nothing about justice for judges then.

This had a particular impact on my home State of North Carolina, which is part of the Fourth Circuit. North Carolina—the largest State in the circuit—until this year had not been represented on the court since 1994. President Clinton tried three times to put a North Carolinian on the court, only to have his nominees blocked for reasons other than their qualifications. In fact, during his last 6 years in office, President Clinton had eight nominees—four of them African American—blocked in the Fourth Circuit alone. These were well-qualified men and women, none of whom could be labeled ideologues, whose views were well within the mainstream of legal thought and practice. Nevertheless, they were blocked. I believe that this was part of a plan, a plan to keep these seats open for a Republican President who would fill them with right-wing judges outside of the mainstream.

We've seen what happens when the President meets us halfway. He's done it before—rarely, but he's done it. He reached out to us on Allyson Duncan, an outstanding North Carolinian who just last month was formally installed as a judge on the Fourth Circuit Court of Appeals, breaking a logjam that had held our State back for a decade.

In that case, President Bush did more than just pay lipservice to our constitutional obligation to a advise and consent. He reached out to us before he made his decision—he consulted with us—he sought our advice. And in making his decision, the President selected a nominee who represents the mainstream of our State.

Throughout Judge Duncan's confirmation process, I commended the President for consulting with us and making an excellent nomination. And I told him that if he takes this approach to future judicial nominations we have a real opportunity to find common ground in the search for excellence on the Federal bench. When we work together, we find outstanding nominees like Allyson Duncan, who represents the best of North Carolina and America.

In light of our efforts to cooperate with the President on nominations, I'm puzzled and troubled by the Republican attacks on us, the accusations that we are anti-women, anti-black, anti-Hispanic, anti-Southern, anti-Catholic. They're running attack ads against us that represent the worst forms of religious and racial McCarthyism. They're doing this even though the record shows that Democrats have voted to confirm 13 of President Bush's African-American nominees while Republicans blocked 12 of Clinton's African-American nominees. We have confirmed 33 of Bush's woman nominees. Nearly 40 percent of the Bush judges confirmed have been from southern States. So, not only are these accusations of bias flat-out wrong, they are outrageous and I must speak out against such demagoguery and race baiting.

We have gone the extra mile. We have demonstrated that we are willing to work with the White House to move forward on nominees who provide balance to the courts. We have confirmed 168 of President Bush's judicial nominees—98 percent. We have been more than cooperative.

It's really a shame that the majority doesn't spend a fraction of the time they've spent on the full employment program for judges on finding ways to improve the lives of the American people.

The American people deserve better than this. We owe it to them to call a halt to this marathon madness and get down to work to address the problems they sent us here to solve. It is time to fight for justice, jobs and opportunity for the American people.●

Mr. DODD. Mr. President, the majority has indicated that as part of this debate to invoke cloture on these three nominees to the Federal judiciary, they may move to consider S. Res. 138, a resolution introduced by the majority leader, Senator FRIST, which would amend the Senate rules to treat debate on Executive Calendar items differently than matters on the Legislative Calendar.

Nothing is more fundamental to the ability of the Senate to fully exercise its constitutional responsibility to provide advice and consent to the President's executive nominees than to subject such nominees to full and deliberative debate. And any move to amend the Senate rules to place additional limitations on that debate is tantamount to a ceding of legislative branch powers to the executive. I appreciate the opportunity to speak on the issue of proposed changes to Senate rule XXII.

The filibuster is widely viewed as one of the Senate's most characteristic procedural rules. I believe we can all agree that the best way to consider a change to Senate rules is to do so in accordance with existing Senate rules. I believe this 30-hour debate will follow Senate rules and precedent.

Any attempt to change Senate rules, particularly cloture rule XXII, should be in keeping with the deliberative rules, precedents and practices that have been the hallmark of this institution since it was conceived during a steamy summer in Philadelphia over 217 years ago.

Senate rules have endured the age-old test of time, people, places, and events. Senate rules delineate the constitutional responsibilities of the body and define the character of the institution. Making changes to the rules and the precedent of the Senate is not an action that should be taken lightly or for partisan purposes.

In the history of the institution, the rules of the Senate have been through general revision just seven times: 1806, 1820, 1828, 1868, 1877, 1884, and 1979. The architecture of our Senate rules and precedents is built on the foundation of the right to debate and amend, the two basic principles that make the Senate the upper House in all of the legislative bodies of the world. If you chip and change this keystone, then you chip and change the Senate as an institution.

Herein lies the central paradox and towering majesty of the Senate. What makes this institution so revered and unique is what can simultaneously gall us the most: the practice of extended debate.

But the Founders insulated the Senate from sanction for debate and explicitly left it to ''determine the rules of its proceedings.''

The rules of the Senate reflect the intent of the Framers that the Senate be the ''saucer into which the nation's passions may be poured to cool.'' The ability to fully examine and debate any matter of national importance is the hallmark of the Senate. Nowhere more than in the advice and consent responsibility of the Senate do we see the Framer's intent to balance the fear of a resulting tyranny of a majority against the principle of majority rule.

As Alexis de Tocqueville observed: ''. . . the main evil of the present democratic institutions of the United States. . . . [arises from] the very inadequate securities against tyranny. . . . if ever the free institutions of America are destroyed, that event may be attributed to the unlimited authority of the majorities, which at some future time may urge the minorities to desperation. . . .''

The President nominates, but his power is balanced, and checked, by the power of the Senate to provide advice and consent. Neither can act alone. And in the case of the judiciary, the creation of the third, separate and equal, branch of Government, the powers are deliberately counterposed.

This is not the first controversy over Senate rules, precedents and practices of the right to extended debate. Through our history, the right of extended debate has never been seriously questioned as other than a vital foundation of our Republic. This right has been a catalyst for achieving the most remarkable feature of our civilization: the degree to which we have been able to provide our citizens with, at one and the same time, both great freedom and great stability.

As Robert Caro, author of ''The Master of the Senate,'' for which he was awarded his second Pulitzer prize, has observed, and I quote him, ''in creating the new nation, its founding fathers, the framers of its constitution, gave its legislature not only its own powers specified and sweeping, but also powers designed to make the Congress independent of the President, and to restrain and to act as a check on his authority, including power to approve his appointments, even the appointments he made within his own administration. And the most potent of these restraining powers the framers gave to the Senate.''

The power to approve Presidential appointments was given to the Senate alone. A President could nominate and appoint Ambassadors, Supreme Court justices, and other officers of the United States, but only with the advice and consent of the United States Senate. This is the American way and it must remain the American way. While the Founding Fathers recognized the inherent dangers in granting a minority of Senators a veto over the will of the majority, the Constitution did just that.

But proposals to limit debate would change that.

S. Res. 138, a proposal by Majority Leader FRIST, would amend Senate rule XXII to provide for a declining number of votes required to invoke cloture on Executive Calendar items, such as judicial nominations.

I have deep reservations about Majority Leader FRIST's resolution to amend Senate rule XXII. I fully appreciate the majority leader's desire to expedite the business of the Senate. I fully understand the frustration with respect to the deep desire to invoke cloture on Executive Calendar items, including executive nominations such as judicial nominations.

But there is simply no crisis facing our judiciary today that necessitates the damage to the very fiber of this institution that such a rules change would render. The vacancy for the Federal judiciary is at its lowest level in 13 years.

Since President Bush came into office, the Senate has confirmed 168 of his nominees and has decided not to proceed with only 4. That is a 98 percent success rate for the President. In my view, this is a great success rate.

The Senate must not act to change its rules. To do so now would amount to a ''hijacking'' of the Senate's constitutional duty to provide advice and consent to the President's nomination authority. The supermajority requirement is consistent with the intent, spirit and language of the Constitution.

S. Res. 138 presents the question of whether rule XXII should be revised to accommodate a targeted remedy for filibusters of judicial nominations. The real question should be whether S. Res. 138 strikes the most appropriate balance between existing Senate rules and the advice and consent duties of the Senate. In the view of this Senator, it does not.

The cloture rule exists by virtue of the longstanding rules of the Senate enacted pursuant to authority under the Constitution, article I, section 5.

The Constitution expressly authorizes such procedural rules and sets no standard to limit the Senate's discretion in formulating such rules. Further, the Constitution does not compel the Senate to take any action, much less a final vote, on any matter, legislative or executive.

There is no argument to the fact that the Senate has plenary authority to devise its own rules. Nor is there any argument to the fact that there is no right to mandatory majority rule. Most importantly, the Senate tradition on filibuster offends no constitutional edict. In the words of Chief Justice Burger, ''there is nothing in the language of the Constitution or history or our cases that require a majority always prevail on every issue.''

At its most fundamental core, the Senate is a testament to the coexisting rights of the majority and the minority. Small states have an equal say in the Senate's tradition, and rules protect debate no matter whether it is a principled stand of one Senator or a chorus of the convinced. The Senate rules balance majority rule with minority right.

As a Senator in this body, I recall watching the Senate as a very determined minority insisted on their right to be heard on the issue of civil rights. Their position on civil rights was unfair, unpopular, and illegal. Yet the majority of Senators did not question the right of the minority Senators to assert their right under Senate rules and precedent to debate, delay, diminish or defeat civil rights legislation. And, the minority did so for years.

Ultimately, both the noble principles of racial equality and extended debate prevailed in the Senate. But the Senate rule that had been long thwarted was left essentially unchanged.

Prior to 1917, there was only a century old rule that required unanimous consent to cut off debate. This means that for 111 years, the Senate practice of extended debate was absolute in its scope. All Senators had to consent in order to bring consideration of a matter to a close. For the subsequent period of 58 years, two-thirds of the Senate were required to end debate. Currently, three-fifths are required. Until 1949, there was no procedure for limiting debate on nominations in the Senate. For the past 212 years, there has never been a Senate rule that permits a simple majority to force a vote on any matter up for consideration, including judicial nominations.

In this historical context, S. Res. 138 would be without precedent to require a simple majority to invoke cloture, in my view. S. Res. 138 would reduce to a majority vote that Senate procedural rule which girds the independence of the coequal judicial branch.

There is an irony to S. Res. 138 that cannot go unstated or unexamined. It would reform the cloture process only for nominations and leave cloture for the remainder of the Senate debate as it is. Arguably, it is precisely in the area of nominations, particularly judicial nominations, that the Framers intended these powers to be utilized.

S. Res. 138 would fundamentally alter the nature of the Senate and the balance of powers created by the Framers of the Constitution. It would undermine the Senate's role in our constitutional democracy, cede enormous power to the Executive and upset the deliberate system of checks and balances intended by the Framers.

S. Res. 138 would fundamentally diminish the Senate's power in relation to that of the Executive. And if the Senate cedes such power to the Executive, then I do not think the Senate will ever get that power back. Of all the issues that the Senate faces now and in future Congresses—such as war, the economy, health, education, election reform, jobs—none is more important than this one on Senate rule changes. Why? Because how we resolve this issue will, in many respects, determine how we resolve all others.

S. Res. 138 proffers change that is historically significant. However, S. Res. 138 does not proffer filibuster reform that will permit ample debate while rejecting delay in perpetuity. Nor does S. Res. 138 fit squarely within Senate tradition of balancing the right to debate with the responsibility to conclude the people's business.

Instead, S. Res. 138 would shift the balance of power on advise and consent to the executive branch. To accommodate this proposal means a profound change in the Senate as an institution and the character of the Senate as a body itself.

It reduces the constitutional advice and consent authority, indeed duty, to a mere rubber stamp of the President's prerogatives. We must always attempt to find the right checks and balances between a rubber stamp and a deliberative body on both legislation and nominations. This is what makes the Senate, as an institution, so powerful, so special, so unique.

We must remember that during the Constitutional Convention, only after lengthy debate, was the power to appoint judges committed to the President as well as to the Senate. Why? John Rutledge of South Carolina said

it best: ''the people will think we are leaning too much toward monarchy'' if the President is given free rein to appoint judges.

The final compromise was characterized by Governor Morris of Pennsylvania as giving the Senate the power to appoint judges nominated to them by the President. In Federalist 76, Hamilton explained, ''the Senate's review would prevent the President from appointing justices to be the obsequious instruments of his pleasure.''

Against this backdrop, I find it quite troubling that Majority Leader FRIST now suggests that we narrow deliberation, debate, and the rights of the minority with respect to the nomination process and thereby enhance the ability of the majority to turn the Senate into a rubber stamp of a President's nominee.

What is at stake in this debate is nothing less than the integrity of the Senate and the independence of the judicial branch—the deliberate intention of the Framers to ensure against the excess of the Executive.

In describing the role of the Senate to provide advice and consent to executive nominations, Roger Sherman noted: ''the Convention, who formed this Constitution, thought it would tend to secure the liberties of the people, if they prohibited the President from the sole appointment of all officers. They knew that the crown of Great Britain, by having that prerogative has been enabled to swallow up the whole administration . . . but this government is different, and intended by the people to be different.''

The real problem here is not constitutional, but rather it is institutional. Senators must think of themselves as part of an institution, held together by a common respect for its rules and traditions. We have a responsibility to the President, the people, and to the institution.

This is a moment for Senators, as Senators, to stand up for the Senate.

Those of us fortunate to serve in this body are but its temporary custodians. We are stewards of an institution governed by rules and practices that have withstood the test of more than two centuries of time. Now is not the time to retool the rules to achieve goals that are, in essence, transient and partisan in nature, no matter how deeply felt.

When in history has the will of a minority—through extended debate been able to stop anything that this Nation desired or that had the broad support of its people? The Senate works its will, extended debate and all, as it was intended to work—in the words of James Madison—''. . . to consist in its proceedings with more coolness, with more system, and with more wisdom, than the popular branch.''

The disagreements that we have over judicial appointments, and over some legislation, will likely be long forgotten, and of limited consequence, in years to come. But to change the rules and practices of the U.S. Senate in the manner that is here proposed, in my view, would do permanent and lasting damage, not only to this institution but to our democracy that has served us so long and so well.

I hope that cooler heads will prevail and that the majority leader will not bring up S. Res. 138 to amend the rules of the Senate.

But if that happens, I urge my colleagues, as Senators, to uphold the unique authority of the Senate to give equal voice to all States, indeed to all people, and to forego the political expedience of the moment in order to ensure the integrity of the Senate, and the functioning of this Republic, for generations to come.

Mr. LIEBERMAN. Mr. President, in the course of this debate, I have been deeply disturbed to hear the characterization my Republican colleagues have given to a filibuster reform proposal Senator HARKIN and I offered nearly a decade ago. They have referred to our proposal, and our statements in support of it, as precedent for their efforts here today. As I have said in the past, I believe that is deeply wrong. To make clear both what our proposal did, and why my Republican colleagues' characterizations of it are wrong, I thought it would be worthwhile to make sure the record included testimony I offered to the Senate Rules Committee this past June. I ask unanimous consent that the full text of that testimony be reprinted in the RECORD.

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

STATEMENT OF SENATOR JOE LIEBERMAN, SENATE RULES AND ADMINISTRATION COMMITTEE, JUNE 5, 2003

Chairman Lott, Senator Dodd and Members of the Committee. I greatly appreciate the opportunity to submit this statement for your hearing record, so that I can share with the Committee my thoughts on filibuster reform and my previous efforts on the topic.

In late 1994, I joined Senator Harkin in launching an effort to encourage Senate discussion of reforming the Senate's cloture rule. Like Senator Harkin, I had become increasingly frustrated at the way the Senate's cloture rule repeatedly allowed a minority of Members to prevent the Senate's majority from enacting legislation. I felt—and continue to feel—that the Senate rules should be changed to prevent a small minority of Senators from bringing legislation to a halt simply by saying that they will never end debate. Senator Harkin and I therefore offered a proposal under which an initial cloture vote would require 60 votes, but the requisite number to reach cloture would decline by three with each of the next three cloture attempts on the same matter. As of the fourth cloture vote, 51 votes—a simple majority—would suffice to invoke cloture.

This was not a partisan effort on our part. Indeed, Senator Harkin and I offered our proposal after the Democrats lost their majority status and at a time we therefore fully understood that our proposal would more often than not—in the short term, at least—inure to our party's detriment. Let me say that again: our proposal was not an effort to push through our own agenda or help our own party. Nor was it a proposal aimed at carving out special rules for one type of legislation or Senate action in order to ease enactment or Senate approval of one particular agenda.

In early January 1995, we offered our proposal on the Senate floor. After a good debate, the Senate voted on it and, unfortunately, we lost by a landslide. 76–19. Among those voting against our proposal were every Member of this Committee who was in the Senate at the time, including the current Majority Leader, whose proposal the Committee is considering today. I considered that an unfortunate result then, and I continue to consider it so today. Despite the often troubling ways in which the current Majority has sought to run the Senate, I still believe the filibuster rule should be changed so that once Members have had an opportunity to fully debate and seek to amend measures, the majority can have its say.

But that is unfortunately not what the Majority Leader's proposal seeks to do. Indeed, although I expect some will seek to characterize the proposal the Committee is considering as akin to the Harkin-Lieberman one, it most assuredly is not. Our proposal applied across the board—to legislation and nominations alike. As I already mentioned, it was the legislative gridlock that motivated us back then, and that continues to be the real problem caused by the cloture rules. But my Republican colleagues don't want an across-the-board reform. As they would have no choice but to acknowledge, they don't want to give up their own ability to filibuster legislation, even while they are in the Majority. That's because, whether it's the patients' bill of rights, campaign finance reform or a plethora of other issues, they have launched their own filibusters while in the Majority, and they just don't want to give up their ability to continue to do so. Majority rule apparently should only go so far in their view.

What the Majority Leader's proposal amounts to is a demand for unilateral disarmament. It is an effort to force the current minority party to swallow a rules change that allows this President and his party to carve an exception from the Senate rules for their out-of-the-mainstream judicial nominees, while keeping the parts of the cloture rule that they want to continue taking advantage of. But the issue of how the Senate operates should not be subjected to such one-sided demands. We all must work with the rules we have and seek to apply them fairly and impartially. That's why, as I said at the time I first made this proposal with Senator Harkin, even though I support filibuster reform, as long as the rules are what they are, I'm not going to be the only one to abandon them. I will continue, as a representative of the interests of the voters of my state, to live within them and support filibusters where I think it appropriate.

In short, in contrast to the serious reform effort we made, this proposal amounts to one party's effort to turn a Senate rule into a partisan tool—to cherry pick its favored issue in the name of democracy, while leaving themselves free to filibuster away on legislative proposals they don't like. I would welcome more company in the effort to engage in serious reform of the cloture rules so that we all—Republicans, Democrats and Independents alike—can make the Senate work better for the American people. But this unfortunately is not that effort.

Mr. SANTORUM. Mr. President, this is a very historic time for our country. Until this Congress there had never been a filibuster of a circuit court nominee in the history of this country. Thus far we have had four filibusters of highly qualified judicial nominees this year and may have two more by the

end of this week. It is not the intent of the Constitution to confirm a nominee with 60 votes but to confirm with a simple majority. Whether we vote a nominee up or we vote them down, it is our duty to bring them for a vote and to represent the will of the majority in the advice and consent role of the Senate in relation to the President's nominees. If the minority would like to create a 60-vote requirement, then they should respect the Constitution and introduce a constitutional amendment to do so—and build the necessary support for it around the Nation—rather than through this backdoor assault. The precedent that is being set through this abuse of the filibuster is a dangerous and destructive one for future Presidents, future nominees, and most importantly the future of the Judiciary.

As we look at the nominees that have faced obstruction, I ask what makes these nominees ripe for such unprecedented obstruction in our country's history? The most recent judicial nominee to experience this assault is California Supreme Court Justice Janice Rogers Brown. I spoke on the floor a few weeks ago of the cruel treatment that Justice Brown has had to endure. Ms. Brown was recently degraded by a stereotypical cartoon on blackcommentator.com. The cartoon has President Bush and Justice Brown walking into a room and the President saying, ''Welcome to the Federal bench, Ms. Clarence—I mean Ms. Rogers Brown, you'll fit right in.'' In the background are Justice Thomas, Colin Powell, and Condoleeza Rice. The bottom says, ''News item: Bush nominates Clarence-like conservative to the bench.'' Left oriented groups opposing the President's nominees did not condemn this distortion.

In Justice Brown's Judiciary Committee hearing, she responded to this cartoon saying, ''But while I've been having those meetings, people have said to me: 'Well, you know, it's not personal, it's just politics, it's not personal.' And I just want to say to you that it is personal, it's very personal—to the nominees, and to the people who care about them.'' It doesn't get more personal than this. Brown is a very intelligent woman who is a Supreme Court Justice in our Nation's largest State, was re-elected to her seat with 76 percent of the public vote, possesses a stellar educational record and has a great judicial reputation. However, in order to fulfill her dream and the President's wishes, she must subject herself to unfair personal attacks and embarrassing degradation.

Carolyn Kuhl, another female judicial nominee, also faces harsh and unwarranted criticism in her nomination for the Ninth Circuit Court of Appeals, a circuit court that even Senator SCHUMER admits is way too liberal and is the most overturned circuit of the 13 circuits. The Judicial Conference of the United States has declared this vacant seat a ''judicial emergency.'' But this is not even the main crisis for this court. This court gave us the notorious Pledge of Allegiance decision that Democrats joined Republicans in disavowing. Our friends on the other side of the aisle stress the importance of appropriate balance on the court. This court has 17 judges appointed by a Democratic President and 8 appointed by a Republican President. It seems apparent that Judge Kuhl would be a perfect candidate to better balance a court tipped extremely to the left. Judge Kuhl, like the overwhelming majority of President Bush's nominees, has received a ''Well Qualified'' rating from the ABA, the ''Gold Standard,'' previously deferred to by Democrats in the Judiciary Committee. However, Judge Kuhl has been receiving unfair treatment from leftist special interest groups seeking to control the nominations process through the historically unprecedented misuse of the filibuster. They criticize Kuhl's role in a 1986 case in which the Government filed a brief stating President Reagan's position that Roe v. Wade was wrongly decided.

Rather than be criticized, Judge Kuhl should be praised for fulfilling her ethical duty to her client. Her job was to represent the President's position before the Supreme Court. Rule 1.2b of the Model Rules of Professional Conduct state that ''[a] lawyer's representation of a client, including representation by appointment does not constitute an endorsement of the political, social, or moral views or activities.'' The hypocrisy of those opposing her nomination lies in the fact that they have not objected to past nominees who were attorneys on the same government brief. Furthermore, Judge Kuhl is supported by a wide range of pro-choice supporters who strongly believe that she will uphold the law. So, as I have asked before, what makes Judge Kuhl so special that warrants obstruction as a judicial appointee?

Then, there is Priscilla Owen. Justice Owen was nominated for the Fifth Circuit Court of Appeals by President Bush in May of 2001. Justice Owen was elected by 84 percent of the voters of Texas to the Texas Supreme Court. This vacancy has been declared a ''judicial emergency'' by the Judicial Conference of the United States. She has yet to have an up-or-down vote. She has significant bipartisan support, including from three former Democrat judges on the Texas Supreme Court and a bipartisan group of 15 past Presidents of the State Bar of Texas. Owen is yet another nominee who has received a unanimous ''Well Qualified Rating'' from the ABA. Critics argue that she has strong views on abortion, but she has always interpreted the law faithfully by applying statutes enacted by the Texas Legislature.

Abortion-rights activists claim that Owen's decision to uphold a new statute that requires girls under the age of 18 to notify their parents of an abortion is an example of judicial activism. Never mentioned by these organizations is that not only was Owen upholding a statute enacted by the Texas Legislature, the U.S. Supreme Court has long held that parental notification is permissible under the constitutional right of abortion as dictated by Roe v. Wade. The claims that Owen is a judge who has and will continue to practice judicial activism are not true and unwarranted. As of today it will be 917 days since President Bush nominated Justice Owen. You will not find a more qualified candidate.

Another nominee who has been waiting more than two years is Charles Pickering. A nominee for the Fifth Circuit of Appeals, another vacant seat declared a ''judicial emergency,'' Judge Pickering has been labeled by some of those across the aisle as ''racially insensitive'', and that his ''poor'' judicial record reflects this. How is it then that Pickering has received a ''Well Qualified'' rating by the ABA, the ''Gold Standard'' according to Democrats on the Judiciary Committee, to serve on the Fifth Circuit Court of Appeals? Many of Pickering's colleagues, civil rights leaders, and Democratic leaders from his own State attest to Pickering's remarkable record on race. James Charles Evers, brother of slain civil rights leader Medgar Evers, has endorsed Pickering by saying ''As someone who has spent all my adult life fighting for equal treatment of African Americans, I can tell you with certainty that Charles Pickering has an admirable record on civil rights issues. He has taken tough stands at tough times in the past, and the treatment he and his record are receiving at the hands of certain interest groups is shameful.'' Along with the false accusations of racial insensitivity, activists also accuse Pickering as not being fit to hear abortion cases. Pickering has testified that he is committed to following Supreme Court Precedent in Roe v. Wade and Planned Parenthood v. Casey.

Abortion rights activists in their assault on some of the President's nominees have especially focused their attacks on Alabama Attorney General William Pryor, nominee for the 11th Circuit Court of Appeals. General Pryor has been criticized by these organizations as well as from colleagues across the aisle for what they term ''deeply held beliefs.'' Earlier this year, I spoke on the floor about General Pryor's ''deeply held beliefs.'' Criticism of Pryor's beliefs stem from his views on abortion. These views are, in large part, due to his background as a devoted Catholic. Being a devoted Catholic requires one to oppose the practice of abortion, and General Pryor is indeed a devoted Catholic. As a practicing Catholic myself, I am disturbed at what is being conceived here. If the Catholic philosophy of having no leeway on the concept of abortion is preventing General Pryor from an up or down vote, then we have a constitutional crisis on our hands which would eliminate tens of millions of Americans from being considered for Federal

judgeships. General Pryor's record speaks for itself. Though he has criticized the Supreme Court's decisions on abortion, which is well within his rights as an American citizen, he has demonstrated a commitment over the years to enforce and uphold the law as one of the longest serving attorneys general in the Nation.

I fear for the future of the judicial nomination process. Good, decent people who have outstanding records of upholding the law are being put through unfair, unjust and unnecessary attacks by people do not agree with their conservative values. One must ask my colleagues, why they think the politicization of the Judiciary is in anyone's interests. At what price do we continue this unfair degradation of judicial nominees?

We all know the sad ending of Miguel Estrada's nomination. His qualifications remain outstanding. He came to the United States at age 17 after being born and raised in Honduras. He graduated magna cum laude from Harvard Law School where he was editor of Harvard Law Review. He is a former assistant to the Solicitor General and argued 15 cases before the U.S. Supreme Court. He clerked for Supreme Court Justice Anthony Kennedy, a Justice who does not share Estrada's conservative philosophies. He received strong support from prominent members of the Clinton administration whom he worked for.

Are we to believe that documents the administration is unwilling to share from the Solicitor General's Office are what blocked his nomination, when all previous living Solicitors General, Republican and Democrat, signed a letter saying such work products should not be required to be provided? To do so would only undermine the ability of the office to represent the Federal Government and the President and would negatively impact the ability to attract quality lawyers to the office. We have also discussed time and again the appropriateness of Estrada's reluctance to prejudge cases at committee hearings. Opponents knew that they had no basis to oppose his nomination so they chose to place the burden on the nominee to prove a negative or else to have the Office of the Solicitor General undermine its independence and effectiveness.

So what is the answer to why these nominees are receiving unprecedented unfair treatment? Why are we spending time here arguing for these candidates that are so well qualified for judgeships? I have voted for dozens of judicial nominees whose philosophies I do not share in deference to the President and to the Constitution. I fear the answer is the belief by a minority of Senators that there is short-term political gain in filibustering these nominees because some special interest groups are demanding this. But the long-term cost of this short-term thinking is tremendous. This unfair obstruction is setting a dangerous precedent and direction for the future of the Judiciary. The Constitution has given the Senate the responsibility to defend the judiciary there is no one else.

Mr. INOUYE. Mr. President, it is most unfortunate that we in the Senate found ourselves embroiled in a lengthy and costly debate over four of President George W. Bush's judicial nominations—and make no mistake: this debate will cost more than is readily apparent.

On a simple level, the preparation for 30 hours of debate on the Senate floor will translate into hundreds—possibly thousands of man hours of preparation. My fellow Senators, their staffs, and the myriad interested civic groups will toil ceaselessly to ensure that both Democrats and Republicans will be able to get their messages across to the American people. The media coverage and analysis are likely to be comprehensive and focused intensely down to the most minute details. Like a ravenous beast, this spectacle will devour our time, attention, and energy, until eventually, it consumes itself.

My Democratic colleagues and I are acutely aware of another cost of this debate: the cost of opportunities lost to the Senate and to the Nation. Thirty hours of sustained attention could have addressed the needs of the 3 million citizens who have lost their jobs since the President took the oath of office. Thirty hours of continuous inquiry could have finished our constitutionally mandated duty of providing funds for the Federal Government. Thirty hours of debate could have broken the logjam on Medicare and Medicaid reform. Any of these goals would have been worthy of America's time, but regrettably, our 30 hours of debate will purchase for us none of these noble ends.

Instead, our colleagues from across the aisle will have spent this time on four men and women—four men and women who have jobs. Four men and women who collectively make a million dollars every year. Four men and women who have already been the subject of countless hours of debate in the Senate, and whose records have already been displayed amply before the American people. Four prosperous men and women against the millions of American citizens who are unemployed.

By far the highest price of these 30 hours of debate, however, will be its contribution to the growing rift between people of different ideological bents. The Senate has always been a place where Senators—a group as diverse and varied as the people they represent—have been able to put aside their differences and work for the good of the country as a whole. As one Senator who has had the privilege of participating in the life of this institution for over 40 years, I cannot understand why the majority leadership has brought us to this point.

My grave concern is tempered only by my hope and confidence that we will rise above the divisive spirit that provoked today's debate, and begin to do the work of the Nation and its people.

The PRESIDING OFFICER. Under the previous order, the hour of 8:30 a.m. having arrived, the Senate will begin an hour of debate equally divided prior to the first cloture vote. Under the previous order, the last 20 minutes will be equally divided with the first 10 minutes under the control of the Democratic leader or his designee, and the last 10 minutes under the control of the majority leader or his designee.

Who seeks time?

The Senator from Utah.

Mr. HATCH. Mr. President, let me personally express gratitude and thanks to Senator SANTORUM of Pennsylvania, Senator NORMAN COLEMAN of Minnesota, Senator LINDSEY GRAHAM of South Carolina, and Senator JEFF SESSIONS of Alabama, all of whom stayed here all night last night to make the points they have made. I personally appreciate it.

Senator GRAHAM asked me to take time to read the full quote of Senator LEAHY that he was not given the benefit of. Senator LEAHY said he was misquoted, so I will read the full quote: This is Senator LEAHY in the CONGRESSIONAL RECORD of June 18, 1998, regarding delays in Senate action on judicial nominations:

> I have stated over and over again on this floor that I would refuse to put an anonymous hold on any judge; that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty. If we don't like somebody the President nominates, vote him or her down.

Now, that is the correct full statement by the distinguished ranking member of the committee. Senator GRAHAM wanted me to make sure that the full statement was put in.

What is involved here is whether or not we are going to abide by the Constitution because the Constitution is pretty clear on this subject of advice and consent. This little book right here contains the Constitution of the United States. In article II, section 2, clause 2, speaking of the President, it says this:

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur, and he shall nominate, and by and with the Advice and Consent of the Senate—

It goes on to say appoint judges. Now, that is what the Constitution says. The Founding Fathers knew what a supermajority vote was. They put that requirement in here, where it was necessary for treaties. It is very clear to anybody who reads it, and I think any constitutional scholar, that advice and consent means a vote up or down, a majority vote up or down.

During the Clinton years, when Democrats were afraid the Republicans were going to filibuster their nominees, Democrat after Democrat got up and said we should not filibuster, vote up or down one way or another. If my colleagues do not like a judge, vote against him or her. A lot of those

quotes have been put in the record during this 40-hour debate. The fact is, when push comes to shove, when it becomes to their political advantage to stop people on the floor of the Senate, they start filibustering.

This business of one-man filibusters, that is pure bunk. The fact is, everybody who came to the floor got a vote up or down. Now, there were a few on our side who wanted to filibuster some of those judges because they were so liberal, but I personally stood up in our conference and in our caucuses, as did Senator LOTT, who was then the majority leader, and said that is not going to happen because that is constitutionally unsound. Plus, it is not right.

But it has happened, as our colleagues on the other side have not been able to stop themselves from taking political advantage.

Why are they doing this against these six people? I get a kick out of the use of 168 to 4. Today it is 6. What will it be tomorrow? I can tell my colleagues the number is going to go up continuously because they do not want anybody on these circuit courts of appeals who may be pro-life. That is what this is all about. It is about abortion. Otherwise, how could anyone find one fault with Priscilla Owen? I do not even know what her position is on abortion. I know that question is not asked by the White House or by us. I do not know what her position is.

What fault can my colleagues find with a woman who was No. 1 on the bar exam in that State and who broke through the glass ceiling for women? Now, women are partners in law firms, where before they could not get secretarial jobs half the time. It was terrible what women went through. She was one of the people who broke through that problem. She won 84 percent of the vote in Texas, which is not particularly a Republican State, although it is fast becoming one looking at what is going on up here, just like Alabama is becoming a Republican State when they see the injustice and unfairness going on here.

Priscilla Owen won 84 percent of the vote; every newspaper in that State ran editorials supporting her, and yet she is being treated like dirt here. Why? Because in a dissent she would have upheld the rights of a parent to have notification that those parents' child was about to have an abortion. Eighty-two percent of the American people believe that is the right thing to do. She was merely evaluating whether the lower court finder of fact in that parental notification case had made an error, and he hadn't, so she thought that the factfinding judge ought to be upheld. What is wrong with that?

Going to Janice Rogers Brown, Janice Rogers Brown won 76 percent of the vote in her reelection, more than the leading liberal then on the California Supreme Court, Stanley Mosk. Mosk was a liberal voice on the court. He got 68 percent. Janice Brown got 76 percent. Now, I know if this was reversed and Mosk was the one who was nominated by a Democrat President, the Democrats would be arguing that he got 68 percent of the vote and that we should just confirm him. And we, as Republicans, probably would if we concluded that he was competent, had a good temperament, was intelligent enough to do the job, was honest and a person of integrity, even though we disagree with him on many issues.

My contention is that the fact that a person may be pro-life is irrelevant, or the fact that a person is pro-choice is irrelevant if that person is otherwise qualified for these Federal judgeships. If we get to the point where we stop people because of one litmus test issue, Katie bar the door, it is going to politicize the Federal judiciary in a way that never should happen.

Janice Rogers Brown is the justice who wrote a majority of the majority opinions last year in the California Supreme Court. She also joined in unanimous opinions, I think around 73 times. There is no question she is in the mainstream. That just has become a bad redefining of terms by our friends on the other side. Since they do not have any real arguments against these people, they will say, well, they are outside the mainstream of American jurisprudence. Well, that is just pure bunk and everybody knows it.

What about Carolyn Kuhl? Carolyn Kuhl has 100 of her fellow judges on the California Superior Court, Democrats and Republicans, vociferously supporting her as somebody who would make an excellent judge on the Ninth Circuit Court of Appeals, which has a tremendous imbalance. Senator SCHUMER is constantly talking about imbalance, that we should balance up the courts, liberals and conservatives being equal. Well, there are 17 Clinton and Carter nominees and judges on the ninth Circuit Court of Appeals. I believe there may be eight judges on that court nominated by Republican Presidents.

If that is the case, if they really want balance, why oppose even voting on Carolyn Kuhl, one of the leading scholars in America? What do they hold against her? When she was a 28-year-old, a junior lawyer in the Department of Justice, doing the bidding of the then-President, Ronald Reagan, she actually helped write some of the briefs which she would do in the normal course of events—anyone would do, even if you do not agree, because that is your job—on some issues that our friends on the other side do not appreciate. Again, it comes down to abortion.

I was talking to one of the leading civil rights ministers who during the 1960s was threatened every day. He was head of the ACLU in Mississippi, a liberal Democrat who has been in some of the Democrats' meetings, during which they've plotted their mistreatment of the President's nominees. He said to me: Senator HATCH, you are absolutely right—he is pro-choice, by the way, but he sees the injustice of this as he came out in support of the judge. He said: Senator HATCH, you are absolutely right, this is all about abortion.

We do not know where these nominees stand on abortion, at least I don't. I have had discussions with all three of them and never asked the question. Whether pro-choice or pro-life is irrelevant if they are otherwise qualified to serve on the courts.

What is being done to these three women we are going to vote on today? We are not voting on their right to be a judge, we are voting on cloture, on the right to go forward and have a vote up and down on these judges. For the first time in history, the absolute first time in history, we now have filibusters against six incredibly qualified, well qualified candidates.

During the 8 years of the Clinton administration, time after time, the Democrats would say: We have a person who is qualified by the American Bar Association. That is the gold standard, the American gold standard. The imprimatur of the American Bar Association, that is all it takes. 377 Clinton nominees got through; one was rejected by a majority vote on the Senate floor. 377. Amazing how the statistics are distorting. This talk about 168—that was a hard fought battle on most of them. It was not at all simple to get them through. Democrats have politicized everything around here with regard to the judiciary. I would like to end that by having votes up and down on all judicial nominees.

I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. How much time is available to the Senator from Vermont?

The PRESIDING OFFICER. The Senator from Vermont has 30 minutes, and that includes time for the Democratic leader.

Mr. LEAHY. I obviously will not take that time.

Again, in 29 years here, I have been accustomed to some hyperbole and some interesting changes of statistics and even quotes. I have great respect for my dear friend from Utah, but, man, he has hit the trifecta of the hyperbole in the out-of-context quotes.

Of course, what he does not point out, when I spoke of filibusters on this floor, I was talking about the one-person anonymous hold filibuster on Sonia Sotomayor. It was only after a public outcry that she was allowed a vote and she had overwhelming support in this body—not somebody who was almost 50–50 or 52–48, she had overwhelming support. But she was not allowed to get a vote. And even that took 2 years of putting her life on hold. Editorial writers from the right to the left said: Give this woman a vote. This was a consensus candidate.

We hear about all the ones who got votes. For some reason, there seems to be a reluctance by my friends on the other side to talk about the 63 who were never allowed votes. They were

blocked because one Republican would anonymously say no.

I don't find the record of cooperation during the Clinton years to be anything to brag about. Sixty-three fine men and women were blocked and never given a vote. In fact, when President Bush took office, there was an unprecedented number of vacancies in a lot of the circuits. Why? As testimony before our committee showed, because the nominees were told by Republican Senators: We think you are great. We think you would make a good judge. But we have been told we are not allowed to move you forward, we are not allowed to give you a vote. We are not allowed to give you a hearing because someday there will be a Republican President and he will want to fill those vacancies.

Notwithstanding that, when I was chairman, even though it pained me to do it, I allowed those vacancies to be filled by President Reagan's nominees, by President Bush's nominees, even though in testimony before our committee the nominees said they were told by Republicans they would never be allowed to have a vote.

I don't hear the other side talk about the 63 who were given a one-person filibuster, anonymously, whether they were judges from Pennsylvania, Ohio, Missouri, Michigan, or elsewhere. They were blocked by these one-person anonymous holds. Sometimes it was not too difficult to realize who the hold was because it was usually from their own State.

Of course, there were many others. As the distinguished Senator from Utah has said in his own writings, the Democratic President would consult with him on different people and he would tell them no, do not even send this one up, they will not get a vote. So they never came forward. I guess on inaugural day that consultation stopped.

We have confirmed 168 and held back 4. Is anyone going to tell me with a straight face that in the Bush administration, with all the promises they have made to the far right, there are not a whole lot of pro-life judges in here? Of course there are. Many have been very clear, saying they were pro-life, but I voted for them because I believed they could be fair, they would be judicious, they would follow the law, they would follow the precedence and not their personal inclinations.

When I hear of the crocodile tears about Ms. Kuhl, saying she was a young person writing a memo for the Reagan administration, do not hold that against her—come on. She was not only writing a memo, she was a spear carrier for Bob Jones University.

Now I know Bob Jones University is kind of a pet of the other side, but this is a university where the founder and philosophies are anti-Catholic, anti-Mormon, anti-Black. Yet we are supposed to say, forget the fact she was anti-Catholic, anti-Mormon, anti-Black in her support of this, she was only doing her job. She was only doing her job.

A lawyer has a right to follow their conscience. If a lawyer has a client and says: Go out there and take a position that really should not be sustained—in this case, a position on Bob Jones University—you ought to say: No, I quit. I quit. We have seen many instances of that in the past.

Not counting the time for the leader, how much time remains to the Senator from Vermont?

The PRESIDING OFFICER. Thirteen minutes.

Mr. LEAHY. I yield 10 minutes to the distinguished Senator from California.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. Mr. President, I thank Senator LEAHY for so many things. He has been so strong on this whole issue of making sure we do not put on the bench folks who are so outside the mainstream that they would set us back. Because you have a very strong position as a top Democrat, you have allowed to be approved 168 of George Bush's nominees.

He has talked to us in depth, as well as other Members of the Judiciary Committee, about the four, up to now, who the Senator believes are far outside that mainstream. In order to protect the rights of our people, this is not some argument about a football game, that you are beating us 168 to 4. It is about protecting the people we represent, protecting their rights, protecting their health, making sure they are treated equally before the law. All the things that we as a great country, the greatest in the world, have given to our citizenry, could be overturned if we wind up having a court system that is radical and that moves away from those freedoms.

So if nothing else, I hope people in America understand that the Republicans in the Senate are complaining because they did not get all of their President's nominees. So we have made the point over and over.

Today, we are going to add two more, I believe, to this list and it will be 168 to 6, for a 97 percent success rate. Why are we doing that? Why do we think we are going to stop two of these candidates today—actually, we have stopped a third before and we will do that again. Because they do not reflect the values of this country in their decisions. I could go over them one by one; I don't have the time to do that. And they would be dangerous.

Here is the interesting thing. We have sitting in the committee two nominees who cleared the committee, Mark Filip and Gary Sharp, one from Illinois, one from New York, and all you have to do is bring those out. They have full support. You will be back up to 98 percent before the day's end.

I say to my friends, I do not deserve to be a Senator if I do not exercise the power our Founders gave us explicitly in the Constitution, the power of advice and consent. It does not say sometimes advice and consent. It does not say maybe advice and consent. It does not say if you feel like it. It does not say if there is a Democrat in power or Republican. It says the Senate has the power to advise and consent. This does not mean rolling over for any Member.

That is the key point. Do the people of America want a rubberstamp Senate or do they really want Senators who take their responsibility seriously and look at each nominee seriously?

The power we were given is a very important power. I will explain that to the people of my State. If they want a Senator who will be a rubberstamp for a President of either party, they need to think long and hard about Senator BOXER because I am not their girl. I am not going to do that. That is not why I am here.

So anyone reading the Constitution knows that Senator LEAHY and members of the Judiciary Committee—and I see the Senator from Illinois here—they are just doing their job.

The Republicans have spoken almost 40 hours. I lost track after 30 hours. They are telling us essentially: Don't do your job; be a rubberstamp. We are not going down that path.

I am happy to yield.

Mr. DURBIN. I know we are coming to the breathless close of this wonderful marathon, this made-for-TV filibuster.

I ask the Senator through the Chair the following question: Is the Senator aware in the early hours this morning Republican Senators from Kansas and Pennsylvania came before the Senate and raised the question of whether the Constitution includes the right to privacy? According to the Senator from Kansas, he referred to it as the discovered right of privacy in the Constitution.

I would like to ask through the Chair if the Senator from California could reflect on the right to privacy, particularly as it relates to one anomaly from her State, Carolyn Kuhl.

Mrs. BOXER. Absolutely. I will show the number of women's organizations who oppose Carolyn Kuhl. I am glad the Senator raised this question.

It is particularly interesting that today we have three women before the Senate. I say to my colleagues from both sides of the aisle, as a woman who has been in public life, actually elected to my first office in 1976, making sure that women have an equal opportunity, making sure that women move into positions of leadership has been one of the hallmarks of my career.

Now we hear people on the other side saying anyone who votes against these women is not in favor of women.

Let me state from the bottom of my heart—and I will get to that issue of privacy—the worst thing that can happen to the women of this country—to your daughters, to your nieces, to your aunts, to your grandmothers, for that matter, to your moms—the worst thing is to have a woman in power who rules against the interests of women. Carolyn Kuhl is one such woman. Janice Brown is one such woman. And Priscilla Owen. And those are the three

who come before the Senate today in a package. Each of them, if you look at their decisions, has been hostile to women.

I will talk about the Carolyn Kuhl case. Before Carolyn Kuhl, as a sitting State judge, comes a case in which a woman is explaining that she went to a physician for a followup mastectomy examination, a very humiliating, difficult, painful moment for that woman. That woman has written us and her story is in the RECORD. I have placed it in the RECORD.

The woman simply said to Judge Kuhl: My privacy was violated because I went to my doctor and the doctor allowed in the room a drug salesman. The doctor did not ask me, the doctor never told me.

This drug salesman was leaning over the table, was fanning this woman with a fan, was involved in this intimate exam.

Every woman in this country knows that if that happened to them, they would be humiliated beyond belief. This woman had the courage to sue. Carolyn Kuhl ruled against the woman, and the excuse is, she allowed the case against the doctor to go forward. Untrue. That particular case never was before her. The issue was breach of privacy. She ruled against the woman. Carolyn Kuhl had to write an apology to the committee for misstating what actually had happened.

Mr. LEAHY. Will the Senator yield?

Mrs. BOXER. Yes.

Mr. LEAHY. In other words, under this ruling, if the doctor had invited his auto mechanic because he might like to watch breast exams, put him in a white coat, it would be the patient's fault for saying: By the way, is this another doctor? Is this your auto mechanic?

Mrs. BOXER. My friend is right.

Mr. LEAHY. Frankly, I would hope I could say to my wife or my daughters, there would be a right of privacy issue here. For those who say there is no privacy in a case such as this, they have never been in a doctor's office for an examination.

I yield back to the Senator from California.

Mrs. BOXER. Let me say that, fortunately, her decision was overruled unanimously by the State appellate court. This is the State appellate court. There are lots of Republicans on that court. They saw this was a terrible decision.

Here is the list of women's groups against the nomination of Carolyn Kuhl. It includes Breast Cancer Action, Breast Cancer Fund—on and on—Women's Leadership Alliance. And the same list—actually a few different names, for Janice Brown and for Priscilla Owen. These women do not care about women advancing. They have not cared about the equal rights of women.

Let's have some backbone here and stand up when we think these nominees are good for the people and oppose them when we know they have been bad for the people and they will do worse yet.

The PRESIDING OFFICER (Mr. SMITH). The Senator's time has expired.

Who seeks time?

Mr. LEAHY. Mr. President, what is the time remaining?

The PRESIDING OFFICER. The Senator from Vermont has 2 minutes 13 seconds; the Senator from Utah has 8 minutes 12 seconds.

Mr. LEAHY. Well, and there is time reserved for the two leaders?

The PRESIDING OFFICER. There are 10 minutes each for the majority leader and the minority leader.

Mr. LEAHY. Mr. President, over these past 24 hours, the American public has heard a lot of what one could generously describe as wishful thinking from the other side of the aisle about the history of the Senate in considering nominations, especially recent history of Republican obstruction when a Democrat was in the White House. Their efforts to re-write American history and the history of this Senate remind me of the old Soviet Union, rewriting its history books to suit the ruling party and erasing photos that would reveal inconvenient facts. Their misleading and wrong assertions have been made over and over and over again, perhaps in the hope that repetition would turn those falsehoods into fact. I think it is important for posterity to set the record straight.

Last night, echoing Republican press conference, Republicans took to the floor to claim that no judicial nominee had ever been filibustered or blocked from getting a confirmation vote in the history of the Senate. They made these assertions repeatedly while pointing to signs with the number zero printed on them. They refused to acknowledge that any judicial nominee has ever been filibustered, that any has ever been denied a confirmation vote, that any nominee for even a short-term position has ever been filibustered on the floor or filibustered in Committee. The repeated the party line from GOPUSA that ''no federal judicial nominee by the past 42 presidents has been filibustered in the history of the U.S. Senate dating back to 1784.'' I ask unanimous consent to place the following excerpt from the New York Times from 1968 into the RECORD about the filibuster in the Senate over the nomination of Justice Abe Fortas to be Chief Justice of the Supreme Court, a letter signed by more than 60 law professors from across the country in support of the use of the filibuster of judicial nominees, and an important and outstanding letter from Professor Michael Gerhardt which thoroughly addresses the specious arguments being made about the use of the filibuster under our Constitution. I hope that this evidence would cause some of my colleagues to reconsider some of the false and misleading statements made by my colleagues on the other side of the aisle. One can always hope.

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

[From the New York Times, Sept. 25, 1968]

PRECEDENT FOR JUDICIAL FILIBUSTERS

CRITICS OF FORTAS BEGIN FILIBUSTER, CITING ''PROPRIETY''

GRIFFIN ATTACK LASTS 3 HOURS—MANSFIELD BACKS JUSTICE, BUT SCORES LECTURE FEE.

May 16, 2003.

Hon. BILL FRIST and TOM DASCHLE,
U.S. Capitol,
Washington, DC.

DEAR SENATORS FRIST AND DASCHLE: As law professors, we write to express our opinion that the Senate's use of the filibuster with respect to both legislation and nominations is constitutional. Both the text of the Constitution and historical practices strongly support the constitutionality of the filibuster. Article I, Section 5 expressly provides, ''Each House may determine the Rules of its Proceedings.'' Article I, Section 5 plainly authorizes the Senate to make procedural rules. It empowers the Senate as well to delegate what is sometimes final authority over the fate of legislation and nominations to committees and their chairs. The textual authority for the filibuster is precisely the same as those for these other measures. If these measures are constitutional, then so too is the filibuster.

The Supreme Court has repeatedly emphasized the relevance of historical practices for determining constitutionality. The filibuster, understood as protracted debate precluding final Senate consideration of a legislative matter, began early in the history of the Republic. It has been used frequently by senators from both parties with respect to nominations as well as legislation. In fact, it has been used effectively to defeat presidential nominations, including the nominations of Abe Fortas to be Chief Justice of the United States in 1968, Sam Brown to be Ambassador in 1994, and Henry Foster to be Surgeon General in 1995. This longstanding historical practice weighs heavily in support of the filibuster's constitutionality.

The filibuster reflects the Senate's longstanding respect for minority views and underscores the unique role of the Senate as a part of American democracy. It has the salutary effect of giving an incentive to all sides to seek compromise on issues where points of view are sharply divided. With regard to nominations to an independent branch of government such as the judiciary, the filibuster encourages the President to find common ground with the Senate by nominating individuals who can garner consensus.

For these and other reasons, we conclude the filibuster is constitutional.

Very truly yours,
(Signed by 60 Law Professors).

UNIVERSITY OF NORTH CAROLINA
SCHOOL OF LAW,
November 10, 2003.

Hon. PATRICK LEAHY,
Dirksen Senate Office Building,
Washington, DC.

DEAR SENATOR LEAHY: I understand that this week the Republican leadership will be coordinating thirty hours of debate about the legitimacy of the recent filibusters against three of President Bush's judicial nominees. To assist you (and the Senate) in this debate, I have taken the liberty of providing below a revised version of my testimony earlier this summer on behalf of the filibuster. The revised testimony reflects my thinking and research on the subject since my testimony in May and June. My continued thinking and research on the filibuster

have clarified further the solid constitutional foundations for filibustering judicial nominations. My hope is that this revised testimony may help to set the record straight on the Senate's longstanding commitments to allowing the filibuster (against all kinds of nominations) and to amending its rules in accordance with its rules.

EXECUTIVE SUMMARY

The filibuster derives its authority from the Senate's express power to design its own procedural rules to govern its internal affairs and the Senate's consistent support for its legitimacy. It is also one of many counter-majoritarian features of the Senate, including the committee system and unanimous consent requirements. If these practices are constitutional, then so too is the filibuster.

While there have been many criticisms directed against the filibuster in recent months, none has merit, in my opinion. First, the most popular arguments against the filibuster are circular, i.e., they simply assume their conclusion. The arguments presume that some constitutional principle, such as majority rule or anti-entrenchment, trumps the filibuster. Then, operating from this premise, they set out to demonstrate flaws in the arguments of the defenders of the filibuster. Yet, exposing flaws in the other side's arguments does not make an affirmative case for a constitutional principle of majority rule or anti-entrenchment; it merely shows imperfections in the defense of the filibuster. The absence of support for the other side does not establish the legitimacy of the case against the filibuster. Those maintaining that the filibuster is illegitimate must show the constitutional foundations for the principles on which they are relying. Second, the arguments against the filibuster—e.g., it violates majority rule—cannot be squared with the constitutional structure as it was designed or has evolved. Third, Article I of the Constitution contains no explicit or implicit anti-entrenchment principle that would preclude the Senate from adopting, for the sake of institutional stability and order, certain procedural rules that carry over from one session to the next and may only be altered with super-majority approval. In fact, entrenchment is far more consistent with our constitutional structure than anti-entrenchment is. Entrenchment is much more the rule rather than the exception in the legislative process. Even legislative bodies such as the House that formally reconstitute themselves as the outset of each new session have pre-set agendas in place prior to any vote as to how they should proceed to reconstitute themselves, what they should do once they have formally reconstituted themselves, the committees to which members need to be assigned, how those assignments may take place, the jurisdictions of those committees, and even the rules they may select under which to operate. Moreover, given that only a third of the Senate is up for re-election at any one time, there is no ''new'' majority that comes into power at the outset of a session who can credibly claim any entitlement to vote on the rules under which it would be operating throughout the session.

The filibuster is best understood as a classic example of a non-reviewable, legislative constitutional judgment. It is a practice that has the same claim to legitimacy as many countermajoritarian practices within the Senate, including the committee structure and unanimous consent requirements. The Constitution permits all of these practices, but it does not mandate any of them. These practices define the Senate's uniqueness as a political institution, particularly its historic commitments to various objectives—respecting the equality of its membership and to minority viewpoints; encouraging compromise on especially divisive matters; and facilitating stability, order, and collegiality in the long run. The principal checks on these practices, including the filibuster, are political. They include the Senate Rules, the need to maintain collegiality within the institution, and the political accountability of senators for their support for, or opposition to, filibusters.

I.

Neither the Constitution nor the Senate Rules expressly mention, or mandate, the filibuster. Nevertheless, the best starting place for understanding the authority for the filibuster is Article I of the Constitution, which governs and defines the powers of the Congress. In Article I, section 5, the Constitution provides, ''Each House [of the Congress] may determine the Rules of its Proceedings.'' This section plainly authorizes the Senate to make procedural rules, including but not limited to the length of debate in the Senate. This section further authorizes the Senate to delegate official responsibility to smaller units (and even individual members) within the Senate. Many of these delegations allow committees and their Chairs to have what is sometimes final say over the fates of legislation and nominations. This same authority provides the support for many informal senatorial practices such as senatorial courtesy—in which individual senators may make recommendations to the President on the people whom he should nominate to federal offices in their respective states—as well as the blue-slip process that has traditionally allowed individual senators with the means by which to nullify nominations to judgeships within their respective states. In addition, a single senator may place a ''hold'' on legislation or a nomination, postponing consideration to a later date. The filibuster derives its legitimacy from the same authority that allows for each of these other legislative practices—Article I, Section 5, which empowers the Senate to implement procedural rules, including the specific rule governing the procedure for cloture, Rule XXII. If these practices are constitutional, then so too is the filibuster.

The other, possible authority for the filibuster is historical practices. The filibuster has been employed, in one form or another, as extended debate in the Senate throughout the history of the Senate. In fact, ''the strategic use of delay in debate is as old as the Senate itself. The first recorded episode of dilatory debate occurred in 1790, when senators from Virginia and South Carolina filibustered to prevent the location of the first Congress in Philadelphia.'' While the First Congress allowed a so-called motion for the previous question which could not be debated, its name was misleading. In practice, ''the previous question motion was seldom used before the Senate abolished it in 1806;'' and it rarely succeeded in silencing those senators determined to continue the debate. Instead, the motion tended, once made, to end debate by requiring the removal of the matter being debated from the Senate agenda. Thus, it did not force a vote but rather forced the Senate to move onto other business. Moreover, the availability of this motion did not prevent the Senate from continuing to permit protracted debate to delay floor votes. The eminent biographer Robert Caro explains the history of the filibuster subsequent to the abolition of the previous question motion:

''For many years after 1806—for 111 years, to be precise—the only way a senator could be made to stop talking so that a vote could be taken on a proposed measure was if there were unanimous consent that he do so, an obvious impossibility. And there took place therefore so many 'extended discussions' of measures to keep them from coming to a vote that the device got a name, 'filibuster,' from the Dutch *vrijbuiter*, which means 'freebooter' or 'pirate,' and which passed into the Spanish as *filibustero*, because the sleek, swift ship used by the Caribbean pirates was called *filibote*, and into legislative parlance because the device was, after all, a pirating, or highjacking, of the very heart of the legislative process.''

In other words, the practice in the Senate from 1806 until 1917 allowed the smallest minority possible with the Senate—a single senator—to bar a floor vote on any legislative matter by engaging in an extended speech. During this period, every floor vote required unanimous consent.

The Senate first, formally curbed the practice of endless debate in 1917, after eleven senators had successfully filibustered President Woodrow Wilson's proposal to arm American merchantmen against German submarine attacks. At President Wilson's urging, the Senate passed Rule XXII, which allows debate upon a ''pending'' matter to be terminated when, after a petition for such ''cloture'' was presented by sixteen senators and approved by two-thirds of the senators present and voting. In subsequent years, senators from both parties have used the filibuster to block a floor vote on a wide range of legislation. From 1917 until 2000, cloture was invoked 193 times out of the 545 times it was attempted. During the period from 1927 through 1962, the Senate did not invoke cloture once. In this period, conservative senators repeatedly used the filibuster to block civil rights legislation, provoking liberal senators to denounce the filibuster as illegitimate and conservative senators to defend it. In the late 1960s and early 1970s, conservatives and liberals switched positions on the filibuster: Liberal senators used the filibuster to block centerpieces of President Nixon's social and economic agenda while many conservative senators questioned its legitimacy. After Bill Clinton became president, a series of Republican filibusters blocked by aspects of his legislative agenda, including a comprehensive bill providing for national health care reform. Nevertheless, the filibuster has endured, with the most recent reform occurring in 985 when a supermajority within the Senate approved an amendment to Rule XXII requiring only three-fifths, rather than two-thirds, of the Senate as the requisite number to invoke cloture.

Throughout the long history of its deployment in the Senate, the filibuster has not been restricted to delaying floor votes only on legislation. It has been often used to thwart presidential nominations. The first, recorded instance in which it was clearly and unambiguously employed to defeat a judicial nomination occurred in 1881. At the time, Republicans held a majority of the seats in the Senate but were unable to end the filibuster, which had been employed near the end of the legislative session, the preclude a floor vote on President Rutherford B. Hayes' nomination of Stanley Matthews to the Supreme Court. Though Matthews eventually served as an Associate Justice, it was only because Hayes' Republican successor, President James Garfield, re-nominated Matthews in the next legislative session. (There were also nine other occasions in the nineteenth century when the Senate held no floor votes on Supreme Court nominations.) A recent Congressional Research Service study shows that from 1949 through 2002, senators have employed the filibuster against 35 presidential nominations, on 21 of which senators had sought and invoked cloture. 17 of the 35 nominations filibustered were to Article III

courts. All 21 nominations on which cloture was invoked were eventually confirmed. Of the 14 nominations on which cloture was sought but not invoked, 11 were eventually confirmed. For instance, Republican senators filibustered President Clinton's nominations of Walter Dellinger to head the Office of Legal Counsel in the Justice Department and Janet Napolitano to be U.S. Attorney for Arizona, but eventually the Senate confirmed both nominees—Dellinger after Republican senators relinquished their opposition to his nomination and Napolitano after the Senate voted 72–26 on a cloture motion to end the filibuster against her nomination. Four of the 35 filibustered nominations failed altogether—then-Associate Justice Abe Fortas to be Chief Justice and Judge Homer Thornberry to be an Associate Justice in 1968, Sam Brown to be Ambassador in 1994, and Dr. Henry Foster to be Surgeon General in 1995. Other nominations have failed without having been formally filibustered, as Senator Jesse Helms' threat of a filibuster nullified President Clinton's intention to nominate then-Assistant Attorney General Walter Dellinger as Solicitor General. Another dramatic use of the filibuster occurred when Republican senators filibustered five of President Clinton's nominations to the State Department in order to gain leverage in a dispute over whether the State Department adequately investigated allegations that a former Clinton campaign worker who later served in the department had improperly searched the records of 160 former political appointees and publicly disclosed the contents of two of the files. As John McGinnis and Michael Rappaport concluded in their extended study of the Constitution's super-majority voting requirements, ''the continuous use of filibusters since the early Republic provides compelling support for their constitutionality.

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

Mr. LEAHY. I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I am highly offended, and I think anybody who is fairminded would be highly offended by this one-sided, partisan attack on Judge Kuhl, and bringing up that particular case because everybody knows that case was settled by the woman's doctor, the one who was at fault. And, frankly, that was hitting below the belt.

Carolyn Kuhl, she is a pioneer for women: cum laude graduate of Princeton University; Duke University Law School: Order of the Coif; law clerk to then-Judge Anthony Kennedy of the Ninth Circuit.

She worked at the Department of Justice: Special assistant to the Attorney General; Deputy Assistant Attorney General; Deputy Solicitor General.

She was 28 years old when she was asked to work on the Bob Jones case. I think it is slanderous to say that Republicans support Bob Jones University's attitudes about race. Give me a break. Nobody on this side does, and neither did she. The case she worked on was a tax issue, and she had an obligation to work with her senior people in the Department. She was very junior at the time. And, frankly, they had a reasonable argument about a certain IRS tax exemption relevant to private universities.

She was a partner in the Los Angeles firm of Munger, Tolles & Olson, one of the best law firms in the country. She is the first female supervising judge of the Civil Department of the Los Angeles County Superior Court.

This is a woman of tremendous abilities. They pick one case out of the hundreds or thousands she has heard and tried, and then distort that case. It drives you nuts around here.

''Both Democrats and Republicans . . . step up to the plate to support [Judge] Kuhl.'' This is Vilma Martinez—not known for conservative politics, by the way—who is one of the top leaders in the Mexican American Legal Defense and Education Foundation, if I recall it correctly. In the Daily Journal this is what Vilma Martinez had to say:

> [Judge Kuhl] stepped up to the plate. She wrote letters, made phone calls and exhorted her fellow Republicans to confirm [Judge] Paez and other Clinton nominees.

Judge Paez was a very controversial nominee. I know. I had to work it through to even give him a chance. But he got a vote up and down. And, unfortunately, some of my colleagues who were against him were right. He has become a very activist judge on the Ninth Circuit Court of Appeals, just stepping right in and becoming a member of the leftist majority on that court.

Vilma Martinez, this Hispanic-American leader, says:

> [Judge Kuhl's efforts are] characteristic of her sense of fairness and respect for an independent judiciary.

She goes on to say:

> [M]any of the groups that support Judge Paez, ironically, have turned their fire on Judge Kuhl, apparently to exact payback against Senate Republicans.

If you listen to those arguments, it is easy to conclude that.

Then, in the bottom paragraph, Vilma Martinez says this—and Vilma Martinez is a Democrat, not a Republican—she says:

> This turnabout is not fair play. It is the continuation of a vicious cycle that punishes worthy judicial candidates in a misguided effort to use the judiciary to further narrow political ends.

That is the type of stuff we are dealing with around here: distortions, distortions of the facts, maligning absolutely qualified people. Look at this. Carolyn Kuhl has the support of pro-choice women. Anne Egerton, judge on the LA Superior Court:

> I understand that some have raised concerns about Judge Kuhl's commitment to gender equality and reproductive rights. I do not share those concerns. . . . I have been a registered Democrat for thirty years, and I have supported—financially and otherwise—[Senator Feinstein], Senator Boxer, and other Democratic legislators and candidates. I have no reservations in recommending Judge Carolyn Kuhl . . . for appointment to the Ninth Circuit Court of Appeals.

Take Gretchen Nelson, pro-choice Democrat, plaintiff's attorney. On February 14 she had this to say:

> I am opposed to the appointment of any judicial nominee who is incapable of ruling based upon a considered and impartial analysis of all of the facts and legal issues presented in any manner. Judge Kuhl is not such a nominee and she is well-deserving of appointment to the Ninth Circuit.

Let's quit slandering these people. Let's quit distorting the facts. All because you think they might be pro-life.

My gosh, look at the women judges who support Judge Kuhl's confirmation. A bipartisan group of 23 women judges at the Los Angeles Superior Court, on February 22, said this:

> Judge Kuhl approaches her job with respect for the law and not a political agenda. Judge Kuhl has been a mentor to new women judges. . . . She has helped promote the careers of women, both Republican and Democrat. . . . As sitting Judges, we more than anyone appreciate the importance of an independent, fair-minded and principled judiciary. We believe that Carolyn Kuhl represents the best values of such a judiciary.

Let's get this out of this totally slanderous political debate and start talking about the real facts.

Democrats on this Floor have tried to confuse the issue, to pretend that what they are doing is no different than what happened to some of President Clinton's nominees. But they are dead wrong. They are comparing apples to oranges. They are different. We did not filibuster a single Clinton nominee who had majority support. Once on the floor, all of them received up or down votes. 377 confirmed for Clinton. Despite the Democrats, not because of them, we have confirmed 168 Bush nominees.

One Senator went so far as to call the four filibustered nominees, as of yesterday, lemons, if you can believe it, when all of them have well qualified ratings from the American Bar Association.

Look at the facts. President Bush has had 29 circuit court of appeals nominees confirmed, but another 12 of them, at least, are facing filibusters. I believe that number is really higher, about 17. It is an amazing, unprecedented series of filibusters of appellate nominees, what we are going through, and there are more to come.

Let me get the last chart up there. The real facts are that since we have had the filibuster rule, since the administration of Franklin Delano Roosevelt, we have had 2,372 judges confirmed and zero filibustered—until now.

Now, it is one thing to filibuster, it is another thing to slander these people. I have seen so much of that over the last 2 or 3 years that I am just sick of it. I am just sick of it.

Let's give these people votes up and down. The reason they will not is they know there are enough good-thinking people in this Senate on both sides who would—for all of these six people who are being filibustered—confirm them on a bipartisan majority.

So a tyrannical minority—which is in so many ways slandering these people, these honest, decent, good people—is preventing votes up and down on judicial nominees for the first time in the history of this country.

Mr. President, how much time do I have left?

The PRESIDING OFFICER. The Senator has 1 minute 15 seconds.

Mr. HATCH. I yield it to the distinguished Senator from Pennsylvania.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SANTORUM. Mr. President, I plead with the Members on the other side of the aisle to stop this. I have folks on our side of the aisle saying: Don't plead with them. Don't plead with them. Let them do it. Because we will have our opportunity someday, and we will make sure there is not another liberal judge ever, ever, to get on that—no more Richard Paezes, no more Ruth Bader Ginsburgs—never, because what is good for the goose is good for the gander. Let them up the ante. We will take all those activist judges they send up and we will shoot them down.

Is that what they want? Anybody who gives a political opinion in America no longer will be eligible for the judiciary. We are going to sanitize the judiciary? We are going to send it to ''Mediocrityville''? Is that what we really want here?

Because let me assure you, as I live and breathe, that is what will happen. If we keep this up—it is 4 today; it will be 6—in 2 hours it will be 6. The Senator from Utah said pretty soon it will be 12. Why it is only 4? Because you just started. You always start with 1.

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

Mr. SANTORUM. Stop now. You have a chance to save this country and this judiciary. Stop now.

The PRESIDING OFFICER. The Democrat leader is recognized.

Mr. DASCHLE. Mr. President, as I understand it, I have 10 minutes.

The PRESIDING OFFICER. The Senator is correct.

Mr. DASCHLE. I would ask the Presiding Officer if he could notify me when I have used all but 3 minutes.

Mr. President, I find it remarkable that our colleagues can continue to come to the floor these past 40 hours and lament the fact that we have had votes on 172 judicial nominees and 4 of them have not been confirmed because they have not attained cloture. With passion and with emotion they scream out. Where is the fairness for those four nominees, they ask. Where is the fairness?

I find it remarkable that some of the very people who lament not getting a vote for those 4 nominees were participants in the effort to deny even a hearing to 63 nominees for the bench during the Clinton administration. Don't talk to me about the unfairness of a cloture vote on the Senate floor. Don't talk to me about cloture. Don't talk to me until you talk about those 63 who waited, in some cases 4 years, and never got a hearing—or a committee vote.

Denying consideration of judicial nominees is an ongoing practice that our Republican colleagues have been involved in for as long as they have been in the Senate. So this extraordinary outcry, this emotional fervor that we hear so often on the other side, with their misleading charts, does not bear up to the facts.

You tell those 63 people who have not had even a chance for a vote, who should have been confirmed, how it is right for them now not to have the jobs for which they work were nominated—you tell them about the fairness of those four votes.

We have done all we can to work with our colleagues to accommodate all nominees. We have now spent 40 hours talking about this matter. And we have actually spent over 20 days debating judicial nominations since the Bush administration has come to office, 20 days debating and largely confirming the nominees sent to us from the White House.

From the beginning of these last 40 hours, our message was really very simple: We have confirmed 168 of the 172 nominees to date. We have worked with our colleagues on the other side to do as much as we can to ensure that they get a fair debate and ultimately an opportunity to be voted on, whether it is a cloture vote or an up-or-down vote on this Senate floor—unlike what they did on 63 occasions during the Clinton administration.

What we have said over the course of these 40 hours, though, is that it is very unfortunate that while we are debating these four jobs, we are not debating what the American people care most about. We are not debating the fact that 3 million people have lost their jobs, or what to do about it. We are not debating the fact that we are not working on the things the American people care most about.

Several times we spoke about the need to pass the highway bill, and our Republican colleagues ignored our concerns. Several times we spoke about the need to pass the manufacturing jobs credit bill; our Republican colleagues ignored our concerns. These are bills that could truly provide the opportunity for the unemployed in this country to actually acquire a good job and be a little more confident that they will have a brighter future.

Several times we have asked for an increase in the minimum wage by unanimous consent so those who are working would get the pay they deserve.

Republicans objected.

We could have been spending our time a lot more effectively, a lot more in concert with the expectations of the American people, but that has not been the case.

We will continue to work with our colleagues, and in those cases where we can find agreement, we will continue to confirm most of the Bush nominees. But that will not be the case this morning.

We are now debating three justices who continue to insist on putting their own views above the law, to interpret law on their own and without regard to judicial precedent.

As a result, virtually every single women's organization and every single civil rights organization in the country has urged the Senate, pleaded with all 100 Senators to reject these nominations.

I am very grateful for the effort made by our Democratic colleagues on the Judiciary Committee who have put the time and effort they have into analyzing the record of these nominees and have concluded, as I have, that they do not warrant confirmation.

Mr. President, there will come a day, once again, when we can find nominees for whom there can be agreement. But until that happens, until we have the confidence that we can look upon them with an expectation that they will uphold the law, interpret law and not write the law, we have no other recourse but to oppose their nominations, as we will this morning.

I yield such time as he may require to the distinguished Senator from New York.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. Thank you.

Mr. President, I thank my colleague from South Dakota for once again being our leader in every way. We are grateful to him, and I think I speak for every Member on this side of the aisle.

Mr. President, this debate ends as it began, with this one immutable fact: 168 to 4; 168 judges confirmed, 4 rejected.

The other side has spent 39 hours trying to come up with other signs, trying to come up with other ways. In reality, this debate has actually helped our side because this fact stands out above all others.

Are we being obstructionist when we approve 168 and reject 4? Everyone but the most extreme of Americans say absolutely not. Are we violating what the Founding Fathers wanted when they talked about advise and consent when we merely blocked 4, 2 percent of the 100 percent of the judges brought up? Every seventh grader who studies constitutional law knows that 168 to 4 is not obstructionist.

The bottom line is the other side has spent hours on sophistry, successful filibusters are wrong, but unsuccessful filibusters are OK because they engaged in filibusters on judicial candidates in 2000 and 1994 and previously. Filibusters of judges are unconstitutional, but filibusters of statutes, of laws, of bills are perfectly OK. What sophistry.

The bottom line is that the other side comes up first with the result and then tries to make the argument backward. I understand why. The small hard-right minority has a scorched earth policy in America. They have to get everything their way and then are pushing, pushing, pushing the other side. They are saying: Do something. But, frankly, because of the wisdom of the Founding Fathers, the Senate still is the cooling saucer, and there is nothing they can do.

This debate has degenerated. To try and get this to be 172 to 0, there is name-calling: anti-Hispanic, anti-Black, anti-Catholic. We know what low and cheap shots those are. We are opposing judges based on their being out of the mainstream, judges who would make law, not interpret law. I don't like judges far left or far right who do that.

Then last night we got from my good friend from Utah, whom I love, he says calling for rollcall votes was obstructionist. That is how absurd and how frustrated and how piqued the other side has been. Calling for rollcall votes on judges is obstructionist? I say to my colleagues, we on this side would have rather spent the time debating how to bring jobs back to America, how to bring health care to America, how to raise the minimum wage.

But at the end of the day, this exercise, come up in the mind of a few, has ended up benefiting us, and there is one solution, I say to my good friend from Pennsylvania, who pleads earnestly——

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

Mr. SCHUMER. To stop this, and that is come talk to us, work with us in a bipartisan way, nominate judges both sides can support. Don't say my way or the highway and this will stop. But that is the only way to stop it.

Thank you, Mr. President.

The PRESIDING OFFICER. The majority leader.

Mr. FRIST. Mr. President, over the past 2 days, the Senate has sustained what has truly been an extraordinary, all-hours debate, a debate on judicial confirmations and on the very nature of each Senator's duty and right to give advice and consent on the nominations sent to us by the President of the United States, just as the Constitution requires.

We have placed our differences over the last 39 hours, to paraphrase Justice Brandeis, in the disinfectant sunshine of public opinion. This continuous debate has been framed by the bipartisan effort on a very simple principle; and that is, give us an opportunity for an up vote or a down vote, just give us that right to vote.

We have been focused on the Fifth Circuit Court nominee, Justice Priscilla Owen of Texas, who has already been denied that simple up-or-down vote on three previous occasions. It has been focused on two new circuit court nominees from California, Judge Carolyn Kuhl, nominated to the Ninth Circuit Court of Appeals, and Janice Rogers Brown nominated to the DC Circuit Court of Appeals.

We also debated the bipartisan proposal cosponsored by Democrat Senator ZELL MILLER of Georgia to limit the use of the filibuster as to all nominations, a proposal that I believe will change the all too rancorous way that Washington does business. Indeed, this proposal, although more narrow, was based on one previously supported by Senators KENNEDY, LIEBERMAN, KERRY, and other Democrats.

The minority has suggested again and again—we heard it just a few minutes ago—that we should not have spent this time on this issue of the Constitution of the United States of America; that we should not have spent this time discussing the unfair treatment of the President's nominees. They argue that we should not have spent this time on these new judicial nominees that we will be voting on in cloture in just a few minutes.

We simply don't believe that the Senate stewardship, our responsibility, that stewardship for the third branch of Government is the least of our duties, as is suggested that we should not be spending time focused on these issues.

It is almost as if the other side of the aisle said these issues are not important. On the contrary, the Senate stewardship of the independent judiciary is perhaps the Senate's most important task. Why? Because it is our responsibility. It is not the responsibility of the House of Representatives.

George Washington understood this. He believed the judiciary was the most important of the three branches because the courts would protect our liberties. But America's courts do much more than that.

We heard a lot about the economy. We heard a lot about jobs. It is our independent judiciary that provides the anchor for America's economic strength. It is the stability, and it is the confidence that our courts provide that make the United States of America the safest location, the best location for domestic investment, for foreign investment, whether in industry or commerce, and for the overall economy. Why? Because the courts protect those liberties. That means, what? More jobs. It means more prosperity for all Americans.

Our courts guard the rule of law, and to the extent they are free of results-oriented politics and other forms of corruption, they are the foundation stones that have allowed America's history to unfold differently than our sister republics to the south.

In this past year, Americans have come to understand the influence of the courts over our everyday lives, over our daily lives, over our national culture in ways that our Founding Fathers would have never imagined.

Of course, the Democrats' complaint that we are spending too much time on these issues is a little bit strained in that it is they who are filibustering, continuing to debate, denying that opportunity to vote yes or no on these nominees. The filibuster rule, when not abused, is intended to give the minority more time, to allow more time for debate.

Despite the complaints and the charges back and forth, I do give my Democratic colleagues real credit for collegially joining in this debate over the last 39 hours. I am enormously proud of my Republican colleagues. I believe that both sides should feel a certain degree of satisfaction as to how this historic debate has been conducted.

In the past 2 days, we have debated three nominees who the American Bar Association considers qualified to serve on the appellate court but who a Democrat minority considers out of the American mainstream. How many times have we heard that over the last 39 hours—''out of the mainstream.''

I can tell you I don't think the minority has argued effectively or persuasively how Justice Owen, who was elected to the Texas Supreme Court by 83 percent of Texas voters, is out of the mainstream. Out of the mainstream, Justice Brown. Out of the mainstream when she was retained to serve by 76 percent of California voters? Is that out of the mainstream?

They have certainly not convinced any fairminded person how it is that Judge Carolyn Kuhl—who has the support of over 100 California judges and labor unions across the political spectrum, and yes, even trial lawyers—cannot serve on that Ninth Circuit, that really worrisome Ninth Circuit Court that declared the Pledge of Allegiance unconstitutional.

What we have seen, and the reason this debate is historic is that it underscores and it lets the American people know, as well as restates the importance of the issue, that over the past year, the minority has used the filibuster to deny a bipartisan majority the opportunity to vote up or down, to give advice and consent. Let me say that again.

A minority, for the first time in history—it happened this year—for the first time in history, a minority in this body is using the filibuster to deny a bipartisan majority the opportunity to vote yes or no.

It has come up that while majorities have delayed judges in the past through the majority's delegation to the Judiciary Committee, votes on judges have never before been blocked by a minority. Of course, this debate has been more than about Senate procedure. In effect, what we have seen over the last year is the minority is, in effect, amending the people's Constitution without the people's assent. The reason for this is now well know.

Senate liberals have sought with increasing intensity to politicize not just the confirmation process, but the courts themselves. In pursuing this course, they are threatening the legitimacy of America's courts. That legitimacy comes from much more than just black robes or a high bench. It comes from the people's belief that judges will apply the law or the Constitution without regard to personal politics.

Rather than seeking to determine the judiciousness of a nominee and whether a nominee will be able to rule without bias, liberal Democrats are out to guarantee that our judges are, in fact, biased against some and in favor of others. In America, with that result,

citizens will have to worry about the personal politics of the judge before whom they come for justice. I say judiciousness, why?

Like other Senators this year faced with the question of what is required by the Constitution's mandate that the Senate give the President advice and consent, I have turned for guidance to the Founding Fathers and especially to the father of the independent judiciary, John Adams, to find that correct standard by which we give advice and consent on a judicial nominee.

President Adams, the father of our independent judiciary, memorialized for us what the standards should be for confirming our judges. He wrote that they should be ''men [and women] of experience on the laws, of exemplary morals, invincible patience, unruffled calmness, and indefatigable application who will be appointed for life and subservient to none.''

President Adams understood well enough the challenge of being judicious despite one's opinions and even in the face of unpopular opinion. Few people remember it was John Adams who defended the British soldiers who, on March 5, 1770, shot into a crowd on the streets of Boston. Our children study this episode today as the Boston massacre. It is a history lesson we can learn from in our work and on judicial nominations.

John Adams defended the British soldiers before a Boston court with angry mobs in the street.

I will close in a second. I will speak on leader time for the next minute.

I have to wonder, Mr. President, if today John Adams would be obstructed by filibuster because an out-of-touch minority, urged on by special interest groups, questions John Adams' qualifications based on his past advocacy simply for being a good lawyer defending a client, however politically unpopular.

In a few minutes, the filibustering minority will have another opportunity to stand in the light of the Senate floor and do the right thing. I say to the minority: Give these nominees a vote. Vote them up or vote them down, but just give them an honest up-or-down vote.

The PRESIDING OFFICER. The Democratic leader.

Mr. DASCHLE. Mr. President, I will use leader time first to engage in a brief colloquy with the distinguished majority leader with regard to the schedule for the remainder of the day. I wonder if he can inform us as to what his intentions are with regard to schedule.

Mr. FRIST. Mr. President, I will be happy to talk during the votes with the leadership on the other side. My intent would be to have these three consecutive cloture votes and then after that have no other votes today. Before saying that with definitiveness, I would like to have a discussion with the minority leader, if there is other business he would like to bring to the floor as well.

We likely will have other business following that. Again, I expect no rollcall votes after these three votes.

Mr. DASCHLE. I thank the majority leader.

Mr. President, I also note at the end of this period of time, we have been here now for about 40 hours. It is probably not accurate to say we have all been here for 40 hours. Some of us had the luxury of coming and going, but there have been a lot of staff on the Senate floor, in our cloakrooms, in the Sergeant at Arms Office, our Capitol Police, all of our clerks—the extraordinary effort that they have made in these last 40 hours should be recognized.

I know I speak for all of our colleagues on both sides of the aisle in expressing our heartfelt gratitude to all of them. Once again, they have exceeded our expectations, and we are grateful for their dedication and professionalism during these difficult days.

I yield the floor.

NOMINATION OF PRISCILLA RICHMAN OWEN, TO BE UNITED STATES CIRCUIT JUDGE FOR THE FIFTH CIRCUIT

CLOTURE MOTION

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

The assistant legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 86, the nomination of Priscilla Richman Owen, of Texas, to be United States Circuit Judge for the Fifth Circuit.

Bill Frist, Orrin Hatch, Lindsey Graham, Mike Crapo, Jeff Sessions, Conrad Burns, Larry E. Craig, Saxby Chambliss, Mitch McConnell, Jim Bunning, Judd Gregg, John Cornyn, Jon Kyl, Trent Lott, Mike DeWine, Craig Thomas, Kay Bailey Hutchison.

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

The question is, Is it the sense of the Senate that debate on Executive Calendar No. 86, the nomination of Priscilla Richman Owen, of Texas, to be United States Circuit Judge for the Fifth Circuit, shall be brought to a close? The yeas and nays are mandatory under the rule. The clerk will call the roll.

Mr. REID. I announce that the Senator from Delaware (Mr. CARPER), the Senator from North Carolina (Mr. EDWARDS), the Senator from Hawaii (Mr. INOUYE), the Senator from Massachusetts (Mr. KERRY), and the Senator from Florida (Mr. NELSON) are necessarily absent.

I further announce that, if present and voting, the Senator from Delaware (Mr. CARPER) and the Senator from Massachusetts (Mr. KERRY) would each vote ''nay.''

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

The yeas and nays resulted—yeas 53, nays 42, as follows:

The result was announced—yeas 53, nays 42, as follows:

[Rollcall Vote No. 450 Ex.]

YEAS—53

Alexander	Dole	Miller
Allard	Domenici	Murkowski
Allen	Ensign	Nelson (NE)
Bennett	Enzi	Nickles
Bond	Fitzgerald	Roberts
Brownback	Frist	Santorum
Bunning	Graham (SC)	Sessions
Burns	Grassley	Shelby
Campbell	Gregg	Smith
Chafee	Hagel	Snowe
Chambliss	Hatch	Specter
Cochran	Hutchison	Stevens
Coleman	Inhofe	Sununu
Collins	Kyl	Talent
Cornyn	Lott	Thomas
Craig	Lugar	Voinovich
Crapo	McCain	Warner
DeWine	McConnell	

NAYS—42

Akaka	Dodd	Leahy
Baucus	Dorgan	Levin
Bayh	Durbin	Lieberman
Biden	Feingold	Lincoln
Bingaman	Feinstein	Mikulski
Boxer	Graham (FL)	Murray
Breaux	Harkin	Pryor
Byrd	Hollings	Reed
Cantwell	Jeffords	Reid
Clinton	Johnson	Rockefeller
Conrad	Kennedy	Sarbanes
Corzine	Kohl	Schumer
Daschle	Landrieu	Stabenow
Dayton	Lautenberg	Wyden

NOT VOTING—5

Carper	Inouye	Nelson (FL)
Edwards	Kerry	

The PRESIDING OFFICER. On this vote, the ayes are 53, the nays are 42. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is not agreed to.

NOMINATION OF CAROLYN B. KUHL TO BE UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT

CLOTURE MOTION

The PRESIDING OFFICER. Under the previous order, the clerk will report the motion to invoke cloture.

The legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of Rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 169, the nomination of Carolyn B. Kuhl, of California, to be United States Circuit Judge for the Ninth Circuit.

Bill Frist, Orrin G. Hatch, Lindsey Graham, Mike Crapo, Jeff Sessions, Conrad Burns, Larry E. Craig, Saxby Chambliss, Mitch McConnell, Jim Bunning, Judd Gregg, John Cornyn, Jon Kyl, Trent Lott, Mike DeWine, Craig Thomas, Kay Bailey Hutchison.

Mr. LEAHY. Mr. President, I want to commend the Senators from California for their leadership in connection with this matter.

Today, the Senate is considering the nomination of California Judge Carolyn Kuhl to the U.S. Court of Appeals

for the Ninth Circuit. In accordance with Republican practices during the period 1995–2000, this nominee would have never come to the Judiciary Committee for a hearing in the first place and would never have been voted upon by the Judiciary Committee. This consideration on the Senate floor today underscores the President's refusal effectively to consult with the home-State Senators from California, both of whom oppose this nomination. In fact, this vote is the culmination of a year in which the President's disregard for home-State Senators and the Republican majority's disregard of past practices to achieve their partisan political objectives could not be more calculated.

Judge Kuhl's appearance before the Judiciary Committee, despite the clearly stated opposition of Senator BOXER, was only one in a string of transparently partisan actions taken by the Senate's Republican majority since the beginning of this Congress. In each of these actions, Republicans have done something they never did while in the majority from 1995 to 2000. Throughout the course of this year, they have continued to ratchet up their unprecedented partisanship and the use of judicial nominees for partisan political purposes.

The Republican majority took a step on the nomination of Judge Kuhl that was unprecedented for this Chairman. They scheduled a hearing for a nominee who did not have approval from both of her home-State Senators, a nominee for whom both blue slips were not returned positively. There is not a single example from 1995 through 2000, when the President was a Democratic President, and when Republican Senators were objecting, when the Judiciary Committee held a hearing on a judicial nominee over the objection of a home-state Senator.

Senate Republicans should remember that when the nomination of Ronnie White of Missouri was finally voted upon in 1999, all Republicans, in an unprecedented party-line vote, defeated that nomination. Several Republican Senators who had voted in favor of Justice White when he was considered by the Committee changed their positions and voted against his confirmation. The facts are that, at the time of his hearing, the senior Senator from Missouri supported the nomination and endorsed him at his hearing, and the junior Senator did not object to the hearing. Senator Ashcroft then chose to vote against the nomination. On the eve of the vote on the nomination, Senator BOND changed his position and decided to join Senator Ashcroft in opposing the nomination.

In connection with that vote, Senator HATCH said that if both home-State Senators had opposed the nomination earlier, it would never have proceeded. He told the Senate: ''[H]ad both home-State Senators been opposed to Judge White in committee, Judge White would never have come to the floor under our rules. I have to say, that would be true whether they are Democrat Senators or Republican Senators. That has just been the way the Judiciary Committee has been.''

The Ronnie White nomination is not an example of a previous time that the Committee and the Senate proceeded over the objections of home-state Senators. To the contrary, it is precisely the opposition, a clear precedent the other way.

While it is true that various Chairmen of the Judiciary Committee have used the blue-slip in different ways, some to maintain unfairness, and others to attempt to remedy it, it is also true that each of those Chairmen was consistent in his application of his own policy—that is, until the Kuhl hearing. That was the first time that this Chairman ever convened a hearing for a judicial nominee who did not have two blue slips acceding to a hearing.

This Republican President's choice of Carolyn Kuhl for a vacancy on the Ninth Circuit is a divisive and political choice. As a lawyer in the Reagan Administration, a lawyer in private practice, and as a state court judge, Judge Kuhl has demonstrated an extreme philosophy that threatens the rights and interests of Americans, particularly women's rights, other civil rights, and access to justice. Among other significant cases, Judge Kuhl spearheaded an effort to reverse the Reagan Administration's policy on tax-exempt status for racially discriminatory private schools, including Bob Jones University. She has also consistently advocated against women's rights and reproductive rights—from aggressively pushing the Justice Department to argue for a reversal of Roe v. Wade, to arguing for limits on the reach of sexual harassment laws, to rulings as a judge which raise concerns about her commitment to privacy rights.

This nomination has generated widespread opposition and requests that the Senate not consent to her confirmation. Among the many membership organizations that have written in opposition are: Seven members of the California Assembly Committee on the Judiciary, California Women Lawyers, the Japanese American Citizens League, the Leadership Conference on Civil Rights, People for the American Way, Planned Parenthood Federation of America, Taxpayers Against Fraud and many, many more.

I suspect we will hear these groups, and the others who oppose the President's nomination of Judge Kuhl, vilified as members of some left-wing conspiracy, intent on sinking each and every nominee, no matter what their views. But I would like to remind those who would raise that argument, as I have before, that these organizations represent millions of citizens with legitimate concerns about the direction of the judiciary in this country. I appreciate their willingness to participate in the process and their refusal to be intimidated into silence. The Washington Times has conceded that ''President Bush has seen more of his appeals court nominees confirmed by the Senate at this point in his term than any other president since at least the 1970s.'' When I was Chairman of the Judiciary Committee during the 107th Congress, the Senate confirmed 100 of this President's nominees. So far this year, the Senate has confirmed 68 additional judges nominated by President Bush. The Senate has now confirmed 168 of the Bush judicial nominees. That is more confirmations than in all of President Reagan's first term and more judges in one year than were confirmed during all of 2000, 1999, 1998, 1997, 1996 or 1995.

Among those 168 confirmations are 29 circuit judges. That is more circuit judges at this point in his presidency than were confirmed for President Reagan, President Bush or President Clinton. So far this year the Senate has confirmed 12 circuit court judges. In the comparable year of 1999, Republicans allowed only 7 circuit court judges to be confirmed all year.

Four of President Bush's nominees to the Ninth Circuit Court of Appeals have already been confirmed. Richard Clifton was given a hearing and confirmed under Democratic leadership. Just this year, the Senate has confirmed two additional Ninth Circuit nominees, one of whom, Jay Bybee, was quite controversial. Just before the Memorial Day recess, Democratic Senators expedited and encouraged the Majority Leader to allow a vote on the nomination of Judge Consuelo Maria Callahan, a consensus nominee with support from both home-State Senators. And, in September, Democratic Senators supported the nomination of Judge Carlos Bea, another nominee with support from both home-State Senators.

Unlike the divisive nomination of Judge Kuhl, both home-state Senators supported the nominations of Judge Callahan and Judge Bea. Rather than disregarding time-honored rules and Senate practices, my friends on the other side of the aisle should help us fill more judicial vacancies more quickly by bringing those nominations that have bipartisan support to the front of the line for Committee hearings and floor votes.

Republican Senators have been claiming that there have never been filibusters of nominees before and arguing that every nominee always gets a Senate up or down vote. That was certainly not the case for 63 of President Clinton's judicial nominees and for hundreds of his Executive Branch nominees. Such a claim is so contrary to history it is breathtaking in its boldness. On a single day in 2000, the Senate had to invoke cloture to stop Republican filibusters of the nominations of Judge Richard Paez and Marsha Berzon. Republicans also unsuccessfully filibustered Judge Rosemary Barkett and Judge H. Lee Sarokin in

1994. They successfully filibustered Executive Branch nominees such as ambassadorial nominees and the nomination of a Surgeon General, and the list goes on and on. I have spoken about them before.

This White House has been the most aggressive in recent history in its efforts to pack the federal courts and tilt it sharply toward a narrow ideology. The most extreme of the Administration's nominees are not being approved. We are seeking to maintain the independence of the Federal judiciary and to protect the rights of Americans in so doing. The Administration and its supporters have taken to using these nominations as partisan matters and to drive wedges between Americans. I have urged that the President be a uniter rather than a divider on this important lifetime nominations, but my voice has been ignored.

The provocative steps taken by the White House and Senate Republicans have broken new grounds in politicizing the Federal judiciary. The Republican majority has shown a corrosive and raw-edged willingness to change, bend and even break the very same rules that they took advantage of when the judicial nominees involved were a Democratic President's choices.

One of Carolyn Kuhl's most notorious decisions as a lawyer in the Reagan Justice Department is among her most troubling. As a political appointee serving directly under the Attorney General of the United States, she spearheaded an effort in the Reagan Administration to reverse position in the Bob Jones University case. This was the case challenging IRS rules denying tax-exempt status to schools that racially discriminate.

In 1981, the IRS rules were challenged by Bob Jones University, which wanted to keep avoiding their tax responsibilities despite a policy prohibited interracial dating. When the school took this issue to the Supreme Court in 1981, the Reagan Justice Department was prepared to defend the rules, as is its duty. But in January 1982, the government suddenly changed its position, and argued that the IRS had no legal authority to deny tax-exempt status and agreed to give Bob Jones, despite its blatant policies of racial discrimination, the tax exemption.

Then-Congressman TRENT LOTT, supported by Senator Strom Thurmond, was pivotal in the lobbying effort to change the government's position, and then-Special Assistant to the Attorney General Carolyn Kuhl concurred. This decision was so outrageous that more than 200 career lawyers in the Justice Department's Civil Rights Division objected to the change of position in a letter to their Assistant Attorney General.

According to records of Congressional hearings on the topic and a New York Times article written at the time, Carolyn Kuhl was one of three people characterized as ''a band of young zealots'' at work as political appointees at the Department of Justice, and part of the ''Bob Jones team'' who opposed the overwhelming sentiment and ''pressed for the legal switch to give Bob Jones its tax exemption.'' Indeed, Carolyn Kuhl and Charles Cooper, then-Special Assistant to Attorney General William French Smith, co-authored a 40-page memorandum to Civil Rights Division Head William Bradford Reynolds strenuously arguing that ''the [IRS] Commissioner's Ruling denying tax-exempt status to racially discriminatory private educational institutions is supported by neither the language nor the legislative history of Section 501(c)(3)'' and that the IRS should therefore ''reverse its position'' in the case and ''accord tax-exempt status'' to Bob Jones.

The Supreme Court, in an 8–1 ruling, repudiated Carolyn Kuhl's position and denied the school tax-exempt status. Chief Justice Warren Burger wrote for the majority, ''[a]n unbroken line of cases following Brown v. Board of Education establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals.''

It is interesting to note that the reason we know so much about Judge Kuhl's advocacy on behalf of schools like Bob Jones is because of internal Justice Department documents turned over to the Senate Finance Committee in February of 1982. At that time, in the wake of the Reagan Administration's switch in position, the Committee held a hearing to consider a legislative fix to the problem. A number of Justice Department memoranda as well as communications between high-level officials were turned over to the Committee in connection with the hearing, just months after the documents were first written. The House Ways and Means Committee held a similar hearing on February 4, 1982. Among the documents turned over to these Congressional committees was a memo written by Carolyn Kuhl on December 8, 1981 to Ken Starr noting Reagan/Bush campaign statements on private schools and a memorandum written by Carolyn Kuhl and Charles Cooper, one of the other members of the ''Bob Jones team,'' to Civil Rights Division Head Reynolds regarding the Bob Jones case.

At her hearing, Judge Kuhl conveniently told us that she regretted having taken the position she did at the time. Although it was the first time she had ever said so publicly, at her hearing, she claimed that in 1982 she had been concerned about the implications the Bob Jones policy would have on all-girls' schools. This concern was not reflected in her memos at the time, and has not been heard in any other context. But, taking her at her word that this was truly a concern, the explanation she gave at her hearing is still very interesting. She said, and I'll quote her, ''I had attended an all-girls' school and I did not want to see a precedent created that would have meant that tax exemptions could be taken away from all-girls' schools because they discriminated against men.'' In other words, she advocated helping a school that was racially discriminatory because of her personal affinity for her alma mater. Either way, whether or not you believe her newly articulated explanation, her responses on this issue raise as many questions as they answer.

Judge Kuhl also contended at her hearing that her advocacy on behalf of Bob Jones University should be excused because of her relative youth and inexperience. This too seems a convenient explanation. She describes herself as someone two and a half, maybe three years out of law school with no decision making authority, painting the picture of a naive young attorney with no influence over such important decisions. But this was 1982, five years after her graduation from law school, and she had proven herself enough to have landed one of the most prized jobs for a political appointee with a law degree: Special Assistant to the Attorney General of the United States. She doubtless had daily personal contact with the nation's highest law enforcement officer, and as his protégé represented his position to the very influential people serving under him, including Solicitor General Charles Fried and Head of the Civil Rights Division William Bradford Reynolds. While I accept the contention that she was not the final decision maker on the Bob Jones matter, the facts lead me to believe that her arguments were taken seriously and held more than a little weight. I think Judge Kuhl underestimated the esteem in which her legal abilities were held. Indeed, only a few years later, she became the Deputy Assistant Attorney General in the Civil Rights Division, with managerial responsibilities for hundreds of attorneys.

I would argue that Judge Kuhl's participation in this case exceeded an attorney's obligation to be a zealous advocate. Rather, her aggressive involvement surely helped build momentum behind the drastic change in position the Justice Department would take. But the substantive weakness of her argument in the face of legal precedent only underscores how political and results-oriented it was. So thin was her case that it caused the New York Times to wonder ''How could any president be given such incompetent legal advice? How could lawyers for the U.S. Government stray so far from the mainstream of the Country's understanding on the racial issue? How could a president at this stage in our history play with the issue for political reasons?'' Judge Kuhl cannot so easily explain this away.

When she was Deputy Solicitor General in the Reagan Justice Department, Carolyn Kuhl tried to persuade the U.S. Supreme Court to eliminate its ''associational standing'' doctrine in

United Automobile Workers Union v. Brock, 477 U.S. 274 (1986). In this case, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) challenged the Secretary of Labor's interpretation of provisions of the Trade Act which would have deprived the union members of certain benefits—benefits available to assist workers laid off because of competition from imports. The issue on appeal to the U.S. Supreme Court was whether the UAW had standing to sue in federal court on behalf of its affected members.

Although Judge Kuhl stated at her hearing that she was not on the brief in this case, she later revised her testimony in written answers, saying that she had confused this case with another. Although she was still not completely forthcoming in her responses, I discovered that she was in fact one of five high level officials on the brief and that she argued the case before the U.S. Supreme Court in March 1986.

In her arguments, she urged the Supreme Court to eliminate the doctrine of representative standing in favor of requiring organizations to meet the requirements for class certification under Rule 23 of the Federal Rules of Civil Procedure. But, she then also admitted that the government would oppose a request for class certification in this case. She stated in her brief that the Supreme Court should ''reconsider the doctrine in light of the practical and analytical difficulties it presents'', and that the doctrine was not of that ''longstanding effect.'' A significant portion of her brief was devoted to the more far-reaching arguments of why the doctrine of representative standing should ''not be recognized'' and why the class action provisions should be applied instead.

The majority of the Supreme Court rejected her arguments and concluded that the government's presentation ''has fallen far short of meeting the heavy burden of persuading us to abandon settled principles of associational standing.'' Id. at 290.

The doctrine of representative standing allows unions, environmental organizations, business groups, and others to protect the interests of their members in court. Elimination of the doctrine would greatly impede the ability of organizations to represent their members. For this reason, a diverse group of organizations, including the U.S. Chamber of Commerce and the AFL–CIO filed an amicus brief opposing Kuhl's position in the case.

Judge Kuhl's arguments in this case raise concerns about whether she would protect the rights of working men and women or curtail access to the courts for such individuals. In addition to this case, as a judge on the state court, she has issued troubling decisions with regard to the rights of working Americans and access to justice, such as a case in which she found that a woman target of a SLAPP (Strategic Lawsuit Against Public Participation) suit was not entitled to recover attorneys' fees for successfully defending against the suit—a decision which was unanimously reversed by the appellate court.

Other cases in which Judge Kuhl was involved with while at Justice demonstrate that on issues related to privacy and women's rights she clearly has an ideological agenda. As Deputy Solicitor General, Kuhl co-authored the Reagan Administration's amicus brief in Thornburgh v. American College of Obstetricians and Gynecologists, urging the Supreme Court to uphold Pennsylvania's severe restrictions on abortion, including prosecution of doctors. Her view on the matter is documented not only in the brief, but also by her boss at the time, Charles Fried, then-Solicitor General, who recounts in his memoirs that, ''[t]he most aggressive memo [about Roe v. Wade] came from my friends Richard Willard and Carolyn Kuhl, who recommended that we urge outright reversal of Roe.''

In that brief, Kuhl argued that the courts below placed too much emphasis on the woman's right to privacy. Moreover, the brief discusses issues beyond the merits of the particular case and urged the Supreme Court to abandon its principles of stare decisis and overturn settled law. In a 6–3 decision, the Supreme Court also rejected that call.

As Deputy Solicitor General, Carolyn Kuhl argued for an extremely narrow legal definition of sexual harassment in the landmark case of Meritor Savings Bank v. Vinson. A female employee, Mechelle Vinson, filed suit against her supervisor and the bank that employed her, alleging that the supervisor had sexually harassed her and that she had been terminated when she refused him, violating her rights under Title VII of the Civil Rights Act. Kuhl's brief for the Reagan Administration argued that Ms. Vinson's claim should be dismissed because her conduct had been found by the trial court to be voluntary. The Supreme Court found the opposite, and held that the claim could go forward no matter the characterization of Ms. Vinson's conduct, as long as the sexual attention she was getting, described by the court as ''appalling'' and ''especially egregious,'' was unwelcome.

It would have been bad enough that Judge Kuhl had taken this position as a political lawyer at the Justice Department, trying to narrow the rights of victims of sexual harassment as part of the Reagan agenda, but even worse and more puzzling, was her explanation of the case at her hearing.

Just as she articulated a never-before heard explanation for her position in the Bob Jones case, Judge Kuhl told us at her hearing that she was ''very happy'' with the decision, and that the Supreme Court's reasoning ''tracked'' the brief she wrote. She dismissed Senator FEINSTEIN's concerns that the Justice Department had declined to accept the unwelcomeness standard adopted by the Supreme Court, brushing her off with a vague mention of the question of the voluntary nature of Ms. Vinson's behavior. This explanation is mystifying, and sounds to me like an attempt to put a positive spin on an issue she knew Democratic Senators would view with suspicion. She knew that those of us concerned with allowing victims of discrimination an opportunity for redress would have problems with her brief in Meritor Savings, and she fudged an answer to try to look like she agreed with us. Such obfuscation should not be allowed to succeed. I would have preferred it if she had been up front with us about her brief and its relationship to the Court's decision.

Judge Kuhl's record on the state bench offers another example of her troubling views on privacy. In the recent case of Sanchez-Scott v. Alza Pharmaceuticals, et al., Judge Kuhl's decision to dismiss a claim for invasion of privacy brought by a cancer patient against her doctor and a pharmaceutical company was reversed by the appellate court. The plaintiff, a patient undergoing chemotherapy for breast cancer, was examined by her oncologist, Dr. Monty Polonsky, in the presence of an unidentified man who turned out to be a representative of a pharmaceutical company.

The complaint stated that the doctor introduced the man, a Mr. Martinez, as, ''a person . . . who was looking at Dr. Polonsky's work,'' but no further details about his identity were provided. During the course of the physical, Ms. Sanchez-Scott felt warm and began to use a pocket fan to cool herself. The doctor took the fan from the plaintiff and gave it to Mr. Martinez so he could fan the plaintiff because, as he told her, ''[i]t would give him something to do.'' Then, the doctor and Mr. Martinez began to laugh at the plaintiff, who became very uncomfortable and asked for the fan back, saying she could fan herself. Mr. Martinez refused and continued to fan her. Dr. Polonsky examined Ms. Sanchez-Scott while she was undressed from the waist up, while Mr. Martinez sat beside the examining table and watched. Only when she went to the reception desk after her exam was over did Ms. Sanchez-Scott learn that Mr. Martinez was a drug salesman, and not a trained medical professional. Ms. Sanchez-Scott explained that she felt uncomfortable and embarrassed and cried from shame and anger once she left the doctor's office.

Judge Kuhl found that the plaintiff could not sustain an action for an invasion of privacy against the doctor because what happened to her did not meet the test of being ''highly offensive to a reasonable person.'' She reasoned that Ms. Sanchez-Scott had been introduced to Mr. Martinez, knew he was there and could have made further inquiry about who he was or object to his presence. She also found relevant that there was no touching, and that

nobody else found out about the presence of the drug salesman in the exam room. She also explained that because the patient would not have a reasonable expectation that a medical procedure would only be observed by a doctor, there could be no expectation of privacy. The appellate court ridiculed her reasoning and allowed the plaintiff to continue with her invasion of privacy claims against her doctor.

Again, at her hearing, Judge Kuhl's answers were misleading. When questioned about this case by Senator DURBIN, Judge Kuhl tried to make herself seem sympathetic to Ms. Sanchez-Scott's plight. She told Senator DURBIN that she could understand why the plaintiff was upset, that she had good reason to be upset. But Judge Kuhl misstated crucial facts about the case that would have shed a clearer light on her legal ruling. She told Senator DURBIN that the plaintiff's claim for invasion of privacy against the doctor was permitted to go forward, an assertion that is simply not true. Later, in a letter to Senator HATCH, she did correct herself, but the impression she tried to leave at the hearing was contrary to the facts. If her ruling in the Sanchez-Scott case had been allowed to stand, the case against the doctor for an invasion of privacy would not have been able to go forward. I know this sounds like nitpicking about a minor procedural issue, but it is more than that. It is about her sensitivity to privacy issues, her ability to follow the law, and her pattern of trying to spin her negative positions to her benefit at her hearing.

Ms. Sanchez-Scott does not see it as nitpicking either. In a letter she wrote to the Committee about her experience in Judge Kuhl's court, she expresses her opposition to rewarding the judge with a promotion to the federal court. She tells us that, ''[a]s a cancer survivor, I trusted that my doctor would make decisions in my best interest . . . I was . . . shocked and dismayed that Judge Kuhl determined that I, not the doctor, had the obligation to protect my privacy in his exam room.''

This President talked about being a uniter, not a divider, yet he has failed to work with all home-State Senators to identify qualified candidates who can be supported by both sides. A recent opinion piece in the Washington Post had it right when it said that rather than promoting ''bipartisanship,'' which this President said he wanted, he has instead promoted ''hyper-partisanship.'' I hope—for the sake of our country and the independence of the judiciary—that the White House and the Senate majority decide to work with Democratic Senators to identify qualified, mainstream nominees who can be supported by all sides and to abandon their quest to pack the circuit courts with activists and ideologues.

I ask unanimous consent that several letters in opposition be printed in the RECORD.

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

CALIFORNIA LEGISLATURE,
Sacramento, CA, February 11, 2003.

Re Oppose the nomination of Carolyn Kuhl to the Ninth Circuit Court of Appeals.

Hon. DIANNE FEINSTEIN,
U.S. Senate, Hart Office Building, Washington, DC.

DEAR SENATOR FEINSTEIN: We are writing as members of the Judiciary Committee of the California Assembly to urge you to oppose the nomination of Judge Carolyn Kuhl to serve on the Ninth Circuit Court of Appeals. We believe that Judge Kuhl's record indicates that her opinions would potentially threaten laws protecting California's environment and civil rights, and the rights of our citizens to privacy and reproductive choice. As part of President Bush's effort to nominate numerous ultra conservative judges to lifetime positions on the federal bench, this nomination represents an unacceptable risk to our state and the nation.

Judge Kuhl's nomination is opposed by more than 40 organizations representing civil rights, religious, environmental, reproductive rights and labor organizations, including the Sierra Club, National Organization for Women, California Abortion Rights Action League, National Women's Law Center, People for the American Way, and the Alliance for Justice among others. Their concerns run the gamut from Judge Kuhl attempting to close off access to the courts by overturning the doctrine of associational standing (the right of organizations to file suit on behalf of their members), to convincing the Reagan administration during her tenure with the Justice Department of attempt overturning Roe v. Wade. As a private attorney she argued in support of regulations prohibiting doctors and health care professionals at federally-funded clinics from counseling women about abortion, or even informing them that abortion was a legal medical option.

Still other of Judge Kuhl's positions show just how far she is from the mainstream of legal thought on issues of concern to most Californians. For example, Judge Kuhl was one of two Justice Department officials who convinced the Attorney General to reinstate the tax exempt status for the segregationist Bob Jones University. This position was opposed—in writing by more than 200 lawyers in the Justice Department's civil rights division, and was even opposed by President Reagan's Solicitor General, Ted Olson.

As a California state trial court judge, Judge Kuhl has not generally written published decisions. However, several published cases cause us concern about her willingness to protect the basic rights of individuals. For example, in one case Judge Kuhl dismissed a breast cancer patient's claim of invasion of privacy after her doctor brought drug company representative into the room during a breast exam. This ruling was reversed on appeal. In still another controversial decision, Judge Kuhl dismissed a case brought under California law enacted to prevent suits against whistleblowers and others acting in the public interest. The California appellate court again reversed Judge Kuhl's decision calling it ''a nullification of an important part of California's anti (abusive lawsuit) legislation.''

Finally, in her career Judge Kuhl has been aligned with some of the most ideologically intransigent and far-right elements of the Republican Party. She is a member of the Federalist Society, which seeks to establish an ultra-conservative federal bench. We believe that placing Judge Kuhl on the Ninth Circuit Court of Appeals would be a grave error that would threaten California law and place a relatively young and ultra-conservative jurist in a lifetime position on one of the most important courts (after the Supreme Court) for our state. We urge you to oppose her nomination as forcefully as possible.

I thank you for considering our views.

Sincerely yours,

ELLEN CORBETT,
Chair, Assembly Committee on Judiciary.

CALIFORNIA WOMEN LAWYERS,
Sacramento, CA, March 26, 2003.

Re opposition—Carolyn Kuhl appointment.

Senator DIANNE FEINSTEIN,
U.S. Senate, Hart Senate Office Building, Washington, DC.

DEAR SENATOR FEINSTEIN: I am writing on behalf of California Women Lawyers (CWL) to inform you of CWL's opposition to the confirmation of the nomination of Los Angeles Superior Court Judge Carolyn Kuhl to the Ninth Circuit Court of Appeals. As you may know, CWL is a statewide organization of women attorneys dedicated to advancing the interests of women, both in the legal profession, and in society, through education, legislation and advocacy. CWL supports a fair and balanced judicial nominating process and process and opposes an extreme right-wing federal bench engaged in ultra-conservative judicial activism.

CWL supports the appointment of federal judges who are open-minded, view the constitution as a living document and who are committed to the role of federal courts in protecting civil rights and individual liberties, and in guaranteeing due process, equal protection of the law, the right of privacy and access to justice. We believe that Judge Kuhl's record indicates she is unsuited for a position on the Ninth Circuit bench.

Judge Kuhl is a longtime member of The Federalist Society and adheres to the ultra-conservative philosophy espoused by that group. While working at the Department of Justice, Ms. Kuhl vigorously supported tax-exempt status for Bob Jones University, despite its history of racial discrimination. Ms. Kuhl has also argued in favor of overturning Roe v. Wade, as well as onerous regulations burdening abortion rights. While on the Superior Court bench, her decisions have been reversed by the California Courts of Appeal for restricting the rights of individuals to sue to protect their privacy and to protect themselves from harassment suits under California law decisions which she based on her narrow interpretation of statutes which clearly favor such individual rights.

Ms. Kuhl's record reveals that she is wedded to an extremist philosophy that is far removed from the beliefs of most Americans. Our nation deserves a federal court pledged to upholding constitutional rights secured through Supreme Court precedents and embodied in civil rights statutes. CWL therefore urges you to not support Ms. Kuhl's nomination.

Sincerely,

ANDREA CARLISE,
CWL President.

LEADERSHIP CONFERENCE ON CIVIL RIGHTS,
Washington, DC, May 7, 2003.

Re Oppose the confirmation of Carolyn Kuhl.

Hon. ORRIN G. HATCH,
Chair, Senate Judiciary Committee, Hart Senate Office Building, Washington, DC.

DEAR SENATOR HATCH: On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest, and most diverse civil and human rights coalition, we write to express our opposition to

the confirmation of Carolyn Kuhl to the United States Court of Appeals for the Ninth Circuit. Our review of Judge Kuhl's record indicates that her positions, opinions, and legal activities in the areas of civil rights and equal opportunity, and the rights of women, workers, and consumers, are troublesome and raise serious questions about her commitment to equal justice and civil rights for all Americans.

First, we are very concerned about Judge Kuhl's record on civil rights and equal opportunity, particularly on the issue of whether the federal government should subsidize institutions that practice racial discrimination. Judge Kuhl was one of three Reagan Justice Department officials who persuaded the Attorney General to reverse prior policy and support the granting of tax-exempt status to Bob Jones University, despite its racially discriminatory policies, in its brief in Bob Jones University v. United States, 461 U.S. 574 (1983). More than 200 Justice Department lawyers, the solicitor general, and the Treasury Department general counsel objected to the change of position that Kuhl advocated. According to the New York Times (May 1983), Kuhl was one of three characterized as a ''band of young zealots'' who urged the change in policy. By an 8–1 vote, the Supreme Court rejected Kuhl's position and upheld the IRS denial of tax exempt status to Bob Jones University.

In addition, we are troubled by Judge Kuhl's work urging the Supreme Court to overrule its precedent on ''associational standing.'' In International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock, 477 U.S. 274 (1986), Kuhl not only argued that the requirement for associational standing had not been met in the particular case, but went on to urge the Supreme Court to overturn the doctrine of associational standing altogether, except in the most extraordinary circumstances. This view, if adopted, would have had a catastrophic affect on the ability of civil rights and other groups to file lawsuits on behalf of their members in order to vindicate their legal rights.

While at the Justice Department, Kuhl was also involved in a troubling effort to limit the reach of sexual harassment doctrine. As Deputy Solicitor General, she co-authored an amicus curiae brief in the landmark sexual harassment case of Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), asserting a position on sexual harassment which, had it been adopted, would have made it more difficult for women to prove sexual harassment in the workplace. In a unanimous opinion authored by then-Justice William Rehnquist, the Court rejected as incorrect the focus in Kuhl's brief of the ''voluntariness'' of the alleged sexual conduct, instead making clear that the test is whether the sexual conduct was ''unwelcome.'' Kuhl was also part of the Reagan Administration's effort to restrict the remedies that courts can order in the case of employment-related discrimination in violation of Title VII. In Local 28 of the Sheet Metal Workers' International Ass'n v. EEOC, 478 U.S. 421 (1986), Kuhl co-authored a brief on behalf of the EEOC advocating the extreme theory that relief in Title VII cases can be granted only to identifiable victims of discrimination. This theory, rejected by the Supreme Court, would have significantly limited the ability of the courts to provide effective remedies for past and persistent discrimination.

Kuhl's record also reveals a troubling tendency to favor corporate interests, at the expense of workers and consumers. As a lawyer in private practice, Kuhl argued on behalf of two major defense contractors that the qui tam provision of the False Claims Act, which allows private individuals to sue corporations that committed fraud against federal government programs, was unconstitutional. See United States ex rel. Rohan v. Litton Industries, Inc., No. 92–55546 (9th Cir.). As a judge, she dismissed a case brought under a California law enacted to prevent suits against whistleblowers and others acting in the public interest. The California appellate court reversed Kuhl's decision in unusually strong terms, calling it ''a nullification of an important part of California's anti-[abusive lawsuit] legislation.'' Liu v. Moore, 69 Cal. App. 4th 745, 748 (1999). Kuhl also dismissed a claim brought by a breast cancer patient whose privacy was invaded when a drug salesman who misrepresented his identity participated in her doctor's examination of her breasts. On appeal, the Court of Appeals unanimously found in favor of the plaintiff, reversing Kuhl's decision. See Sanchez-Scott v. Alza Pharmaceuticals, 86 Cal. App. 4th 365 (2001).

In sum, Judge Carolyn Kuhl's views on important civil rights issues, particularly with regard to equal opportunity and the rights of workers and consumers, are outside the mainstream. Her work as a Justice Department official, in private practice, and as a California judge reflects a lack of commitment to core constitutional values and to upholding equal rights for all Americans. Therefore, we urge the Judiciary Committee to reject the confirmation of Carolyn Kuhl to the Ninth Circuit Court of Appeals. If you have any questions or need further information, please contact Nancy Zirkin, LCCR Deputy Director/Director of Public Policy at (202) 263–2880, or Julie Fernandes, LCCR Senior Policy Analyst, at (202) 263–2856.

Sincerely,

WADE HENDERSON.
Dr. DOROTHY L. HEIGHT.

PLANNED PARENTHOOD FEDERATION OF AMERICA—STATEMENT REGARDING THE NOMINATION OF CAROLYN KUHL TO THE NINTH CIRCUIT COURT OF APPEALS

The Planned Parenthood Federation of America (PPFA), the world's largest and most trusted voluntary family planning organization, has a long-standing history of working to ensure the protection of reproductive rights as well as working to advance the social, economic, and political rights of women. Because lower federal courts exercise enormous power in deciding cases involving women's rights, the right to privacy, reproductive freedoms, and other basic civil rights, PPFA believes that judges appointed to these courts must demonstrate a commitment to safeguarding these fundamental rights. PPFA will oppose confirmation of nominees who fail to do so.

We believe that California Superior Court Judge Carolyn Kuhl's record demonstrates that she is not committed to protecting these rights. Therefore, PPFA opposes her nomination to the United States Court of Appeals for the Ninth Circuit.

Judge Kuhl held various positions in the U.S. Department of Justice during the Reagan administration. From 1982 to 1985, Kuhl held the appointment of Deputy Assistant Attorney General for the Civil Division. During her tenure in that position, the Supreme Court agreed to hear Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), a challenge to several Pennsylvania abortion restrictions. The Reagan administration filed a brief in Thornburgh that not only supported the Pennsylvania restrictions, but also called for an outright reversal of Roe v. Wade: ''Indeed, the textual, doctrinal and historical basis for Roe v. Wade is so far flawed, and . . . is a source of such instability in the law that this Court should reconsider that decision and on reconsideration abandon it.''

The Acting Solicitor General at the time the Thornburgh brief was filed, Charles Fried, wrote, in his book, Order and Law, that when he was considering what position to take in the case, ''[t]he most aggressive memo came from my friends Richard Willard and Carolyn Kuhl in Civil, who recommended that we urge outright reversal of Roe.''

In addition, when in private practice, Kuhl chose to serve as counsel for the American Academy of Medical Ethics in Rust v. Sullivan, 500 U.S. 173 (1991), the case challenging the ''gag rule''—federal regulations promulgated by the Bush I administration that prohibited health care professionals at family planning clinics that receive funding from the Title X program from counseling women about abortion—or even providing non-directive counseling that informed them of abortion as an option. Kuhl's brief argued that this prohibition did not violate the rights of the health care providers and their patients.

Given Kuhl's record demonstrating animosity towards reproductive rights, PPFA joins other organizations concerned with women's rights and civil rights in opposing her nomination to the Ninth Circuit Court of Appeals.

TAXPAYERS AGAINST FRAUD,
THE FALSE CLAIMS ACT LEGAL CENTER,
Washington, DC, April 3, 2003.

Re Judge Carolyn Kuhl.

Chairman ORRIN G. HATCH,
Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, DC
Senator PATRICK J. LEAHY,
Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, DC

DEAR CHAIRMAN HATCH AND SENATOR LEAHY: Taxpayers Against Fraud, the False Claims Act Legal Center (''TAF''), opposes the appointment of Judge Carolyn Kuhl to a position on the United States Court of Appeals for the Ninth Circuit. TAF's opposition is based on Judge Kuhl's apparent effort to deceive the Ninth Circuit in U.S. ex rel. Rohan v. Newbert (No. 92–55546). Judge Kuhl is effect represented to the Court that the Justice Department had questioned the constitutionality of the whistleblower (''qui tam'') provisions of the False Claims Act (''FCA''), when in fact this was untrue.

In 1989, a memorandum was prepared in the Office of Legal Counsel of the Department of Justice questioning the constitutionality of the FCA. However, the views are set forth in that memorandum (''OLC Memo'') were not adopted by the Department or advanced by the Department in FCA cases.

Despite the fact that the OLC Memo did not represent the views of the Justice Department, Kuhl, in her capacity as counsel for Litton Systems, Inc., submitted it to the Ninth Circuit, citing it in support of her arguments that the qui tam provisions of the FCA are unconstitutional and implied that the OLC Memo set forth the views of the Justice Department. The Department was not a party in the case, but learned of the misrepresentation of its views and submitted a letter to the Clerk of the Ninth Circuit setting the record straight.

We at TAF are deeply disturbed that Judge Kuhl would attempt to mislead the Ninth Circuit, the court to which she now aspires, about the views of the Department of Justice, regarding the constitutionality of an act of Congress. TAF believes her stunning lack of candor disqualifies her from service on that court.

JAMES W. MOORMAN,
President.

Mr. FRIST. Mr. President, I ask unanimous consent that the next two votes be 10-minute votes.

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

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

The question is, Is it the sense of the Senate that debate on Executive Calendar No. 169, the nomination of Carolyn B. Kuhl, of California, to be United States Circuit Judge for the Ninth Circuit, shall be brought to a close.

The yeas and nays are required under the rule.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. REID. I announce that the Senator from North Carolina (Mr. EDWARDS), the Senator from Hawaii (Mr. INOUYE), the Senator from Massachusetts (Mr. KERRY), and the Senator from Florida (Mr. NELSON) are necessarily absent.

I further announce that, if present and voting, the Senator from Massachusetts (Mr. KERRY) would vote ''nay.''

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

The yeas and nays resulted—yeas 53, nays 43, as follows:

[Rollcall Vote No. 451 Ex.]

YEAS—53

Alexander	Dole	Miller
Allard	Domenici	Murkowski
Allen	Ensign	Nelson (NE)
Bennett	Enzi	Nickles
Bond	Fitzgerald	Roberts
Brownback	Frist	Santorum
Bunning	Graham (SC)	Sessions
Burns	Grassley	Shelby
Campbell	Gregg	Smith
Chafee	Hagel	Snowe
Chambliss	Hatch	Specter
Cochran	Hutchison	Stevens
Coleman	Inhofe	Sununu
Collins	Kyl	Talent
Cornyn	Lott	Thomas
Craig	Lugar	Voinovich
Crapo	McCain	Warner
DeWine	McConnell	

NAYS—43

Akaka	Dodd	Levin
Baucus	Dorgan	Lieberman
Bayh	Durbin	Lincoln
Biden	Feingold	Mikulski
Bingaman	Feinstein	Murray
Boxer	Graham (FL)	Pryor
Breaux	Harkin	Reed
Byrd	Hollings	Reid
Cantwell	Jeffords	Rockefeller
Carper	Johnson	Sarbanes
Clinton	Kennedy	Schumer
Conrad	Kohl	Stabenow
Corzine	Landrieu	Wyden
Daschle	Lautenberg	
Dayton	Leahy	

NOT VOTING—4

Edwards	Kerry
Inouye	Nelson (FL)

The PRESIDING OFFICER. On this vote, the yeas are 53, the nays are 43. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected.

NOMINATION OF JANICE R. BROWN, OF CALIFORNIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

CLOTURE MOTION

The PRESIDING OFFICER. Under the previous order, the clerk will report the motion to invoke cloture.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of Rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 455, the nomination of Janice R. Brown, of California, to be United States Circuit Judge for the District of Columbia Circuit.

Bill Frist, Orrin G. Hatch, Lindsey Graham, Mike Crapo, Jeff Sessions, Conrad R. Burns, Larry E. Craig, Saxby Chambliss, Mitch McConnell, Jim Bunning, Judd Gregg, John Cornyn, Jon Kyl, Trent Lott, Mike DeWine, Craig Thomas, Kay Bailey Hutchison.

Mr. LEAHY. Mr. President, the opposition to Justice Brown for a lifetime position on the D.C. Circuit is deep and wide and is based on her record, both on and off the bench. As anyone who was watching C–SPAN last night and the night before would know, the Republicans are using the judicial nomination process in a manner that divides rather than unites. As the San Francisco Chronicle wrote, ''Presidents typically shape the judiciary to reflect their own views. But with Charles Pickering, Priscilla Owens, William Pryor, Miguel Estrada and now Brown, Bush seems bent on stacking the bench with ideologues.''

For this particular nominee, Janice Rogers Brown, the White House political operatives and ideologically driven selection staff reached out 3,000 miles to find a nominee who has repeatedly received negative ratings, who has been criticized by her Republican colleagues on the bench, and who has emerged from the Senate Judiciary Committee on a party-line vote. As Justice Brown's home State newspaper, the San Francisco Chronicle, wrote: ''naming Janice Rogers Brown to the U.S. Circuit Court of Appeals for the D.C. Circuit, President Bush has again chosen a contrarian with a judicial philosophy that lies well outside the bounds of the mainstream.'' Even the Washington Post, which has been very sympathetic to this Administration and, in particular, to its court-packing efforts on the D.C. Circuit, has written that Janice Rogers Brown ''is one of the most unapologetically ideological nominees'' in many years.

As the nominee herself conceded at the end of her confirmation hearing, she was ''treated with great courtesy'' by the Members of the Judiciary Committee. Thereafter, this was a nomination rushed out of the Committee last week before the ink was dry on nonresponsive answers to Senators' questions, and during Senate floor debate on another highly divisive judicial nominee, before a full Committee debate could be held. The District of Columbia Circuit is too important to the rights of all Americans to be left to judges whose ideological bias would lead them to gut the environmental protections, workplace protections, consumer protections and other government regulations authorized by Congress to protect all Americans.

In my statement at the outset of her confirmation hearing less than one month ago, I urged partisans to end the ugly game of contending that any criticism of the record of a Bush judicial nominee had to be motivated by bigotry. I asked that the right-wing tactic of smears and name calling subside and that we not see the race card dealt from the shameful deck of unfounded charges that stalwarts of this President's most extreme nominees have come to rely upon as they further inject partisanship and politics into the appointment of Federal judges. I noted that I expected that those who ultimately decided to support Justice Brown, even though they oppose affirmative action, would do so because they believed she would be a fair Federal judge. I suggested that those who opposed her because they retained serious doubt about her nomination and are concerned that she was selected on ideological grounds, could oppose her nomination for principled reasons having nothing to do with race. I urged that we focus on substance at the hearing and in this process.

My plea went unheeded, so that, first, I must, again, briefly respond to the partisan smears and name-calling that I have been hearing from the other side of the aisle. We have heard the ridiculous charges that we are opposing Justice Brown because of her gender or her race. My opposition to this nominee has nothing to do with her race; it is has nothing to do with her gender. It is about what kind of a lifetime appointment to the District of Columbia Circuit I fear she would be.

If Democrats were making decisions based on the gender of the nominee, would we have confirmed 33 judges nominated by President Bush who are women, including seven to the Courts of Appeal? Would we have worked so hard during the Clinton years to increase gender diversity on the bench and fight for votes for Bonnie Campbell, Elena Kagan and the scores of women nominees who were blocked and delayed by anonymous Republican holds? Would we be urging President Bush to work with us to find outstanding women judges and lawyers to increase gender diversity on the Federal bench? Do our critics really contend that Senators MIKULSKI, FEINSTEIN, BOXER, MURRAY, LANDRIEU, LINCOLN, CANTWELL, CLINTON, and STABENOW are anti-woman, or that Senators KENNEDY, BIDEN, HARKIN, REID or any other Democratic Senators would discriminate against women? This is a smokescreen, intended to obscure this nominee's stark record.

If Democrats were making decisions based on the race of the nominee, why would we have voted to confirm 13 African-American judges nominated by President Bush, including all four of the other African Americans nominated by President Bush to the appellate courts? Would we have confirmed Lavenski Smith to the 8th Circuit? Would we have fought so hard for two

Congresses to confirm Roger Gregory and integrate the 4th Circuit? Would we have worked with Senator EDWARDS to confirm Allyson Duncan to the 4th Circuit? For that matter, would we have been so outraged at the Republicans' treatment of Justice Ronnie White, Judge Beatty, Judge Wynn, Kathleen McCree Lewis and so many outstanding African-American judges and lawyers who the Republicans blocked from confirmation during the Clinton years? These claims of racism are irresponsible and false. These ploys are wrong, and they should stop.

In fact, the list of the African-American organizations and individuals who oppose Justice Rogers Brown's nomination is one of the most troubling indications that this is another divisive, ideologically driven nomination. Are we to believe that the 39 members of the Congressional Black Caucus are racist? Members of the Congressional Black Caucus include the respected congressional delegate from the District of Columbia ELEANOR HOLMES NORTON, the chair of the Congressional Black Caucus, the Honorable ELIJAH CUMMINGS, and such distinguished Americans as Representatives CHARLES RANGEL and JOHN CONYERS. In addition the Nation's oldest and largest association of predominantly African-American lawyers and judges, the National Bar Association, and its State counterpart, the California Association of Black Lawyers both oppose this nomination.

The foremost national civil rights organization, the Leadership Conference on Civil Rights opposes this nomination. The women of Delta Sigma Theta oppose this nomination. Dr. Dorothy Height, Dr. Joseph Lowery and Julian Bond have spoken out against this nomination.

Justice Brown has a lengthy record, of opinions, of speeches and of writings. She has very strong opinions, and there is little mystery about her views, even though she sought to moderate them when she appeared before the Judiciary Committee.

I come to my decision after reviewing Justice Brown's record—her judicial opinions, her speeches and writings—and considering her testimony and oral and written answers provided to the Senate Judiciary Committee.

Now, Justice Brown's supporters will say we are opposing Justice Brown because her viewpoint is different than ours on social issues. But my opposition is not about whether Justice Brown would vote like me if she were a member of the United States Senate on issues of importance. This is not about her position on choice. This is not about one dissent or one speech. This is about Justice Brown's approach to the law—an approach which she has consistently used to promote her own ideological agenda, an extreme agenda that is out of the mainstream. Her approach does not entitle her to a lifetime appointment to this very important appellate court.

Janice Rogers Brown's approach to the law can be best described as a ''jurisprudence of convenience.'' What do I mean by that? Justice Brown has proven herself to be a results-oriented, agenda-driven judge whose respect for precedent and rules of judicial interpretation change depending on the subject matter before her and the results she wants to reach.

While Justice Brown's approach to the law has been inconsistent—she has taken whatever approach she needs to in order to get to a result she desires—the results which she has worked toward have been very consistent—throughout her public record. Some of Brown's supporters, and in fact Justice Brown herself, have tried to detract attention from the ideas she has expressed in speeches—while she was a member of the bench—claiming they are ''just speeches.'' Well, that is a hard distinction to follow when Justice Brown's comments to groups across the country over the last 10 years repeated the same themes—in fact, sometimes even the same words—as she has written in her opinions.

In Santa Monica Beach v. Superior Court of L.A. County, Justice Brown wrote of the demise of the Lochner era, claiming ''the 'revolution of 1937' ended the era of economic substantive due process but it did not dampen the court's penchant for rewriting the Constitution.'' Similarly, in a speech to the Federalist Society, she said of the year 1937—it ''marks the triumph of our own socialist revolution.''

In San Remo Hotel v. City and County of San Francisco, Justice Brown wrote, ''(t)urning a democracy into a kleptocracy does not enhance the stature of the thieves; it only diminishes the legitimacy of the government.'' Similarly, two years earlier, she told an audience at the Institute for Justice, ''If we can invoke no ultimate limits on the power of government, a democracy is inevitably transformed into a kleptocracy—a license to steal, a warrant for oppression.''

As Berkeley Law School Professor Stephen Barnett pointed out about Justice Brown's ''apparent claim that these are 'just speeches' that exist in an entirely different world from her judicial opinions,'' ''that defense not only is implausible but trivializes the judicial role.'' I agree with Professor Barnett on this and understand his determination to oppose her nomination. Justice Brown's provocative speeches are disturbing in their own right, and they are made more so by their reprise in her opinions.

Justice Brown now says that she will ''follow the law.'' However, in a judicial dissent, she wrote, ''We cannot simply cloak ourselves in the doctrine of stare decisis.''

One of the examples of Justice Brown's results-oriented jurisprudence can be seen in the way she has disregarded precedent in her opinions in order to expand the rights of corporations and property owners, at the expense of workers and individuals who have been the victims of discrimination. In several dissents, Justice Brown called for overturning an exception to at-will employment, long recognized by the California Supreme Court, that was created to protect workers from discrimination. She has repeatedly argued for overturning precedent to provide more leeway for corporations against attempts to stop the sale of cigarettes to minors, prevent consumer fraud, and prevent the exclusion of women and homosexuals.

Justice Brown has also been inconsistent in the application of rules of judicial interpretation—again depending on the result that she wants to reach in order to fulfill her extremist ideological agenda.

These legal trends—her disregard for precedent, her inconsistency in judicial interpretation, and her tendency to inject her personal opinions into her judicial opinions—lead to no other conclusion but that Janice Rogers Brown is—in the true sense of the words—a judicial activist.

When it is needed to reach a conclusion that meets her own ideological beliefs, Justice Brown stresses the need for deference to the legislature and the electorate. However, when the laws—as passed by legislators and voters—are different than laws she believes are necessary, she has advocated for judicial activism.

One stark example springs to mind: In order to support her view that judges should be able to limit damages in employment discrimination cases, she concluded that ''creativity'' was a permissible judicial practice and that all judges ''make law.''

Justice Brown's approach to the law has led to many opinions which are very disturbing. She has repeatedly and consistently advocated turning back the clock 100 years to return to an era where worker protection laws were found unconstitutional. She has attacked the New Deal, an era which created Social Security and labor standards, by saying it ''inoculated the Federal Constitution with a kind of underground collectivist mentality.''

And she has repeatedly opposed protections against discrimination of individuals—in their jobs and in their homes. Justice Brown's recent claims that her words do not mean what they say are simply unconvincing.

There is one more aspect of Justice Brown's nomination which is extremely disturbing. That has to do with the court for which she was nominated. She is being considered for a position on the premier administrative law court in the Nation—a court that is charged with overseeing the actions of Federal agencies that are responsible for worker protections, environmental protections, consumer safeguards, and civil rights protections.

I am concerned about her ability to be a fair arbitrator on this court. Justice Brown has made no secret of her disdain for government. She has said,

''where government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies.''

How can someone who believes it is not the ''job of government to take care of'' the American people be entrusted to make fair and neutral decisions when faced with the responsibility of interpreting the powers of the Federal Government and the breadth of regulatory statutes? Justice Brown responded to this question at her hearing by calling on us to review her record as a judge to see that she does not ''hate Government.'' Well, I did review her record. And, what I found was disturbing: She has used her position on and off the bench to argue for the dismantling of government from the inside out.

It is no small irony that this President, who spoke of being a uniter but has used his position to send judicial nominations that divide the Senate and the country, and who spoke with disdain of ''judicial activism,'' has nominated several of the most consummate judicial activists ever chosen by any President. None of the President's nominees is more in the mold of judicial activist than this nominee, Janice Rogers Brown.

I am voting against Justice Borwn's nomination today because the American people deserve judges who will interpret the law fairly and objectively. Janice Rogers Brown is a confirmed and committed judicial activist who has a consistent record of using her position as a member of the court to advocate for her personal belief. We must not enable her to bring her ''jurisprudence of convenience'' to one of the most important courts in the Nation.

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

The question is, Is it the sense of the Senate that debate on the nomination of Janice R. Brown, of California, to be United States Circuit Judge for the District of Columbia Circuit, shall be brought to a close?

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

The legislative clerk called the roll.

Mr. REID. I announce that the Senator from North Carolina (Mr. EDWARDS), the Senator from Hawaii (Mr. INOUYE), the Senator from Massachusetts (Mr. KERRY), and the Senator from Florida (Mr. NELSON) are necessarily absent.

I further announce that, if present and voting, the Senator from Massachusetts (Mr. KERRY) would vote ''nay.''

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

The yeas and nays resulted—yeas 53, nays 43, as follows:

[Rollcall Vote No. 452 Ex.]

YEAS—53

Alexander	Dole	Miller
Allard	Domenici	Murkowski
Allen	Ensign	Nelson (NE)
Bennett	Enzi	Nickles
Bond	Fitzgerald	Roberts
Brownback	Frist	Santorum
Bunning	Graham (SC)	Sessions
Burns	Grassley	Shelby
Campbell	Gregg	Smith
Chafee	Hagel	Snowe
Chambliss	Hatch	Specter
Cochran	Hutchison	Stevens
Coleman	Inhofe	Sununu
Collins	Kyl	Talent
Cornyn	Lott	Thomas
Craig	Lugar	Voinovich
Crapo	McCain	Warner
DeWine	McConnell	

NAYS—43

Akaka	Dodd	Levin
Baucus	Dorgan	Lieberman
Bayh	Durbin	Lincoln
Biden	Feingold	Mikulski
Bingaman	Feinstein	Murray
Boxer	Graham (FL)	Pryor
Breaux	Harkin	Reed
Byrd	Hollings	Reid
Cantwell	Jeffords	Rockefeller
Carper	Johnson	Sarbanes
Clinton	Kennedy	Schumer
Conrad	Kohl	Stabenow
Corzine	Landrieu	Wyden
Daschle	Lautenberg	
Dayton	Leahy	

NOT VOTING—4

Edwards	Kerry
Inouye	Nelson (FL)

The motion was rejected.

The PRESIDING OFFICER. On this vote, the yeas are 53, the nays are 43. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected.

Mr. STEVENS. Mr. President, I move to reconsider the vote.

Mr. BOND. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

LEGISLATIVE SESSION

Mr. STEVENS. Mr. President, I ask unanimous consent the Senate return to legislative session.

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

MORNING BUSINESS

Mr. STEVENS. Mr. President, I ask unanimous consent we proceed to a period for morning business with Senators permitted to speak therein for up to 10 minutes.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

The PRESIDING OFFICER. The Senator from Washington.

THE UNEMPLOYMENT PROBLEM IN AMERICA

Ms. CANTWELL. Mr. President, we just completed 30 hours of debate on judicial nominees, an obviously important debate for all Members who participated. But it is time for us to address the unemployment problem in America, and the fact that this body cannot adjourn for the year without passing an unemployment benefit extension.

Many of my colleagues will remember last year we were at this same point, when unemployment benefits were going to expire in December. We had a debate about whether that was necessary to do by the time we adjourned. I can tell you that not a lot has changed in Washington State. We still have 7.6-percent unemployment and a very high level at the national level, at 6 percent. Americans want to know whether they are going to have an extension of those benefits.

During the Bush and Clinton administrations we extended unemployment benefits for an extension of over 30 weeks during that time period because we thought it was important to make sure people were covered. During the economic downturn, unemployment benefits are a stimulus. For every dollar spent on unemployment benefits it generates $2.15 as far as the economy—that is mortgage payments that can be made, health care benefits that can be extended.

While my colleagues think last year's solution of coming back in January and fixing this unemployment benefit problem was a solution, I guarantee it was not. Adjourning from here without expanding unemployment benefits is like putting a lump of coal in the stockings of Americans at Christmastime.

There were individuals in my State who, because of the failure of us acting, really did make economic choices about their future. I had a constituent who took a big chunk out of her pension program at a 30-percent penalty, basically trading her long-term economic future off for short-term returns because we hadn't given her a commitment on unemployment benefits.

UNANIMOUS CONSENT REQUEST—S. 1853

I ask unanimous consent the Senate proceed to legislative session and the Finance Committee be discharged from further consideration of S. 1853, a bill to extend unemployment benefit insurance for displaced workers, and that the Senate proceed to its immediate consideration, that the bill be read a third time and passed, and the motion to reconsider be laid on the table.

The PRESIDING OFFICER. Is there objection? The Senator from Nevada.

Mr. ENSIGN. Reserving the right to object, I ask unanimous consent that I may ask the Senator from Washington a question while reserving my right to object.

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

Mr. ENSIGN. Mr. President, in asking this question, is the Senator from Washington aware, back in 1993 when the Democrats controlled the House, the Senate, and the White House the rate of unemployment was higher than it is today and that every Democrat in the House and the Senate and the President signed a bill to terminate the program when the unemployment rate

was higher? Is the Senator from Washington aware of that fact?

Ms. CANTWELL. I am not aware to what the Senator from Nevada is referring. I know during the Bush and Clinton administrations, with a richer package of 20 weeks after a Federal program on extension, richer than the 13 weeks that we have now, we extended that over a 30-month period of time.

So far this administration has only done that over a 22-month period of time. While we all want the economy to recover, and we all want to put Americans back to work—I guarantee these individuals would rather have a paycheck than an unemployment check—we need to do a better job making sure that we are making a commitment to unemployment benefits before we adjourn for the session.

We just spent all this time debating judicial nominees. I think it was a hardy debate on both sides. But let's give the American people and those who are suffering from unemployment the benefit of knowing that they will get this benefit extension before we adjourn.

Mr. ENSIGN. Mr. President, the fact is, when the Democrats were in control of all three bodies, the Democrats terminated the program of extending unemployment benefits at the Federal level. They terminated the program.

More people were unemployed at that time when they terminated the program. It is good enough today. The economy is recovering. It is producing jobs. Therefore, I object.

The PRESIDING OFFICER. Objection is heard.

The Senator from Pennsylvania.

JUDICIAL NOMINATIONS

Mr. SANTORUM. Mr. President, I just want to thank all of the Members, particularly on this side of the aisle, for the terrific level of debate we have seen over the past 40 hours. I was amazed, yesterday, sitting both here and in my office, and seeing Member after Member come to the Senate floor. I have never seen a debate where more of our Members came to the floor to let their views be known to the American public, of how important this issue is to the future of our country, the issue we just voted on, the issue of judicial nominations.

I was stunned. I thought we would have to scurry around and have sort of a core of people who were willing to come to the floor and fill up the time. But for 40 hours, 39-plus hours, we had no problem. In fact, at 5 o'clock in the morning, Senator CHAMBLISS and I were arguing over 5 minutes, who was going to get the extra 5 minutes because there was such enthusiasm for a cause that we felt was just. It was not a small group.

Some in the media suggested that there was some division over here as to whether to take on this strategy. I would say, just look at the response of our membership. They came to the floor. They came with passion. They came with a conviction that what we were arguing for was the right thing for the country. Maybe it was not the right thing for us politically. We had that debate about having a higher standard for judges, higher than a simple majority, a three-fifths majority, which is now the rule. I think this debate and the votes today have cemented that.

Now the standard will be that you have to have 60 percent of the Senate in order to be a Federal judge. We have made that the rule. So the 214-year history is now gone.

We had a great debate about it. The rule has changed. I thank all who participated on both sides. I thank the staff, the pages, the staff here on the floor—the floor staff, which has been rotating, but even rotating these jobs were not made for three shifts. We don't have three-shift jobs. This is a one-shift operation and they had to work three shifts. They did a great job—the folks in the cloakroom, the Judiciary Committee, all the leadership staff. I particularly thank the staff of the Republican conference—Mark Rogers and Barbara Leeden and Elizabeth Keys, Robert Traynham, Melissa Seckora—all the staff who have worked so hard, holding press conferences in the middle of the night.

Gosh, we had press conferences, 1:30, 2:30, 3:30, 4:30, 5:30, 6:30 in the morning, every hour.

All the outside groups who were concerned about the future of our country and concerned about the future of the judiciary came to Washington. I remember walking in late in the evening on Wednesday evening, and in the rain, in the wind, people lined up outside the Capitol to get into the Capitol to be here on Wednesday night because they knew this was a debate that had real significance because they knew this was a debate that is going to have a place in history.

By affirming what has happened four times before today, now five, now six—that 168-to-4 chart, that 98 percent chart—that is now history; 168 to 6. That is not even accurate because there are 6 more they have said they will filibuster.

Obviously, when the minority leader says there is going to be a filibuster, you get the ducks in a row. They have been able to do that and do it successfully.

So it is now 168 to 12. Of course, we just started that this year. There have only been four, they say. This is the first time it has been done.

It is like a little ball, like dropping a pebble at the top of a large mountain. It shakes lose a couple of other pebbles. Pretty soon, over time this gets to be a boulder, an avalanche that is coming down and is going to hit the judicial branch of our Government.

I predict, if nothing is done to change the rule, the number will be in the hundreds within a couple of years, in the thousands and the tens of thousands as this country goes forward. Why? Because we have changed the way we consider nominations.

I am going to repeat what I said at the close of the debate because I still hope there is a chance that some Members will reconsider. There are Members on our side who have smiles on their faces, Members who care deeply about issues that are before the court today who have smiles on their faces because they say: Now we have the tool to stop activist judges. Now we have the tools we didn't have before. Now they have to get 60 percent of the vote for the judges, the Richard Paezes of this world and the Marsha Berzons of this world, and those who could come on and replace the document I hold in my hand, the Constitution, with their own view of the world.

What an activist judge is, is a little James Madison, just someone who thinks they can write their own Constitution. Madison didn't have the privilege of having all the knowledge that we have today about what is right and wrong. He didn't have the understanding that so many of our learned jurists have in doing what is right for the American people. So this guy, Madison—it was a pretty good first draft. There are many activist judges who think they can write a better Constitution, and they do so on a regular basis. What Madison thought would change the Constitution is something that is actually in the Constitution, and that is a procedure for amending the Constitution. But a lot of Members on the other side of the aisle don't believe we should have to bother with that rather cumbersome process in this fast-changing world in which we live. It just takes too much time. It is far too much effort. It involves having to convince the American public. Why should we bother with such folly?

We, the enlightened, the intellectuals, those who have reached the pinnacles of our professional occupations, we in the judiciary, we are the ones who should be able to lay out for future generations what should have been done for them.

So this elitist, activist corps—elitist in the most pejorative sense of the word ''elitist''—are activist judges who take this document, light a match to it, and throw it away and say: We are a country of people, we are a country of people, not of laws.

That is what we are going to get more of. So what my colleagues believe we can do now is apply the same standard they have applied to Janice Rogers Brown, elected by 76 percent of the vote in the State of California; Priscilla Owen, elected by 84 percent of the people of the State of Texas; Carolyn Kuhl, William Pryor, Charles Pickering, Miguel Estrada—the list goes on and will go on. It will go on.

This is a huge tragedy, what happened here today. The point is, as the Senator from Iowa, Mr. HARKIN, when we came in the Chamber just 40-some

hours ago had a sign held up: ''I am going to watch 'The Bachelor'.'' That was funny. I chuckled. But true humor, good humor, really good and biting humor, always has an element of truth to it, doesn't it? It always has an element of truth. The element of truth here is that the other side does not want you to hear what is going on. They want you to go and watch ''The Bachelor,'' tending to your business. We will take care of the business here. You need not mind what we do here. No, don't bother with us; we'll handle it. You could watch ''The Bachelor.'' We will take care of the people's business here and don't bother with us.

Hopefully, some Americans paid attention. Hopefully, some Americans heard the debate that went on here in the Senate Chamber for the past 40 hours and heard very clearly that we have changed, potentially forever, the standard by which we will confirm judicial nominees. In so doing we eliminate those, not just from the right.

Let me assure you, my colleagues on the other side of the aisle, let me assure you we are not just eliminating those on the right, because what is good for the goose is good for the gander. When you twist and contort the law, it becomes the law for everybody. It is twisted and contorted in its ugliest sense, but it is there for all to see and there for all to use. Rest assured, it will be used. Whether it is by the Senator from Pennsylvania—I hope not because I hope never to be in the minority, and I hope never to have to serve under a Democrat President. That is obviously my objective. I hope I don't have the opportunity or the desire to ever use it. But I suspect someday, someone—either myself or someone who shares my philosophy and ideas of how this Government should be run and how the judiciary should behave—will take this tortured process that has been cemented today and use it against the very people you believe are mainstream, who the Democrats of the left believe represent the deep and wide channel that is the mainstream of American thought; people who believe that ''under God'' should not be in the Pledge of Allegiance, that deep, wide mainstream; people who believe this is a living document.

Let me interpret what that means. That is what you will hear a lot from those on the other side, that this is a living, breathing document. A living, breathing document? Yes. It is living and breathing, but it is not a document. It is a judge. When you hear ''living and breathing,'' documents don't live and breathe. They say exactly what they mean. Documents written 214 years ago don't change by themselves. They don't breathe. They do not live. They were put there and put on paper for a reason—to provide stability to this country and certainty for those here in America who know their rights and who understand those rights throughout time. If we are to change these words, we do so through the process where the people of America—not some unelected few—have input into that process. It is called the amendment process to the Constitution which requires the Congress to act and three-quarters of States to affirm and ratify. That is how we change this document—not by appointing and confirming living, breathing judges to make it their own. That is what they have done.

They think now that they have a sufficient number of these folks on the court that they don't want any conservative judges. What is a conservative judge? A conservative judge is not someone who changes this document to reflect their ideology. I would not call that a conservative judge. I would not call that a judge for whom I would vote. That is not a conservative judge. I don't want a judge who is going to come in and contort the Constitution to my thinking. I want a judge who is going to live by what this Constitution says. It reflects the will of the people. That is what a conservative judge is. A conservative judge is someone who abides by the Constitution—not someone who sees it as a living, breathing document. Judges who are conservative are called ''strict constructionists''—to strictly and narrowly construe controversies that are before them and decide cases in the narrowest sense—not to use a dispute between parties as an opportunity to legislate.

The Senator from Kansas, Mr. BROWNBACK, said at about 4:15 in the morning that what is really happening here is this new test is being introduced by Senators on the other side of the aisle—this ideological test.

Your job as a judge is to look at the disputes between parties, see the applicable law that has been passed by Congress, the State legislatures, or provisions in the Constitution and apply those to the factual circumstances before you. That is your job. If that is your job, then why should we be concerned about your ideology? That is a pretty fair question. If all you are supposed to do is look at the statutes and use the rules and the statutory constructions which are laid out, or look at the Constitution and refer to the interpretations of the Supreme Court with respect to that area of the law, then why at the district court or on the appellate court level should we be concerned about your ideology? It should not be a factor because you are simply applying the law. A liberal can apply the law just as easily as a conservative can apply the law and look at ideology.

Why should your political ideology have anything to do with it if that is all your job is? I don't mean to demean by saying ''if that is all your job is.'' It is a very important job. It is an adjudicatory process. It is a very important process in our country. It is one of the three branches of Government. It is their responsibility to do that. It is not the responsibility of the Senator from Arkansas or Nevada to settle disputes and make decisions. We give that to people who study the law, understand it, and then make the decisions based upon it. We are the ones who create the law. We are the ones who have the great debates on what the law should be that they apply.

The President is the one who executes the law, and in the case of the judiciary appoints those who prosecute it.

I will say in conclusion that what is happening now with this political test is a recognition by the other side—an admission by the other side—that no longer are judges just there to try facts and apply the law, but they are there—in fact, the other side wants them to be there to change the law—not to apply the law but to change the law to reflect the ideology that is dominant on their side of the aisle. They do not want judges who will apply the law. They want judges who will make the law. You would think they would not want to give up their legislative prerogative. That is our prerogative. It is our job to make the law.

What they have found over the years is that the public will not buy a lot of stuff they want to sell. They can't get it done. What they have figured out is a way to avoid having to go through this cumbersome process of writing the laws, getting the public to go along with it, and having to stand for things that are unpopular, which is to just find people who will do it for them and they don't have to stand for election. We can get them in there and they are there for life. They can do our bidding because we can't get it done.

A very dangerous thing happened here today. It will not serve this country well. It will politicize the branch of the Government that heretofore has stayed fairly apolitical. It is a mistake.

I hope and pray that Americans will write and talk to their Members of the Senate, ask them, plead with them to stop this. Put this genie back in the bottle and put it away—throw it away. It is not good for America. It is not right for America. It has never been America. For 214 years we have kept politics out of the judiciary. Let us not politicize it. People are so tired of politics. They complain and rail about it all the time. What have we done here today? We have now injected a healthy dose of it into the judicial system.

May God help this country for what we have done today.

I yield the floor.

The PRESIDING OFFICER (Mr. ENSIGN). The Senator from Arkansas is recognized.

NOMINATION OF J. LEON HOLMES

Mr. PRYOR. Mr. President, I want to again remind this Senate and my colleagues on both sides of the aisle about one of the judicial nominees who happens to be from my State of Arkansas, Mr. Leon Holmes.

Leon and I practiced law together in Little Rock for a few years in the late

1980s or early 1990s. He is a very fine person, a very fine man, and a very fine lawyer. I am proud to count him as a friend.

Let me emphasis that Leon Holmes and I don't agree on every single issue. There is no doubt that there are some things he and I disagree on. But I am very respectful of his views because I know that he has arrived at those views through long consideration. He is a man of great integrity and great judgment. President Bush nominated him in January of this year to be a district judge for the Eastern District of Arkansas.

Mr. Holmes is a practicing lawyer in Little Rock, and has been with a number of very prestigious law firms in his legal career. He is considered probably by most people one of the best lawyers in Arkansas, and certainly on certain types of cases would be considered among the best, if not the best. But at any rate, President Bush nominated him in January—if my memory is correct, January 25—and his nomination went to the Judiciary Committee. He came out of the Judiciary Committee on May 1.

For over 6 months now, Mr. Holmes has been languishing on the Executive Calendar. I am troubled as to why he has been languishing like that. I have talked to the Republican leader many times, to the Republican chairman of the Judiciary many times, and I have talked to my colleagues many times. Both Senators from Arkansas are quite puzzled as to why. We have had 30-plus hours of filibuster led by the Republican Party on some of these judicial nominations, and here we have a nomination that we want to proceed on. We want to move forward on that today. To date, there has not been anything scheduled.

UNANIMOUS CONSENT REQUEST

With that in mind, I would like to ask unanimous consent—I know that we will need a moment to allow someone to come out on the Senate floor—that at a time to be determined by the two leaders, the Senate proceed to executive session to consider Executive Calendar No. 165, the nomination of J. Leon Holmes of Arkansas to be U.S. district judge, that it be considered under the following time limitation: 5 hours for debate equally divided between the chairman and the ranking member, or their designees; that when the time is used or yielded, the Senate without any intervening action or debate vote on confirmation of the nomination; that the President be immediately notified of the Senate's action, and the Senate return to legislative session.

The PRESIDING OFFICER. The Chair informs the Senator from Arkansas that the leaders are trying to work out an agreement to bring this nominee to the floor, and at the current time, unfortunately, I will have to object in my capacity as a Senator from Nevada.

Mr. PRYOR. Thank you, Mr. President.

I have worked for months on this nomination.

Let me emphasis that Mr. Holmes was not my nomination. He is President Bush's nomination. I wasn't consulted in any form or fashion before the nomination was put forward. I wasn't brought into the loop at all. The nomination was handed to me. Unfortunately, I continue to work on this and for whatever reason my efforts seem to be falling on deaf ears on the Republican side.

Mr. DASCHLE. Mr. President, will the Senator from Arkansas yield for just a moment?

Mr. PRYOR. Absolutely.

Mr. DASCHLE. Mr. President, I appreciate the request made by the distinguished Senator from Arkansas. This is a matter that he and his colleague from Arkansas, Senator LINCOLN, have been involved in and supported for a long period of time. He and I have had a number of conversations.

I want to make sure that the record is clear there will be no objection on this side to having votes on the nomination. We have had now 40 hours of debate where one Republican after another has come to the floor in an outcry that we haven't been able to have a vote on a judge, that we are denied the opportunity to have an up-or-down vote on a judge.

As we have said on 168 occasions, let us have the up-or-down vote. This one would be the 169th.

We are prepared this afternoon within the next hour to have a vote on the judge referenced by the distinguished Senator from Arkansas.

I appreciate very much his request. I certainly understand his frustration after all of the outcry that we have heard from our colleagues on the other side. It is amazingly ironic after all of that on a nominee for which there is absolutely no objection to moving to. I will oppose the nominee. I will vote against the nominee when it is presented to the Senate, but there is certainly no opposition within our caucus.

I want the record to be clear with regard to that point. Again, as I have on other occasions, I want to work with the majority leader for a very short time and have a vote. Let us have the vote. After all of this, you would think that the Republican caucus and the majority leader and others responsible for these decisions would jump at the chance of having a vote on the Holmes nomination.

We are ready. We will certainly not object to a time limit or to ultimately have an up-or-down vote, as the Senator from Arkansas has proposed.

Mr. PRYOR. Mr. President, I would like to reiterate what the minority leader has just said. There is no hold on the Democratic side on this nomination. All systems are go on this side. I have talked to my Democratic colleagues and we are ready to vote Mr. Holmes up or down.

Quite frankly, I know on a personal level that Mr. Holmes is ready to be voted up or down.

Again, thank you, Mr. President, for the time. I yield the remainder of my time. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. SESSIONS. Mr. President, we have had a good 39 hours, I guess, of debate. It is great to see my friend from Texas here, Senator CORNYN, who served on the Texas Supreme Court and understands these issues and chairs the constitutional law subcommittee of the Judiciary Committee. I say it is good because we have had a very bad and very historic change in the procedures of the Senate.

After all this debate, I think it is doubtful anyone could maintain today that in previous years we did not have filibusters. And I don't think anyone could doubt that we now have sustained filibusters as an organized, systematic way to change the number of votes necessary to confirm a President's nomination from a majority of 51 to 60 votes. This is a big deal. It is not a good deal. It is not good for the Senate. It changes the historic balance of power. It enhances of power of the Senate.

Now the Senate can block a nomination with only 40 votes. It weakens the President, and it weakens the courts. It is a classical alteration of the balance of power established by our Founders when this country was created. It is not good. It was driven by politics. It is a further decline in civility and debate, and it is a greater increase in the influence of politics in the confirmation process. This Senate is not and should not be proud of what has occurred to date.

I am glad it was brought about with some pain. I am glad it just didn't slide in a banal way without any thought. I am glad there are Senators who stayed here all night last night. I was here past midnight. Some stayed here all night because they wanted to be sure they were on record and Americans understood what we have done. I think it ought to be seared on our souls what occurred here. Every Member of this body needs to think about it. We need to realize that this was not lightly done. There is no doubt that in the spring after the election of President Bush, Democratic Senators met in retreat and they had a conference with some liberal law professors. And as the New York Times reported on that retreat, the Senators decided to change the ground rules for confirmation. We have absolutely seen that.

We had nominees blocked in committee on a party-line vote in the Judiciary Committee when the Democrats had their brief period of majority. JIM JEFFORDS switched parties. We had

nominees not brought up for hearing in committee. And we had filibusters on the floor to a remarkable degree.

I will just say that this is unhealthy. One of the things we had in the Judiciary Committee, in the courts subcommittee that I chaired and then Senator SCHUMER chaired after JIM JEFFORDS switched parties, and he began to have hearings on a number of things. He said the burden of proof should be on the nominee. That has not been the issue. So we had a hearing on the fact that the burden of proof should be on the nominee. We had a hearing that the Supreme Court was an extremist, activist, conservative court, which is so far from the truth, it is hard to believe it. That was the agenda of that.

The third thing most threatening to us and to our classical understanding of law was a hearing to say: Well, politics is involved in everything. We ought to ask judges all about their ideology, their politics. That should be openly a part of the confirmation process.

I felt so strongly against that. Lloyd Cutler, the White House counsel under President Carter and President Clinton, clearly and unequivocally rejected that. He said it would lead to the politicization of the courts. I practiced before Federal judges for nearly 15 years as a Federal prosecutor. I will just say that we have to believe—criminal defenders, civil litigants, prosecutors have to believe—that the judge who sits on their case will be able to set aside his or her personal political biases and ideas and beliefs, faithful beliefs, whatever; he will set them aside. When they go to that court, there will be a fair and objective trial, and they will be judged on the merits of the law and the facts and not what the judge thinks, not the politics of the judge.

Lloyd Cutler was correct, as every other witness was who testified at that hearing. We do not need to politicize the courts. We are heading in that way.

Senators are so political. They are driven so much by the special interest groups that they think and believe everything can be settled by political deal. They think courts operate that way. That is not the way they do. I practiced in court. You go to court. You offer to put evidence. Somebody objects. The judge reads the law, and he decides, well, if it meets the standard to come in or it is excluded. You don't admit half of it. It is either admitted or it is not admitted, as Judge Cornyn so ably knew, both as attorney general and as a member of the Texas Supreme Court. Those are things that go to the core of the heritage of law we have been given.

The whole world knows that America and the British have a magnificent legal system. The average citizen can borrow $100,000, buy a house, a $200,000 house, pay it back at 6 percent interest over 30 years. The money, the guy who loaned them $100,000 can believe he is going to collect it. If he doesn't pay it, he can foreclose, and there are procedures, and he pays off the debts and gets out and gets himself paid off. That is why he can afford to loan the man the money at this incredibly low rate.

You go to undeveloped countries around the world, and you see houses half built and you say: Why? They say, well, they saved up enough money to put up the walls and roof, but not enough for the insides. There is no way for them to borrow money. They don't have a legal system that works like ours. We need to cherish and protect the system.

Investors come from all over the world to America because they believe if they have to go to court, they will get a fair shake even though they are a company from Japan or South Korea or Singapore or China or Germany or France. That is something we need to protect. We do not need to allow it to be politicized. We need judges who follow the law as written, who will not impose their personal agendas in the decisionmaking process.

All of these things are matters that President Bush talked about in his election campaign. He believes them deeply. The American people share those beliefs by a substantial number. But they are not shared to the degree they should be by others in this Chamber who are blocking these nominations.

I hope that somehow, some way, this filibuster procedure can end. I hope that somehow, some way, we can avoid the collision we are engaged in now, the obstruction and the delay we are facing today, and get on with the classical way we have always handled judicial nominations in America. It is just unfortunate.

So it has been good that we have had a painful, tough 39 hours. A lot of things have been said. I hope that as we go forward, we can work our way through it. It may take litigation. It may take rules changes. It may take other things. I hope we will continue to back an independent judiciary of men and women of quality and integrity.

The PRESIDING OFFICER. The Senator from Texas.

Mr. CORNYN. Mr. President, I express my gratitude to the Senator from Alabama for his leadership on these issues. He and I share an experience in common, having been attorneys general of our respective States, I in Texas and he in Alabama. I guess that experience, together with the fundamental values we have all come to believe in, ensconced in the Constitution, that elevate the rule of law over the political maneuverings of men and women, is something about which we feel very strongly. I know he does, and I appreciate his eloquence and his passion and his commitment to those values and that ideal.

I know after this lengthy debate there will be those who will want to make a judgment on who won and who lost. That is what I want to talk about for a few minutes because, frankly, I think the battle is not over. With the failure to achieve the necessary votes for cloture of these three nominees this morning, three highly qualified and distinguished individuals who, frankly, don't deserve the shabby treatment they have received during this confirmation process, there will be some who will say: Well, the majority was unable to get the minority to change their mind and so the majority must have lost. The stubborn, recalcitrant minority must have won.

I would say this is a case of perhaps having lost the battle but the war is still raging. The war is still going on. Frankly, it is a war, a battle, a metaphor for a war that has been going on since the inception of this country. It is a debate about what kind of country this is, what kind of country America is.

Indeed, it is also a question of what kind of country we will become. I believe that if our judicial confirmation process becomes so politicized, as it appears to have become, and the test for confirmation is political correctness and licking your finger and putting it in the wind to test which way public opinion is going, and to make sure that if you are a lawyer or a judge or an attorney general you have made decisions in a way that is consistent with public opinion polls rather than the law, I think we will risk losing that war because it is fundamentally a war of words, of ideas, about what kind of Nation we are and what kind of Nation we will become, whether we will become one ruled by politics and polls and special interest groups or whether we are a nation of laws and not men and women.

There is more to be said. There is more to be done in this ongoing war. Of course, we all know those who have followed this debate are aware that the majority leader and Senator ZELL MILLER from Georgia, a Democrat colleague of ours, have filed a rule change proposal which would allow for sufficient debate in the Chamber on nominees but ultimately allow what the Constitution itself commands, and that is that majorities ultimately rule. This is about a fundamental precept of our democratic form of government which says that after the debate, after everybody has had their say, after we have learned from each other in the give and take, ultimately there has to be a vote, and that when those votes are counted, majorities will rule and they will determine the outcome.

Of course, that is the rule everywhere where democracy is respected and practiced except, I am sad to say, in the Senate, when it comes to these judicial nominees, because what we have experienced here with this unprecedented obstruction is a tyranny of the minority. It is, frankly, a shame. I think we are poorer for it.

We could talk about this ongoing war of ideas and debate. We can talk about the battle we fought here this last day

and a half and how it is just one battle in this ongoing conflict of ideas and really debate about the nature of our country that we have had since the beginning of this country. But there is a judgment day. There is a judgment day under our form of government, and that is when ordinary citizens exercise their right to go to the polls and to say whether they approve or disapprove of what we are doing here in this Chamber.

Whether you are a city councilman, county commissioner, Governor, Senator, Congressman, President of the United States, we are subject to the ultimate judgment of those voters, of those citizens, because we are a country that believes in the sovereignty of the people. And it is the people who will have the last word.

I believe our friends on the other side of the aisle who have exercised this tyranny of the minority have made a very dangerous gamble. Their gamble is, what they are betting is, that not enough people are really paying attention. Of course, that is part of what we have been trying to do, to make sure that people who are interested have an opportunity to understand what is going on here and what is at stake.

But ultimately, under our form of government, there can be no division in this body or anywhere else in this country about the fact that, ultimately, the American people will exercise the final judgment and determine who wins and who loses. That has not been decided today on this issue.

This is just one battle in that ongoing war leading up to that day of judgment. Ultimately, for those of us who run for public office, that is what determines whether we will continue to serve here in this body or in any other elected office in this Nation or not; whether we maintain the confidence of the people; whether the people believe that what we are doing here represents their interests as opposed to special interests. And if, in fact, they have confidence in our judgment, our honesty, integrity, and what it is we are trying to accomplish here, then they will say so by returning us to this place, or any other office of public service. So, ultimately, this battle has really been a skirmish in this ongoing conflict.

There is an important difference between those who would obstruct a bipartisan majority who want to confirm these fine nominees, and that is really the nature of the judicial branch of our Government.

I have had the honor for 13 years to serve my State in the judiciary before I was attorney general, and now in the Senate. I believe fervently that what the Framers intended by creating the judicial branch was not one where we had ideologues on the bench, or even politicians who were trying to advance a political or personal agenda. What they conceived and what has helped maintain the rule of law by determining the independence of the judiciary is that we will have rules that will govern all of us, and there will be disputes about those rules and the facts will be decided by independent judges, not ideologues, not those politicians on the bench, not somebody who has run for a particular platform to be nominated and confirmed to lifetime tenure.

The Framers' genius really was that that is a role they left to the representative branches of Government, the Congress and the executive branch, represented by the President. They conceived of a judiciary that would interpret the law and not make the law; that would interpret what the legislature's intent was, not promulgate public policy from the bench, or legislate from the bench. The legislation, they said, should come from the Congress. Once the Congress has determined the laws, then the President has a responsibility to execute the law.

It is a judiciary that serves as the impartial ''umpire.'' We all know that, in any sporting activity, an umpire who takes sides before the contest is inconsistent with the whole idea of fair play. We are talking about more than fair play here. We are talking about what kind of nation America is and what kind of nation America will become, whether we preserve this concept of an independent judiciary, unaffected by politics, that determines the law, not makes the law.

I believe James Madison, Alexander Hamilton, and others of the Founding Fathers, who so wisely conceived of this form of government, would literally roll in their graves if they heard some of the suggestions we have heard during this debate and elsewhere—that judges can, and perhaps should, be ideologues; and really what we are trying to do is achieve some sort of mythical balance to make sure we have enough conservatives and liberals and moderates on a multijudge bench, and somehow in this ''witch's brew'' we are going to come out with justice, with fairness; that people will know what the rules are ahead of time and be able to conform our conduct to what the rules are, so they can go about their business unafraid of being interfered with, molested, or sued.

Indeed, that is what we depend on, the knowledge of what the rules are, and that they will be administered by those who do not have a stake in the outcome, or have an ax to grind, or have a political or personal agenda. That is what our judges are supposed to be, not those who participate in a game of political football.

We do not want, as this process has seemed to degenerate into, judges who will precommit to the outcome of cases that may come before them before they have even heard the facts. In the Judiciary Committee, on which I serve, I have heard judicial nominees questioned about: How would you rule if such and so happened? What is your view of the 14th amendment or the 5th amendment? Assuming this given set of facts, how would you rule in that case?

Those questions are entirely inappropriate. We don't want judges, and we should not confirm judges, who would prejudge a hypothetical set of facts. We want judges who have an open mind and a commitment to the rule of law, and who will enforce that law impartially, without regard to who wins or loses.

If what we are doing here jeopardizes the rule of law, we will have done great damage not only to this body but to our country.

Mr. President, I thank my colleagues for patiently listening after this long debate. But I believed it was important to make some of these points.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

The PRESIDENT pro tempore. Without objection, it is so ordered.

PRAYER

The PRESIDENT pro tempore. The hour of 12 noon having arrived and the Senate having been in continuous session since Wednesday, pursuant to the order of the Senate on February 29, 1960, the Senate will suspend while the Chaplain offers a prayer.

Today's prayer will be offered by our guest Chaplain, Rev. Leroy Gilbert, Pastor of Mount Gilead Baptist Church in Washington, DC.

The guest Chaplain offered the following prayer:

Eternal God, the God of grace and glory, the God whose giving knows no ending, the God who stretched the spangled heavens and made us speechless at the sight of His magnificent handiworks, we pause to invoke Your blessing upon our Nation, our Senators, and all those who serve them.

Lord, we pray that the work of this Body will equip every household in America with the resources to build strong and stable families. We pray that the Senators' tireless efforts will enable the people of America to stand strong for the principles that undergird our rights, liberties, and the pursuit of happiness. We pray, when citizens observe how this Senate conducts the business of our Nation, they will be inspired by how those from different political parties can work together to achieve a common purpose for the good of America.

As one Nation under God, may we always be protected by Your divine promises as recorded in Chapter 54 of Isaiah, which declares: ''This is the heritage of the servants of God . . . no weapon formed against you shall prosper . . . tyranny and terror will be far from you . . . whoever attacks you will surrender to you.'' To You, Almighty God who assures the faithful, ''I will make your way prosperous and you shall have good success,'' we pray. Amen.

The PRESIDENT pro tempore. In my capacity as the Senator from Alaska, I suggest the absence of a quorum.

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

ANIMAL DRUG USER FEE ACT OF 2003

Mr. GREGG. Mr. President, on November 7, 2003, the Senate passed the Animal Drug User Fee Act of 2003 which authorizes animal drug user fees.

Performance goals, existing outside of the statute, accompany the authorization of animal drug user fees. These goals represent a realistic projection of what the Food and Drug Administration's Center for Veterinary Medicine can accomplish with industry cooperation. The Secretary of Health and Human Services forwarded these goals to the chairmen of the Senate Committee on Health, Education, Labor, and Pensions, and the House Committee on Energy and Commerce, in a document entitled ''Animal Drug User Fee Act Performance Goals and Procedures.'' According to Section 2 of ADUFA, ''The fees authorized by this Act will be dedicated toward expediting the animal drug development process and the review of new and supplemental animal drug applications and investigational animal drug submissions . . . as set forth in the CONGRESSIONAL RECORD.''

Today, I am submitting for the RECORD this document, which was forwarded to the Committee on Health, Education, Labor, and Pensions on November 13, 2003, as well as the letter from Secretary Thompson that accompanied the transmittal of this document.

I ask unanimous consent they be printed in the RECORD.

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

THE SECRETARY OF HEALTH AND HUMAN SERVICES,
Washington, DC, November 13, 2003.

Hon. JUDD GREGG,
Chairman, Committee on Health, Education, Labor and Pension,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: As you are aware, the Food and Drug Administration has been working with representatives of the veterinary pharmaceutical industry and staff of your Committee to design a new animal drug ''user fee'' proposal. Under this proposal, the additional revenues generated from fees paid by this industry would be dedicated for use in expediting the process for the review of animal drug applications, in accordance with performance goals that have been developed by FDA in consultation with the industry. S. 313, the ''Animal Drug User Fee Act of 2003'' reflects the fee mechanisms developed in these discussions. The performance goals are specific in the enclosure to this letter entitled, ''Animal Drug Under Fee Act Performance Goals and Procedures.'' I believe they represent a realistic projection of what FDA can accomplish with industry cooperation and the additional resources that would be provided by the bill and annual FDA appropriations that fully cover the costs of pay and inflation increases for the animal drug review process each year.

I appreciate the support of you and your staffs, and the assistance of other Members of the Committee.

Sincerely,

TOMMY G. THOMPSON.

ANIMAL DRUG USER FEE ACT PERFORMANCE GOALS AND PROCEDURES

The goals and procedures of the FDA Center for Veterinary Medicine (CVM) as agreed to under the ''Animal Drug User Fee Act of 2003'' are summarized as follows:

FIVE-YEAR GOALS (TO BE IMPLEMENTED BY SEPTEMBER 30, 2008)

1. Review and act on 90 percent of complete animal drug applications (NADAs) and reactivations of such applications within 180 days after submission date.

2. Review and act on 90 percent of non-manufacturing supplemental animal drug applications (i.e., supplemental animal drug applications for which safety or effectiveness data are required) and reactivations of such supplemental applications within 180 days after submission date.

3. Review and act on 90 percent of manufacturing supplemental animal drug applications and reactivations of such supplemental applications within 120 days after submission date.

4. Review and act on 90 percent of investigational animal drug study submissions within 180 days after submission date.

5. Review and act on 90 percent of investigational animal drug submissions consisting of protocols, that the Agency and the sponsor consider to be an essential part of the basis for making the decision to approve or not approve an animal drug application or supplemental animal drug application, without substantial data within 50 days after submission date.

6. Review and act on 90 percent of administrative animal drug applications (NADAs submitted after all scientific decisions have been made in the investigational animal drug process, i.e., prior to submission of the NADA) within 60 days after submission date.

The term ''review and act on'' is understood to mean the issuance of a complete action letter after the complete review of an animal drug application, supplemental animal drug application, or investigational animal drug submission which either (1) approves an animal drug application or supplemental animal drug application or notifies a sponsor that an investigational new animal drug submission is complete or (2) sets forth in detail the specific deficiencies in such animal drug application, supplemental animal drug application, or investigational animal drug submission and, where appropriate, the actions necessary to place such an application, supplemental application, or submission in condition for approval. Within 30 days of submission, FDA shall refuse to file an animal drug application, supplemental animal drug application, or their reactivation, which is determined to be insufficient on its face or otherwise of unacceptable quality for review upon initial inspection as per 21 CFR 514.110. Thus, the agency will refuse to file an application containing numbers or types of errors, or flaws in the development plan, sufficient to cause the quality of the entire submission to be questioned to the extent that it cannot reasonably be reviewed. Within 60 days of submission, FDA will refuse to review an investigational animal drug submission which is determined to be insufficient on its face or otherwise of unacceptable quality upon initial inspection using criteria and procedures similar to those found in 21 CFR 514.110. A decision to refuse to file an application or to refuse to review a submission as described above will result in the application or submission not being entered into the cohort upon which the relevant user fee goal is based. The Agency will keep a record of the numbers and types of such refusals and include them in its annual performance report.

FDA may request minor amendments to animal drug applications, supplemental animal drug applications, and investigational animal drug submissions. At its discretion, the Agency may extend an internal due date (but not a user fee goal) to allow for the complete review of an application or submission for which a minor amendment is requested. If a pending application is amended with significant changes, the amended application may be considered resubmitted, thereby effectively resetting the clock to the date FDA received the amendment. The Agency intends to establish the same policy for investigational animal drug submissions.

Sponsors are not required to submit study protocols for review. However, for each voluntarily submitted protocol for a study that the Agency and the sponsor consider to be an essential part of the basis for making the decision to approve or not approve an animal drug application or supplemental animal drug application, the Agency will issue an acknowledgement letter providing comments resulting from a complete review of the protocol. The acknowledgment letter will be as detailed as possible considering the quality and level of detail of the protocol submission, will include a succinct assessment of the protocol; and will state whether the Agency agrees, disagrees, or lacks sufficient information to reach a decision that the protocol design, execution plans and data analyses are adequate to achieve the objectives of the study. If the Agency determines that a protocol is acceptable, this represents an agreement that the data generated by the protocol can be used to support a safety or effectiveness decision regarding the subject animal drug. The fundamental agreement is that having agreed to the design, execution, or analyses proposed in protocols reviewed under this process, the Agency will not later alter its perspectives on the issues of design, execution or analyses unless public or animal health concerns unrecognized at the time of protocol assessment under this process are evident.

INTERIM BACKLOG GOALS

1. Review and act on pending animal drug applications, supplemental animal drug applications, and investigational animal drug submissions within 24 months of initiation of user fee payments.

ADDITIONAL INTERIM GOALS

1. Fifty percent of FDA incremental review staff recruited and on-board by first quarter of FY 2006. Total staff increment on-board by end of FY 2008.

2. FDA will review all submissions in accordance with procedures for working within a queue. An application/submission that is not reviewed within the applicable Interim Application/Submission Goal time frame (noted below) will be reviewed with the highest possible priority among those pending.

INTERIM APPLICATION/SUBMISSION GOALS

FY 04-90 percent of:

Animal drug applications (NADAs) and reactivations of such applications received during FY 2003 are reviewed within 259 days.

Non-manufacturing supplemental animal drug applications and reactivations of such